

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
NOTICE OF MOTION (L) NO. 197 OF 2018
IN
COMMERCIAL SUIT IP (L) NO. 114 OF 2018
AND
NOTICE OF MOTION (L) NO. 198 OF 2018
IN
COMMERCIAL SUIT IP (L) NO. 113 OF 2018

Tips Industries Ltd. ... Plaintiff

Versus

Wynk Music Ltd. & Anr. ... Defendants

Mr. Ravi Kadam, Senior Advocate a/w Mr. Venkatesh Dhond, Senior Advocate
alongwith Mr. Rohan Kadam, i/b Mrs. Ujawala Kamat for the Plaintiff.

Mr. Aspi Chinoy, Senior Advocate alongwith Ms. Vanditta Hedge, Ms. Ekta Asrani
and Ms. Sayli i/b Singh and Singh and Malhotra and Hedge for the Defendant No. 1 in
COMIP(L) NI. 114 of 2018

Dr. B.B. Saraf a/w Ms. Vaditta Hedge, Ms. Ekta Asrani and Ms. Sayli i/b /b Singh and
Singh and Malhotra and Hedge for the Defendant No. 1 in COMIP(L) NI. 113 of 2018

CORAM: S.J. KATHAWALLA, J.
DATE: 23rd APRIL, 2019

JUDGMENT :

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1. The question which is being answered by this Court in the present matter is associated with the issue of easy / ready access to music / sound recording *vis-a-vis* the restrictions which can be put on the same by the *bonafide* owners of copyright in the said music and / or sound recording. The advent of the internet has irreversibly made a global impact upon the functioning of society and the music industry is no exception. In the past, a musicophile's desire to access the latest song album or favourite classic would inevitably lead him to the doorstep of a record store or have him sifting through the radio channels on a traditional radio / transistor. Whereas today, any song is just a couple of clicks away. The rapid technological advancement in the music industry, has phased out the traditional purchase of records, cassettes, compact discs, etc. The innovation of online streaming services such as the services provided by the present Defendants, have rendered the same obsolete and antiquated. Most users have switched to modern platforms for their music demands. The Legislature, being conscious of the shift in the industry, responded with an amendment to the Copyright Act, 1957 (The

Copyright Amendment Act, 2012). However, a few provisions of the copyright law, which are the subject matter of this proceeding / decision and pertain to these services require delineation.

2. The Plaintiff is presently seeking an order of temporary injunction against the Defendants in terms of prayer clauses (a) of both, Notice of Motion (L) No. 197 of 2018 in Commercial IP Suit (L) No.114 of 2018 and Notice of Motion (L) No. 198 of 2018 in Commercial IP Suit (L) No.113 of 2018, which are reproduced hereunder:

**Notice of Motion (L) No. 197 of 2018 in Commercial IP Suit (L) No.114
of 2018**

(a) Pending hearing and final disposal of the Suit, a temporary Order and injunction restraining the Defendants, their servants, directors, agents or any other persons/entity claiming through or under them from in any manner, directly or indirectly, exploiting the reproduction rights, issue rights and commercial rental rights/rights of sale underlying the Plaintiff's copyright in its Repertoire (at Exhibit B") by way of providing download services/features on the musical portal www.wynk.in and WAP/mobile sites and WYNK applications via the consumer offerings and/or any other feature/application providing enabling/permitting/download of the Plaintiff's copyrighted works or on / via / through any other website / portal / device / application / technology etc.

**Notice of Motion (L) No.198 of 2018 in Commercial IP Suit (L) No.113
of 2018**

(a) Pending the hearing and final disposal of the present Suit, a temporary order and injunction restraining the Defendants, their servants, directors, agents or any other persons/ entity claiming through or under them from in any manner, directly or indirectly, communicating to the public by any medium, device, wire or wireless means, and by any mode whatsoever, performing, using for interactive streaming and branded non interactive curated streaming to the end users on internet enabled digital devices via the Defendants' player on the musical portal www.wynk.in and WYNK WAP / mobile sites and WYNK Applications via the consumer offering or on / via / through any other website / portal / device / application / technology, etc., the Plaintiff's Repertoire of sound recordings and images, details and particulars of which are given at Exhibit 'B' and "Z" to the Plaint (pgs. 20, 79 and 80).

EVENTS LEADING TO THE TWO SUITS

3. The Plaintiff - Tips Industries Ltd., claims to be the owner of the copyright in over 25,000 sound recordings ("**Plaintiff's Repertoire**"). The Defendants own and operate WYNK, an Over the Top Service available on the internet, smartphones and smart media. Through this service, upon payment of a subscription fee, the Defendants' customers / subscribers can access numerous sound recordings and audio-visual recordings including, *inter alia*, the Plaintiff's Repertoire. The Plaintiff's Repertoire was earlier licensed to the Defendants by the copyright society - Phonographic Performance Limited ("**PPL**"), under a written License Agreement dated 22nd August 2014. The license fee

apportionable to the Plaintiff's content was Rs.1.31 Crores (Rupees One Crore Thirty One Lakh only) per year. However, this agreement expired by efflux of time on 31st August 2016.

4. In or about August 2016, negotiations ensued between the Plaintiff and Defendant No. 1 to arrive at terms for a fresh / renewed license. An extension letter was emailed to the Plaintiff by the Defendants on 24th August 2016, to extend the aforesaid license agreement till 31st October 2016. The Plaintiff who reverted with a signed copy of the letter on 1st September 2016, agreed to extend the license till 31st October 2016 on a condition that a written agreement would be executed by then, failing which, use by the Defendants would be discontinued by 7th November 2016 with a liability to pay for usage during this period. The Defendants thereafter, from October 2016, began sharing proposals with the Plaintiff.
5. According to the Plaintiff, on or around 22nd March 2017, in a meeting between the Plaintiff and Defendants' representative, a Minimum Guaranteed Amount ("**License Fees**") of Rs. 4.5 Crores (Rupees Four Crores Fifty Lakh only) towards the Plaintiff's Repertoire was agreed upon for a term of 2 years i.e. Rs.2 Crores (Rupees Two Crores only) for the first year and Rs.2.5 Crores (Rupees Two Crores and Fifty Lakhs only) for the second year. The Defendants dispute that the said figure of Rs.4.5 Crores (Rupees Four Crores and Fifty Lakhs only) was ever agreed upon. According to the Defendants, the said figure was not

acceptable to the Defendants as the same was excessive and hence the same was rejected by the Defendants vide their letter dated 24th April 2017. Thereafter, correspondence ensued between the parties on these licence terms, however, the negotiations of the parties *inter-se*, failed and the Plaintiff on two separate occasions viz. 27th April 2017 and 5th May 2017 requested the Defendants to deactivate the Plaintiff's Repertoire on the WYNK platform. According to the Plaintiff, these requests were not complied with by the Defendants.

6. The Plaintiff, thereafter, issued a cease and desist notice dated 17th November 2017 to the Defendants, calling upon them to deactivate / remove the Plaintiff's Repertoire from the WYNK platforms. The said cease and desist notice recorded the history of negotiations between the parties. The relevant portion from the said cease and desist notice dated 17th November 2017 is reproduced hereinbelow:

"Since the last 16 months, we have continued to support Wynk and have not removed our content from the service. In the spirit of partnership, we have continued promoting Wynk on our social media platforms & have been forwarding customers to listen to our content on Wynk."

...We have been in negotiation with the Wynk team for over a 1.5 years and since 23rd March 2017 have maintained our value of Rs 4.5 Cr for 2 years. This price was discounted from our first ask of Rs 7 Cr. ... We have also asked Wynk to take a decision regarding the Tips content and are yet to hear back. Hence we are now instructing Wynk to deactivate all Tips Music Content by 1st December 2017 on the advice of our legal team and our auditors."

.....*This is not the ideal outcome for us, but since there is no movement on the contract we have no other recourse but to instruct the deactivation of content.*"

7. In reply, the Defendants, by their notice dated 24th November 2017 (annexed to an email dated 25th November 2017) invoked Section 31-D of the Copyright Act, 1957 (“**the Act**”) claiming themselves to be a broadcasting organisation / broadcasters. In short, the Defendants claimed that they are a broadcasting organization and that they are entitled to a statutory license under Section 31-D of the Act to communicate the work to the public by way of broadcast of the Plaintiff’s musical work and sound recordings. In response, the Plaintiff addressed a holding letter dated 1st December 2017 to the Defendants. By their letter dated 8th December 2017, the Defendants reiterated their stand that they had validly invoked Section 31-D of the Act. The Plaintiff sent its substantive response vide its letter dated 23rd January 2018 and denied the Defendants’ right to invoke Section 31-D of the Act and contended that the invocation of the said section by the Defendants is wholly illegal and *non-est*.
8. On 29th January 2018, the Plaintiff therefore filed two Suits against the Defendants for infringement of copyright thereby disputing the Defendants’ right to avail of the statutory license provided for by Section 31-D of the Act and on that basis claiming permanent injunction against the Defendants restraining them from:

- a.* communicating to the public the Plaintiff's repertoire of songs (Commercial IP Suit (L) No.113 of 2018); and
- b.* giving on commercial rental / sale the Plaintiff's repertoire of songs by way of providing download services / features (Commercial IP Suit (L) No.114 of 2018).

NATURE OF DEFENDANTS' SERVICES IMPUGNED BY THE PLAINTIFF

9. The services / activities of the Defendants as impugned by the Plaintiff can be broadly categorized as follows:
 - a.* Enabling users upon payment of monthly rental fee, to download electronic copies of the Plaintiff's songs on their devices and to enjoy them offline and without being connected to the internet. (Commercial IP Suit (L) No.114 of 2018).
 - b.* Selling electronic copies of the Plaintiff's copyrights repertoire to users for a flat fee wherein upon payment, users can download these songs and enjoy them in perpetuity for a one-time payment. (Commercial IP Suit (L) No.114 of 2018).
 - c.* Providing on demand streaming services where the Defendants make the songs available to public by streaming them online i.e. over internet which

can be accessed through any device connected to internet. (Commercial IP Suit (L) No.113 of 2018)

ISSUES

10. The learned Senior Advocates appearing for both the sides have argued extensively. I have heard the submissions in detail and perused the record of both the Notice of Motions and Suits. The parties have also filed their respective written submissions. Broadly, the following issues arise for consideration before me:

A. Whether the Defendants are infringing the Plaintiff's copyright in the Plaintiff's Repertoire as provided for in Section 14(1)(e) of the Act? Allied to this are the following issues:

- (i) Whether the use of the Plaintiff's Repertoire by the Defendants' customers be considered "fair use" under Section 52(1)(a)(i) of the Act?
- (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)(b) of the Act?

- (iii) Whether the Defendants can invoke Section 31-D of the Act to exercise a Statutory License in respect of their download/purchase business?
- B. Whether the Defendants can invoke Section 31-D of the Act to exercise a Statutory License in respect of the Plaintiff's Repertoire, for internet broadcasting?
- C. Whether Rule 29 of the Copyright Rules, 2013 (“**the Rules**”) and the third proviso thereto are invalid?
- D. What is the bearing of the Government of India's Office Memorandum dated 5th September 2016 on the present matter?
- E. Whether pending the suit, the Defendants may be permitted to use the Plaintiff's Repertoire upon payment of a deposit?
- F. Whether the Plaintiff is only interested in money and thus injunction should not be granted?

The rival arguments in respect of the aforesaid issues are dealt with hereinbelow.

ISSUE A: Whether the Defendants are infringing upon the Plaintiff's copyright in the Plaintiff's Repertoire as provided for in Section 14(1)(e) of the Act?

11. According to the Plaintiff, the Defendants' download business as impugned in Commercial IP Suit (L) No.114 of 2018 constitutes two separate features / services viz. (i) download (rental) and (ii) outright purchase. It is submitted that

the download feature permits the Defendants’ customers / subscribers to store offline copies of the sound recordings available on the WYNK platform, which may be accessed on the “All Downloaded” tab / page of the WYNK application (“**Downloaded Songs**”) and may be played only through the said application. Similarly, vide the outright purchase feature, the Defendants’ customers can also procure offline copies of the sound recordings available on the WYNK platform which are accessible on the “All Purchased” tab / page of the application (“**Purchased Songs**”). The difference between the two features being that the Downloaded Songs are only temporarily available / accessible during the validity of the paid monthly subscription for the WYNK application, whereas, the Purchased Songs are purchased by paying specific charges and permanent physical / electronic copies of the same are saved on the customer’s device. According to the Plaintiff, the *download* and *outright purchase* features are nothing but *commercial rental* and *sale* of sound recordings, respectively. The Ld. Senior Advocate for the Plaintiff relied upon the following table elucidating the differences between the download feature and purchase feature of the Defendants’ WYNK application as available on the Defendants’ website:

Download Feature	Purchase Feature
Sound recordings are stored within the app.	Sound recordings are stored outside the app.
Sound recordings can only be played	Sound recordings can be played over any

through the WYNK application.	player.
Go to 'MY Music' tab / page and tap on 'All Downloaded' to access downloaded songs.	Go to 'My Music' and tap on 'All Purchased' tab / page to access downloaded songs.
Downloaded sound recordings are played without data usage.	Purchased sound recordings are also played without data usage if electronic file is moved from its location.
Physical files of the downloaded sound recordings are stored in encrypted format.	Electronic files of the purchased sound recordings are stored in mp3 format.
Only the url of the downloaded sound recordings can be shared from within the app.	Electronic files of purchased sound recordings can be shared by Bluetooth, transferred to PC etc.
Active WYNK subscription is required to download sound recordings.	Need to pay charges to purchase individual sound recordings / albums.
Sound recordings can be downloaded in both Android and iOS App.	Sound recordings can only be purchased only in Android App.

12. According to the Plaintiff, the services / activities of the Defendants impugned in Commercial IP Suit (L) No.114 of 2018 infringe upon the Plaintiff's following exclusive rights in respect 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) under Section 14 (1)(e)(i) of the Act.
- (ii) to sell or give on commercial rental or offer for sale or for such rental, any of copy of the sound recording under Section 14 (1)(e)(ii) of the Act;

It is submitted on behalf of the Plaintiff that section 14 (1)(e) of the Act stipulates that an owner of copyright in a sound recording has three disjunctive and independent rights that are enumerated under sub-clauses (i) to (iii) of the said sub section. The Legislature has consciously drawn a distinction between an owner's copyright to exclusively sell and / or commercially rent its sound recordings to the public and to further make copies of such recordings, and the exclusive right to communicate the sound recording to the public. These rights (sell and / or commercially rent) are distinct from and do not overlap with the exclusive right to communicate the work to public as provided in Section 14(1)(e) (iii) of the Act, which right is the subject matter of the Commercial IP Suit (L) No.114 of 2018.

13. According to the Plaintiff, Section 14(1)(e)(i) of the Act confers the Plaintiff with the exclusive right to create sound recordings embodying its copyrighted sound recordings, which right extends to storage by electronic or any other means. The Defendants through their outright purchase / download services are enabling their customers to store physical files of the Plaintiff's sound recordings on their devices which is nothing but making another sound recording whose storage is by electronic means. As per the Plaintiff, this violates the Plaintiff's exclusive right to reproduce sound recordings under Section 14(1)(e)(i) of the Act.
14. In so far as the Purchase feature (permanent download subscription) is concerned, the Ld. Senior Advocate for the Plaintiff submitted that the Defendants have admittedly stopped the said Purchase feature. He relied upon paragraph 11 of the Affidavit in Reply of Defendant No.1 dated 10th February 2018 wherein the Defendants have inter alia pleaded the following:

“11. I submit that with reference to the permanent download subscription option provided by the Defendant No.1, the Defendant No.1 hereby states that the Plaintiff's content is no longer available for permanent download on the Defendant No.1's platforms.”

According to the Plaintiff, the fact that the Defendants have voluntarily and, on their accord, admitted that they have stopped their Purchase feature amounts to an acceptance on the part of the Defendants that the Plaintiff retains the

exclusive right to sell its works under Section 14(1)(e)(ii) of the Act. As per the Plaintiff, in view of the said admission, an injunction must be granted on this ground alone restraining them from operating their “Purchase” feature qua the Plaintiff’s Repertoire.

15. Relying upon the definition of “commercial rental” as provided in Section 2(fa) of the Act, the Ld. Senior Advocate for the Plaintiff submitted that the said definition excludes only rentals / lease / lending for non-profit purposes by non-profit libraries and non-profit educational institutions. He submitted that by implication, rental, lease and/or lending of sound recordings by any other person would amount to a “commercial rental” within the meaning of Section 2 (fa) of the Act. He submitted that since the Defendants are neither non-profit libraries nor educational institutions coupled with the fact that the services offered by the Defendants are indeed meant for profit, the renting out of the Plaintiff’s work for consideration / money / fee by the Defendants amounts to a “commercial rental” under Section 2 (fa) of the Act.
16. The Ld. Senior Advocate for the Plaintiff further submitted that since the right to sell and / or to commercially rent out sound recordings flow from the same class of rights protected under the provisions of Section 14(1)(e)(ii) of the Act, the acceptance on the part of the Defendants that the Plaintiff retains the exclusive right to sell its work amounts to an implicit admission that the Plaintiff also

retains the exclusive right to commercially rent out its works. He submitted that on this count alone, the Defendants are estopped from denying that they are not infringing the Plaintiff's right of commercial rental under Section 14(1)(e)(ii) of the Act.

17. The Ld. Senior Advocate for the Defendants, on the other hand submitted that 'communication to the public' of a sound recording within the meaning of Section 2(ff) of the Act and 'commercial sale' or 'rental' of the sound recording operate in distinct / different fields. Relying upon the definition of "communication to the public", he submitted that making a work available for being heard or enjoyed by the public directly by any means of display or diffusion, without issuing a physical copy of such work is within the purview of "communication to the public" and does not constitute commercial rental and / or sale of a sound recording as provided in Section 14(1)(e)(ii) of the Act.
18. The Ld. Senior Advocate for the Defendants further submitted that Defendants' WYNK application allows the subscriber to retain an electronic copy of the song / sound recording and access / enjoy the same any number of times, during the validity of the subscription (Download-rental). He submitted that the application does not permit the subscriber to make a copy of the sound recording / song or to transfer any such copy to any third party. He submitted that such activity constitutes 'communication to the public' and does not constitute commercial rental or sale of the sound recording. He further

submitted that permitting a subscriber to retain the electronic song/sound recording for his personal use / listening on the Wynk App constitutes “fair dealing” with such work for private or personal use as provided for in Section 52(1)(a)(i) of the Act and does not constitute an infringement of copyright. He submitted that it is equivalent to a member of the public making a copy of audio / song program for his subsequent personal use / enjoyment thereof. He further submitted that the storage of the Plaintiff’s songs on the Defendants’ platform is protected under Section 52(1)(b) of the Act, being transient or incidental storage of the sound recording purely in the technical process of electronic transmission or communication to public. He therefore submitted that the activities / services of the Defendants do not amount to infringement of the Plaintiff’s copyright.

19. The Defendants have also raised a defence stating that they are a broadcasting organization and that Section 31-D of the Act confers upon them a statutory right to carry on their download and streaming business (internet broadcasting). I have dealt with the said defence in the subsequent paragraphs where I have considered whether the Defendants can take benefit of Section 31-D of the Act.

20. I have considered the above submissions. At this stage, it is important to consider the relevant provisions of the Act which have been relied upon by both the sides for the purpose of making submissions on the present Issue. The said relevant provisions of the Act are reproduced hereunder:

"Section 2 - Interpretation.-

In this Act, unless the context otherwise requires,--

(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;*

(fa) "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.;

Explanation.-For the purposes of this clause, a "non-profit library or non-profit educational institution" means a library or educational institution which receives grants from the Government or exempted from payment of tax under the Income-tax Act, 1961.(43 of 1961)

(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 of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

Explanation.-For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public;

- (m) *"infringing copy" means,--*
- (i) *in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;*
 - (ii) *in relation to a cinematographic film, a copy of the film made on any medium by any means;*
 - (iii) *in relation to a sound recording, any other recording embodying the same sound recording, made by any means;*
 - (iv) *in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act*

Section 14 - Meaning of Copyright-

(1) *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:--*

...

...

- (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.*

Explanation.--For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.”

21. Section 14 of the Copyright Act provides the meaning of ‘copyright’ for the purposes of this Act. It provides that for the purposes of this Act, ‘copyright’ means the exclusive right to do or authorise doing of any of the acts given in sub sections (a) to (e) in respect of work or any substantial part thereof subject to the other provisions of the Act. The meaning of copyright in respect of sound recording is provided in Section 14(1)(e) of the Act. A bare perusal of Section 14(1)(e) of the Act would reveal that three broad categories of rights have been contemplated in respect of sound recordings. These three categories of rights are provided in Section 14(1)(e)(i), Section 14(1)(e)(ii) and Section 14(1)(e)(iii) of the Act. These three categories of rights are independent and distinct of each other. Hence, in respect of a single sound recording, the owner of the copyright has the exclusive right to make any other sound recording embodying it including storing it in any medium be electronic or other means. In respect of the same sound recording, he also has the right to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording. He also has the right to communicate the same sound recording to the public. Hence, in so far as a sound recording is concerned, the owner of the copyright has these distinct rights which can be independently assigned or licensed by the owner of the copyright to various parties. These three categories of rights do not overlap with each other.

22. The Defendants are admittedly enabling their customers to download sound recordings and access them offline *in lieu* of a monthly subscription fee. The customers' access to the Downloaded Songs is contingent upon uninterrupted payment of the subscription fee. Non-payment of this subscription fee prompts a withdrawal of such access to the same, until the subscription is restored. Such Downloaded Songs are stored as electronic files actually available on the customers' devices. The table reproduced in the earlier paragraph (as available on the website of the Defendants) demonstrates that the Defendants through their outright purchase / download services are enabling their subscribers to actually store electronic files of the Plaintiff's sound recordings on their devices. Storing the files of the Plaintiff's sound recordings in electronic medium by the Defendants is nothing but making of another sound recording embodying the Plaintiff's sound recording. This right is an exclusive right granted to the owner of the copyright in the sound recording under Section 14(1)(e)(i) of the Act and the Defendants cannot be allowed to continue the same without any permission or authorization of the Plaintiff.

23. In so far as the exclusive rights of the Plaintiff to sell or offer for sale any copy of the sound recording as provided in Section 14(1)(e)(ii) of the Act is concerned, it is evident that the activity of the Defendants enabling their customers to permanently download sound recordings and have a permanent access to the same once paid for (permanent download subscription option) clearly amounts to

sale of the sound recording. In case of permanent download subscription option, the sound recordings are permanently downloaded whereby a mirror copy is saved on the customers' devices. Such mirror copy can be accessed freely from outside the application and even be copied and / or transferred onto other devices. Further, the sound recording so downloaded can be played by any player and not just the Defendants' Wynk App. Still further, the sound recording can be shared with other users through Bluetooth or transferred to computers, laptops etc. This, according to me, virtually amounts to a sale of the sound recording by the Defendants. The Defendants do not have any right to sell or offer for sale the Plaintiff's sound recordings without any authorization or permission of the Plaintiff. Such feature of permanent download subscription option offered by the Defendants to their customers to permanently download sound recordings and have a permanent access to the same once paid for, amounts to sale of the sound recordings and thereby violates the exclusive right of the Plaintiff to sell or offer for sale its sound recordings as provided in Section 14(1)(e)(ii) of the Act.

24. In paragraph 11 of their Affidavit in Reply, the Defendants have stated that the Plaintiff's content is no longer available for permanent download subscription on their platforms. In the absence of any reason forthcoming from the Defendants for stopping the feature of permanent download subscription in so far as the Plaintiff's content is concerned while continuing the download feature, it is safe to assume that the Defendants have indeed acknowledged that they have no right

to offer such permanent download subscription in respect of Plaintiff's content which virtually amounts to sale of the sound recordings and such right is exclusively available with the Plaintiff as provided in Section 14(1)(e)(ii) of the Act.

25. In so far as the exclusive rights of the Plaintiff to give on commercial rental or offer for such rental any copy of the sound recording as provided in Section 14(1)(e)(ii) of the Act is concerned, it is important to understand as to what amounts to a 'commercial rental' as provided in Section 2(fa) of the Act. Section 2(fa) is reproduced hereinbelow:

(fa) "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.;

Explanation.-For the purposes of this clause, a "non-profit library or non-profit educational institution" means a library or educational institution which receives grants from the Government or exempted from payment of tax under the Income-tax Act, 1961.(43 of 1961)

A bare perusal of the definition would reveal that the said definition is couched in a negative manner thereby exclusively providing only those specific instances which do not amount to 'commercial rental'. Hence, by implication, all other instances which are not specifically provided in the said definition amount to 'commercial rental'. Further, it is evident that unless the **purpose** of rental, lease or lending of a lawfully acquired copy of a sound recording is for **non-profit**

purpose by a non-profit library or non-profit educational institution, the said rental, lease or lending would be termed as ‘commercial rental’. Applying the meaning of the said term ‘commercial rental’ to the activities of the Defendants, it becomes evident that the activities of the Defendants enabling their customers to download sound recordings and access them offline *in lieu* of a monthly subscription fee clearly do not fall under the exclusions provided in the said definition of ‘commercial rental’ and would therefore amount to ‘commercial rental’. The Defendants’ impugned activities do not constitute as “non-profit activities”. The Defendants are enabling their customers to download sound recordings and access them offline *in lieu* of a monthly subscription fee. Such Downloaded Songs are stored as physical electronic files on the customers’ devices. The customers’ access to the Downloaded Songs is contingent upon uninterrupted payment of the subscription fee. Non-payment of this subscription fee prompts a withdrawal of such access to the same, until the subscription is restored. Thus, the Defendants are essentially renting out the sound recordings available on their Platform, including the Plaintiff’s Repertoire, in exchange for a consideration / fee. Sale/ Commercial rental of sound recordings in a digital medium through the internet is no different than done through physical modes. This is a vivid instance of a commercial rental as contemplated under the Act. Thus, vide this download service, the Defendants are in fact offering for commercial rental and giving on commercial rental copies of the Plaintiff’s sound

recordings which the users can exploit till the time the subscription is in force and once the subscription expires, the user would not be in a position to exploit the sound recordings. The Defendants do not have any such right without any authorization or permission of the Plaintiff. Such feature of download subscription option offered by the Defendants enabling their customers to download sound recordings and access them offline *in lieu* of a monthly subscription fee violates the exclusive right of the Plaintiff to give on commercial rental or offer for such commercial rental a copy of its sound recordings as provided in Section 14(1)(e)(ii) of the Act.

26. I also see considerable force in the submissions made by the Ld. Senior Advocate for the Plaintiff that since the right to sell and / or to commercially rent out sound recordings flow from the same class of rights protected under the provisions of Section 14(1)(e)(ii) of the Act, the acceptance on the part of the Defendants that the Plaintiff retains the exclusive right to sell its work amounts to an implicit admission that the Plaintiff also retains the exclusive right to commercially rent out its works. If the Defendants have stopped the permanent download subscription service which amounts to sale of the Plaintiff's sound recordings there is no reason to continue with the giving on commercial rental or offering for such commercial rental, any copy of the Plaintiff's sound recordings.

27. 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 31-D 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.

ISSUE A (i): Whether the use of the Plaintiff's Repertoire by the Defendants' customers be considered "fair use" under Section 52(1)(a)(i) of the Act?

28. The Defendants have raised further defences under Sections 52(1)(a)(i) and Section 52(1)(b) of the Act and have contended that their activities do not amount to infringement of Plaintiff's copyright.
29. It is submitted on behalf of the Defendants that permitting a customer to retain an electronic copy of a sound recording copy for their personal use or enjoyment on the WYNK application constitutes "fair dealing" with such work for private or personal use, and does not constitute an infringement of copyright. It is further submitted that such storage is equivalent to a member of public making a copy of a song / sound recording for his subsequent personal use / enjoyment thereof.
30. The defence of fair use is dealt with in Section 52(1)(a)(i) of the Act, which is reproduced below:

“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;*

...”

31. The Plaintiff relied upon the following excerpts from the English case laws of

Hubbard v. Vosper 1972 2 Q.B. 84 and *Ashdown v. Telegraph Group* 2002 1 Ch. 149

wherein the standards to determine “fair dealing” have been laid down:

HUBBARD AND ANOTHER v. VOSPER AND ANOTHER
(supra)

“The question is, therefore, whether Mr. Vosper’s treatment of Mr. Hubbard’s books was a “fair dealing” with them “for the purposes of criticism or review.” There is very little in our law books to help on this. Some cases can be used to illustrate what is not “fair dealing.” It is not fair dealing for a rival in the trade to take copyright material and use it for his own benefit. Such as when “The Times” published a letter on America by Rudyard Kipling. The St. James’ Gazette took out half-a-dozen passages and published them as extracts. ...

It is impossible to define what is “fair dealing.” It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may

be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide. ...”

Ashdown v Telegraph Group Ltd (supra)

“70. Authority is very sparse in relation to the defense of fair dealing in the context of reporting current events: see the comment of Scott J. in British Broadcasting Corpn v British Satellite Broadcasting Ltd [1999] Ch 141, 148. Sir Andrew Morritt V-C commented with approval, however, on the summary of the authors of Laddie, Prescott & Victoria, The Modern Law of Copyright and Design, 3rd ed (2000), para 20.16 on the test of fair dealing in the general context of section 30. We have also found this an accurate and helpful summary and set it out for the purpose of discussion.

“It is impossible to lay down any hard-and-fast definition of what fair dealing is, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor’s exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant’s additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work

has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However, this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negate fair dealing."

It is submitted by the Ld. Senior Advocate on behalf of the Plaintiff that applying the above standards, the use of a copyright, to be fair, must not:

- a.* Commercially compete with the owner's exploitation of the copyright work or be a substitute for the probable purchase of authorized copies and the like.
- b.* Publish a work that has not already been published.
- c.* Take an excessive amount of the copyrighted work. The taking of even a small amount on a regular basis may negate fair dealing.

It is submitted on behalf of the Plaintiff that, the Defendants' use of the Plaintiff's Repertoire is hit by the first and third factor; that the Defendants'

download and purchase features are clearly a substitute for the purchase of sound recordings whose sale and / or commercial rental has been authorized by the Plaintiff; that if the Defendants' use is permitted to continue, they would in-turn compete with the Plaintiff's exclusive right to sell and / or commercial rent out its repertoire; that the Defendants have furthermore appropriated the entirety of the Plaintiff's Repertoire for their own commercial use via their WYNK Application; and that such appropriation amounts to an excessive taking of copyrighted material and negates any plea of fair dealing.

32. The Plaintiff submitted that private or personal use under Section 52(1)(a)(ii) is only excused if it is first shown to be "fair dealing". It is submitted that it is only pursuant to this burden being discharged, that a person may rely upon the circumstances enumerated under Sub-clauses (i) to (iii) of Section 52(1)(a); that having pleaded fair dealing, the burden to prove it rests upon the Defendants. It is submitted that the Defendants have not discharged this burden since no particulars have been pleaded nor has material been adduced in support.

33. In the absence of statutory definition of fair dealing, the Plaintiff has referred to Section 107 of the US Copyright Act, which is reproduced below:

*"Section 107 · Limitations on exclusive rights: Fair use
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple*

copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”*

34. The Ld. Senior Advocate for the Plaintiff submitted that the purpose and character of the Defendants' use via its Download feature is purely commercial and to earn revenue for itself. He submitted that though the Plaintiff's Repertoire is published, its sound recordings have been generated through enormous skill, labour and thought; the Defendants have admittedly appropriated the entirety of the Plaintiff's copyrighted Repertoire for their own benefit; if not interdicted by necessary orders, the Defendants use would usurp the potential market for the Plaintiff's sale / rent of its works or that carried out by its licensees. He further submitted on behalf of the Plaintiff that the Court must assess whether the use materially impairs the marketability of the copied work; that it need only be shown that if the challenged use becomes widespread it would adversely impact the potential market for the copyrighted work; if the Defendants' use of the Plaintiff's Repertoire is excused as fair dealing and / or fair use, the latter's copyright would be rendered nugatory; the Plaintiff would be unable to recover the economic potential of its works in respect of which it has expended

significant resources and labour; and that the Plaintiff would be unable to license its works to others since they too would carry out the same acts as the Defendants in the present case.

35. The Ld. Senior Advocate for the Plaintiff also relied upon the case of *Ruperndra Kashyap v. Jivan Publishing House reported in 1996 (16) PTC 439 (Delhi)*, wherein a rival publisher raised the defence of fair dealing under Section 52(1)(a)(i) of the Act. In that case, the Defendants were publishing copyrighted question papers. In their defence, the Defendants therein alleged that their use was a fair dealing under the aforesaid section since they were selling their publication to students for their personal use. The Court rejected this defence stating:

“... It would, therefore, suffice to deal with the plea raised by reference to S. 52(1)(a)(i) of the Act, which provides inter alia, that a fair dealing with the literary work for the purpose of research or private study does not constitute infringement of copyright. The words 'research or private study' have been substituted by the words 'private use including research' by the Copyright (Amendment) Act, 1994 (Act 381 of 1994). What is contemplated is a defense to the person conducting research or private study who while doing so, if dealing fairly with a literary work, may not incur wrath of the copyright having been infringed. But, if a publisher publishes a book for commercial exploitation and in doing so infringes a Copyright, the defense under section 52(1)(a)(i) would not be available to such a publisher though the book published by him may be used or be meant for use in research or private study. The defense raised by defendants 1 and 2 based on Section 52(1)(a)(i) is not available to them and the plea so raised has to be rejected.”

36. 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. The defence of fair use may be available in a given case, to an individual user. The activities of the Defendants can never be termed as ‘private’ or ‘personal use’ or ‘research’. The Defendants are clearly selling and / or commercially renting sound recordings including, *inter alia*, the Plaintiff’s Repertoire for their own commercial benefit. Thus, the Defendants use of the Plaintiff’s Repertoire cannot be termed as fair dealing for the purpose of private / personal use or conducting research. Hence, the exception under Section 52(1)(a)(i) of the Act is not available to the Defendants. Since I am of the opinion that the Defendants’ activities cannot be considered as having as their purpose, private or personal use (or other activities covered under Section 52 of the Act), including research, I do not think it necessary to consider the remaining submission of the Plaintiff on the aspect of what exactly amounts to “fair dealing” with any work. The said question would have arisen only if the activities of the Defendants would have amounted to private or personal use, including research. I therefore hold that the defence of fair use available under Section 52(1)(a)(i) of the Act is not available to the Defendants in the present case.

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?

37. According to the Defendants, copies of the sound recordings available on the WYNK application, stored on its customer's devices are transient and / or incidental to the services provided by the Defendants. It is submitted that such activity is contemplated and permissible under Section 52(1)(b) of the Act. Section 52(1)(b) of the Act is reproduced hereunder:

*“52. Certain acts not to be infringement of copyright. —
(1) The following acts shall not constitute an infringement of copyright, namely, —
...
(b) the transient or incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public.”*

38. A bare perusal of the said Section would reveal that defence under the said Section must satisfy the following two essential requirements:

- a.* such storage must be transient or incidental;
- b.* it must occur purely in the technical process of technical transmission or communication to the public.

39. According to the Plaintiff, the storage of the Plaintiff's on the Defendants' WYNK Platform and the customer's devices is neither transient nor incidental; that the Defendants have advertised their services on the premise that physical electronic files of the sound recordings can be retained and stored by their customers for offline use; that offline storage of these physical files thus appears to be the primary object / unique selling point of the Defendants' business and therefore the storage thereof cannot be termed as 'incidental'; that the storage can also not be termed as transient since the physical file stored remains on the

user's device and is not deleted forthwith. According to the Plaintiff, the purpose and intent of Section 52(1)(b) of the Act was to protect internet service providers such as MTNL etc. acting in good faith.

40. In support of its submissions, the Plaintiff relied upon the following extract of the 227th Report of the Rajya Sabha Parliamentary Standing Committee on the Copyright (Amendment) Bill, 2010:

“19.1 Clause 31 of the Bill seeks to amend section 52 of the Act relating to certain acts not to be infringement of copyright. The Bill seeks to substitute certain clauses of section 52 as follows:-

- clause (a) seeks to provide that a fair dealing with any work, not being a computer programme for the purpose of private or personal use, including research; criticism or review, whether of that work or of any other work and the reporting of current events, including the reporting of a lecture delivered in public shall not constitute an infringement of copyright. An Explanation is also proposed to be inserted so as to clarify that storing of any work in any electronic medium for aforesaid the purposes 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.*
- clause (b) seeks to provide that the transient and incidental storage of a work or performance purely in the technical process of electronic transmission or communication to the public shall not constitute an infringement of copyright.*

- *clause (c) seeks to provide that transient and 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 also shall not constitute an infringement of copyright*

19.2 According to the Department, section 52 deals with fair dealing and certain acts which are not infringement and it does not deal with infringement per se. Any transient and incidental storage of any work through the process of 'caching' has been provided exceptions as per the international practice. Any deliberate storing of such works and unauthorized reproduction and distribution of such works is infringement under section 51 of the Act attracting civil and criminal liability. Exceptions under this section have been extended for education and research purposes as works are available in digital formats and internet. The scope of these proposed provisions ensure that any introduction of new technology will also be covered under this proposed section. The proposed amendment in clause (c) introduces liability of internet service providers. The practice of making available the works on internet and websites in unauthorized manner without licence from the author or right owner is infringement. This leads to suspension of the service provider's activity. However, in order to provide a safe harbour as per international norms to the service provider to take down such unauthorized works upon receipt of notice from the authors and right owners and any abuse of suspension, it is provided that an order within 14 days from the competent court to be produced for the continued prevention of such storage.

19.10 In the light of the divergent views expressed by the stakeholders particularly with regard to the stipulation of 14 days period under Section 52 (1)(c) the Committee is of the view that the viability, of the duration of 14 days may again be reviewed by way of balancing the views of the stakeholders as well as the legal requirement in the matter. As for the words the “transient and incidental” occurring in section 52 (1)(b) and 52 (1)(c) the Committee recommends that the word ‘and’ may be replaced with the word or in both the clauses so as to read “transient or incidental”. The Committee feels that this will take care of the concern of ISPs for unlimited liability for third party actions.”

41. 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.

ISSUE A (iii): Whether the Defendants can invoke Section 31-D of the Act to exercise a Statutory License in respect of their download/purchase business?

42. I have already observed hereinbefore that the services rendered by the Defendants through their download and purchase features amount to commercial rental and / or sale of the Plaintiff's copyrighted sound recordings. Since the right to commercially rent and / or sell a sound recording is a separate and distinct right as against the right to communicate the sound recording to the public, the Defendants cannot exercise a Statutory License under Section 31-D in respect of the download and purchase features provided by them.

43. The Ld. Senior Advocate for the Plaintiff submitted that Section 31-D of the Act does not contemplate a right or entitlement to commercially rent out or sell copyrighted works. The said section only contemplates a statutory license for 'broadcasting'. He submitted that Section 31-D of the Act does not enable or permit a person to sell or commercially rent out sound recordings. He submitted that even otherwise, broadcast is a specie of activity that falls within the scope of 'communication to the public'.

44. The Ld. Senior Advocate for the Plaintiff submitted that the right to commercially rent / sell sound recordings is a separate right carved out under

Section 14(1)(e)(ii) of the Act and is independent to the right to communicate to the public as provided in Section 14(1)(e)(iii) of the Act. It is submitted that from a combined reading of Sections 2(dd), 2(ff) and 31-D of the Act along with Section 14(1)(e) of the Act, the intention of the Legislature to exclude the right to commercially rent / sale of sound recordings from Section 31-D is apparent and what is covered is only the communication of sound recording to public. The Ld. Senior Advocate appearing for the Plaintiff relied on the 227th Report of the Rajya Sabha Parliamentary Standing Committee on the Copyright (Amendment) Bill, 2010. Therein the Committee opined that sale / downloading of sound recordings through the internet does not fall within the scope of a communication to the public. The relevant excerpts of the said Rajya Sabha Parliamentary Standing Committee report are reproduced below:

“6.2 According to the Department, the definition has been revised to tackle the exploitation of works in digital medium, thereby bringing the same in conformity with WCT and WPPT. The Committee notes that the proposed amendment in the definition of the term ‘communication to the public’ has not found favour with music companies represented by the South India Music Companies Association, the RPG Enterprises Saregama, Indian Music Industry and also the Association of Radio Operators for India. Attention was drawn to the following factors having an adverse impact on the music industry and radio operators: – subscription to caller tunes and authorized websites permitting streaming/downloading of copies etc. will be considered “communication to the public” inspite of it being a sale of the copy; –

no rationale in exclusion of only physical copies from the purview of “communication to the public” in an age where commercialization and sale of music is taking place extensively through the medium of internet and transfer of files through computers/blue tooth; – creation of a transient electronic copy in the course of or for the purpose of “communication to public” under current law is treated as an infringement. While such act by a legitimate TV/Radio station would be lawful, the section will be misused by unauthorized websites treating it as an activity during the course of “communication to the public” – free radio broadcast which is a service to the public and is also in the interest of artists as it promotes their compositions will be brought under the definition. Therefore, the word ‘performance’ should be excluded from the provision. – proposed amendment will be misinterpreted by certain quarters when even issuing “digital” copies would amount to ‘communication to public’. It would be wrong to consider digital sales such as iTunes as “communication to the public” In reality, it is only a sale, but on a different medium.

6.3 *The Committee feels that the reservations of the stakeholders are unfounded. Issuing physical copies or legitimate digital downloading music or video recording by payment cannot be considered a communication to the public. The Department has justified the proposed amendment for exploitation of digital mediums. As the amendment is in tune with the technological advancement, the Committee accepts the amendment. The Committee is also of the view that the copyright societies can play a proactive role in resolving problems, if any, arising due to the proposed changes in the definition.”*

45. The commercial rental / sale of sound recordings and broadcasting of sound recordings are two distinct activities which have been separately impugned by the Plaintiff by filing two separate suits. I have already come to a conclusion that the Defendants' impugned services (download/purchase features) are in the nature of commercial rental and / or sale of sound recordings. A bare perusal of Section 14(1)(e) of the Act, would make it clear that the Legislature intended to keep independent the right to commercially rent / sell a sound recording from the right to communicate the sound recording to the public. The distinction drawn by the Legislature between Sections 14(1)(e)(ii) and 14(1)(e)(iii) of the Act by carving out the rights therein separately, clarifies the position that the exclusive right granted to the owner of copyright in a sound recording under Section 14(1)(e)(ii) does not overlap with the exclusive right of communication of the sound recording to the public provided under Section 14(1)(e)(iii) of the Act.

46. Broadcast has been defined under Section 2(dd) of the Act as under:

- “(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;”

47. A bare perusal of the definition of the term 'broadcast' would make it clear that the same is a specie of 'communication to the public'. Hence, by deduction, the right to commercially rental or to sell a sound recording is separate and distinct from the right to broadcast.

48. Now, a bare reading of Section 31-D would reveal that the said provision is applicable to only broadcasting organizations which are desirous of communicating to the public by way of 'broadcast'. Section 31-D is reproduced hereunder:

“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 Appellate Board.*
- (3) The rates of royalties for radio broadcasting shall be different from television broadcasting and the Appellate Board 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 Appellate Board 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.”*

49. It is evident that the Legislature was well aware of the distinction between the right to commercial rental or to sell on one hand and right to broadcast on the other hand whilst enacting Section 31-D of the Act. Had the Legislature intended for a statutory license under the said Section 31-D to encompass sale and / or commercial rental as contemplated under Section 14(1)(e)(ii), the Legislature would have employed express language to that effect in Section 31-D of the Act. The absence of such language or even mention of sale and / or commercial rental in Section 31-D of the Act, makes the intention of the Legislature crystal clear to exclude commercial rental / sale of sound recordings from the purview of Section 31-D. It is therefore evident that Section 31-D contemplates communication to public by way of broadcast of sound recordings only, and not their commercial rental and / or sale. Further, such interpretation is also fortified by the excerpts relied upon by the Plaintiff from 227th Report of the Rajya Sabha Parliamentary Standing Committee on the Copyright (Amendment) Bill, 2010 wherein it was observed that ‘*Issuing physical copies or legitimate digital downloading music or video recording by payment cannot be considered a communication to the public*’. Since the services (download / purchase feature) provided by the Defendants are in the

nature of commercial rental and / or sale of sound recordings, they do not fall within the purview of Section 31-D of the Act and the Defendants are prohibited from exercising a statutory license apropos thereto.

ISSUE B: Whether the Defendants can invoke Section 31-D of the Act to exercise a Statutory License in respect of the Plaintiff's Repertoire for internet broadcasting?

50. I shall now deal with the most contentious issue in the present matter. Apart from the download / purchase feature, the Defendants are also offering 'on demand streaming services' on their App where the Defendants make the songs available to public by streaming them online i.e. over internet which can be accessed through any device connected to internet. The said services of the Defendants i.e. on demand streaming services, have been impugned by the Plaintiff in Commercial IP Suit (L) No.113 of 2018. There is no dispute about the fact that 'on demand streaming services' offered by the Defendants amounts to communicating of the sound recording to public. It is the Plaintiff's case that such communication of the sound recording to the public without any authorization from the Plaintiff amounts to infringement of the Plaintiff's exclusive right provided in Section 14(1)(e)(iii) of the Act. In reply, the Defendants have contended that they are broadcasting organizations and that they have a statutory license under Section 31-D of the Act to communicate to

the public by way of broadcast of the Plaintiff's Repertoire since they have already given a Notice dated 25th November 2017 contemplated under Section 31-D(2) of the Act.

51. The Plaintiff has raised a two-pronged objection to the Defendant's invocation of Section 31-D.

a. The grant of Statutory License under Section 31-D is only restricted to radio and television broadcasting organisations and the Defendants' on demand streaming services offered through internet as an "internet broadcasting organisation" do not fall within the purview of Section 31-D of the Act.

b. Assuming that 'internet broadcasting' is covered within the provision of Section 31-D of the Act, Statutory License under the said Section 31-D can only be exercised upon fixation of the manner and rate of royalty by the Appellate Board.

52. In the interest of perspicuity, I have dealt with the Plaintiff's objections individually, as seen below.

The grant of Statutory License under Section 31-D is only restricted to radio and television broadcasting organisations and the Defendants' on demand streaming services offered through internet as an "internet broadcasting organisation" do not fall within the purview of Section 31-D of the Act.

53. Seeking to claim benefit of Section 31-D, the Defendants have contended that they are a broadcasting organization and that they are communicating to the public by way of broadcast of the Plaintiff's Repertoire over internet. The question that stems now is that, whether a Statutory License under Section 31-D available to internet broadcasters such as the present Defendants? A joint reading of the Act and the Rules suggests the answer is in the negative. Let us see how.
54. The Ld. Senior Advocate for the Defendants submitted that they are an internet broadcasting organization and that they are entitled to a Statutory License under Section 31-D of the Act to broadcast over internet sound recordings including *inter alia* the Plaintiff's Repertoire. The Defendants relied upon Section 31-D(1) of the Act which bears a reference to "any" broadcasting organisation. It is submitted that Section 31-D is plenary and all-encompassing in nature and thus covers in its purview 'any' broadcasting organisation. The Ld. Senior Advocate for the Defendants then placed reliance upon the use of phrases "*any means of wireless diffusion*" and "*any means of display or diffusion other than by issuing physical copies*" found in Sections 2(dd) and 2(ff) of the Act, respectively. He submitted that a bare reading of Section 31-D along with Sections 2(dd) and 2(ff) clearly expresses that the legislative intent is that any broadcasting organization, which is broadcasting / communicating to the public by any means of display or diffusion including wireless and wired diffusion, is entitled to a Statutory License under Section 31-D of the Act.

55. The Ld. Senior Advocate for the Defendants further submitted that the principle of *contemporaneo expositio* must be applied while interpreting Section 31-D of the Act. He submitted that a liberal construction of Section 31-D and the definition of broadcast under Section 2(dd) would breathe life into the statute. He submitted that Section 31-D(3) does not even purport to detract from or limit the scope of Section 2(ff) when read with Section 31(D)(1) of the Act so as to limit Section 31-D of the Act only to radio and television broadcasting. He submitted that if such interpretation is permitted, it would be in direct conflict with Section 2(ff) which allows broadcasts / communication to the public, by any means of display or diffusion.
56. The Ld. Senior Advocate for the Defendants submitted that Section 31-D(3) divides broadcast into ‘audio broadcasts (radio)’ and ‘audio-visual broadcasts (television)’. He submitted that the Defendants are broadcasting sound recordings over internet. He submitted that internet broadcasting is a type of audio broadcasting and hence internet broadcasting falls within the term ‘radio broadcasting’. He further submitted that in view of the wide language of Section 31-D(3) and the legislative intent to encompass ‘any’ broadcasting organization communicating to the public / broadcasting by ‘any’ means of display or diffusion, the word “radio” in Section 31-D(3) must be read as encompassing all means of audio broadcasting, including internet broadcasting. In support of this

submission, the Ld. Senior Advocate for the Defendants placed reliance upon the following judgments:

- a. *All Kerala Online Lottery Dealers Association v. State of Kerala (2016) 2 SCC 161* – Statute regulating paper lotteries was held to cover online internet lotteries;
- b. *Senior Electric Inspector v. Laxminarayan Chopra and Ors. AIR 1962 SC 159* – the words “telegraphic line” were held to cover devices for wireless transmission;
- c. *State SIL Import v. Exim Aides Silk Exporters (1999) 4 SCC 567* – Notice in writing under Section 138 of Negotiable Instruments Act, 1881 was held to cover Notice sent by Fax.

57. In reply, the Ld. Senior Advocate for the Plaintiff submitted that Section 14(1)(e) and Section 30 of the Act are couched in a positive language. The two sections enumerate the rights granted and enjoyed by the owner of a sound recording. The rights granted under the said sections are exclusive in nature and grant the owner the right to communicate his sound recording to the public and to license the same to such persons and to such extent, as the owner may deem fit. He submitted that Section 31-D of the Act was introduced into the Act upon the enactment of the Copyright (Amendment) Act, 2012. He submitted that the said Section contemplates a Statutory License that permits a broadcaster to broadcast published literary works, musical works and sound recordings. He submitted that subject to the fulfilment / meeting of the conditions enumerated under Sub-sections 31-D(2) to 31-D(7), a broadcasting organization is free to broadcast

published sound recordings without first obtaining a license from the copyright owner and without his consent. Section 31-D is an exception to the copyright owner's exclusive right to otherwise freely license his works on the terms and conditions as he may deem fit.

58. The Ld. Senior Advocate for the Plaintiff submitted that a Statutory License is in the nature of an expropriatory legislation; that Section 31-D is an exception to and deprives the copyright owner's right to license works for broadcasting on the terms and conditions that he deems fit and proper; that the said section permits broadcasting of copyright works without the owner's consent and thus is in the nature of an expropriatory legislation and must be construed strictly; that the said Section 31-D must not only be read strictly, but also in a manner so as to put least burden on the expropriated copyright owner. In this regard the Plaintiff relied upon the judgments in (i) *Super Cassettes Industries v. Music Broadcast* (2012 5 SCC 488); (ii) *Union of India v. Board of Control for Cricket in India and Ors.* 2017 SCC Online SC 991; and (iii) *State of Madhya Pradesh v. Vishnu Prasad Sharma and Ors.* AIR 1963 SC 1593. The relevant excerpts of the judgments are reproduced below:

“Super Cassettes Industries Ltd. vs. Music Broadcast Pvt. Ltd. 2012 5 SCC 488

56. Copyright in a "work", undoubtedly, is a valuable legal right subsisting in the "owner" or somebody claiming through the owner. Such a right has more than one dimension. It may have a commercial

value depending upon the quality, nature and the public demand of the work. It may also have aesthetic value. Whether such a right should be transferred or not is a matter, essentially, for the "owner" of the copyright to determine. It is, further, the right of the owner to decide on what terms and conditions (which need not necessarily be related to money alone), he would part with the copyright of his work if ever he decides to part with it. However, Section 31 of the Copyright Act creates an exception to the abovementioned principle of the right of the owner of the copyright. In substance - the Section deprives the "copyright" of the "owner" against his volition. In other words, by Section 31, the State is authorised, by its coercive powers, to deprive the owner of his copyright in a work, which is his property and the right to enjoy such property in the manner as the owner of the property pleases. Necessarily, in view of the constitutional mandate under Article 300A, such a deprivation can only be by the authority of law and it is too well entrenched a principle on the constitutional law that such a law could be only for a public purpose.

Union of India (UOI) and Ors. vs. Board of Control for Cricket in India and Ors. 2018 (73) PTC 31 (SC)

28. ... Though much argument has been advanced as to whether Section 3 of the Sports Act, 2007 is expropriatory in nature, we have no hesitation in holding the said provision of the Act to be of such a nature inasmuch as it curtails or abridges the rights of a content rights owner or holder and television or radio broadcasting service provider, as may be. Sharing of revenue between the content rights owner or holder and the Prasar Bharati envisaged by Section 3(2) of the Sports Act, 2007 would hardly redeem the situation to take the Sports Act,

2007 out of the category of expropriatory legislation. Section 3 of the Sports Act, 2007, therefore, has to be interpreted very strictly. ...

State of Madhya Pradesh and Ors. vs. Vishnu Prasad Sharma and Ors. AIR 1966 SC 1593

3. ... After the issue of a notification under Section 4, an owner of land in the locality notified cannot have full beneficial enjoyment of his property; he cannot, for example, build on his land for if he does so and the land is acquired, he will get no compensation for the building put up and will lose the costs incurred for it. If it is a justification for saying that a number of declarations can be made under Section 6 because otherwise the Government may have to pay more, it seems to me that it is at least an equal justification for saying that such declarations cannot have been contemplated by the Act because that would mean an avoidable deprivation of the owners of their beneficial enjoyment of lands till such time as the Government is able to make its plan. As the Act is an expropriatory Act, that interpretation of it should be accepted which puts the least burden on the expropriated owner....”

59. Ld. Senior Advocate for the Plaintiff further submitted that the Copyright (Amendment) Act, 2012 is a modern statute and it was passed on the basis of the Copyright Amendment Bill 2010. He submitted that the digital downloading / surfing of music was very much in the public domain in 2010 / 2012. The Legislature was therefore fully aware and cognizant of digital technologies and of music downloading / streaming at the time the said Copyright Amendment Bill 2010 was passed. He submitted that the Legislature’s awareness is demonstrated

from the Statement of Objects and Reasons of the Copyright (Amendment) Act, 2012, which is reproduced hereinbelow:

“2. *The Act is now proposed to be amended with the object of making certain changes for clarity, to remove operational difficulties and also to address certain newer issues that have emerged in the context of digital technologies and the Internet. The two World Intellectual Property Organisation (WIPO) Internet Treaties, namely, WIPO Copyright Treaty (WCT), 1996 and WIPO Performances and Phonograms Treaty (WPPT), 1996 have set the international standards in these spheres. The WCT and the WPPT were negotiated in 1996 to address the challenges posed to the protection of Copyrights and Related Rights by digital technology, particularly with regard to the dissemination of protected material over digital networks such as the Internet. The member countries of the WIPO agreed on the utility of having the Internet treaties in the changed global technical scenario and adopted them by consensus. In order to extend protection of copyright material in India over digital networks such as internet and other computer networks in respect of literary, dramatic, musical and artistic works, cinematograph films and sound recordings works of performers, it is proposed amend the Act to harmonise with the provisions of the two WIPO Internet Treaties, to the extent considered necessary and desirable. ...*”

60. Ld. Senior Advocate for the Plaintiff submitted that the Legislature was thus aware and cognizant of the advent of digital technologies and the internet. The Copyright Amendment Act, 2012 was proposed, *inter alia*, for harmonization of the Act with WIPO internet treaties. He submitted that the absence of express

words in Section 31-D providing for a Statutory License in respect of internet streaming and / or downloading, was therefore a conscious legislative choice. He submitted that its absence implies that the Parliament did not seem a licensing regime for internet music streaming, necessary or desirable.

61. Ld. Senior Advocate for the Plaintiff further submitted that the Parliament was conscious of music downloading and digital technologies at the time of enacting the Copyright (Amendment) Act, 2012. He submitted that the application of the principle of *contemporaneo expositio* is plainly not warranted in the facts of the present case. He submitted that doing so would entail ascribing a purpose to Section 31-D which was plainly not intended and / or warranted. In this respect the Plaintiff has sought to distinguish the judgments relied upon by the Defendants in the cases – (i) *Senior Electric Inspector & Ors. v. Laxminarayan Chopra & Anr. AIR 1962 SC 159*, (ii) *All Kerala Lottery Dealers Association v. State of Kerala & Ors. (2016) 2 SCC 161*, and (iii) *State of Punjab & Ors. v. Amritsar Beverages Ltd. & Ors. (2006) 7 SCC 607*. The relevant excerpts of the judgments are reproduced below:

“The Senior Electric Inspector and Ors. vs. Laxmi Narayan Chopra and Ors. AIR 1962 SC 159

7. ... in the year 1885 the Legislature could not have dreamt of the future discovery of wireless telegraphy and, therefore, could not have intended to use the expression "telegraph line" in a comprehensive sense so as to take in electric wires of a receiving station of wireless telegraphy.

All Kerala Online Lottery Dealers Association vs. State of Kerala and Ors. (2016) 2 SCC 161

27. ... *The relevant provisions of the Act clearly demonstrate that even though all types of lotteries are meant to be regulated by the said Act, online lotteries were not under the contemplation of the Central Government at the time when the Act came into force.*

State of Punjab and Ors. vs. Amritsar Beverages Ltd. and Ors. (2006) 7 SCC 607

9. *The Act was enacted in the year 1948. Information Technology at that time far from being developed was unknown. Constitution of India is a living organ. It had been interpreted differently having regard to different societal situations. [See Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I and Anr. (2004) 9 SCC 512 , Union of India v. Naveen Jindal and Anr. AIR 2004 SC 1559 , John Vallamattom and Anr. v. Union of India AIR 2003 SC 2902 and Kapila Hingorani v. State of Bihar (2003) III LLJ 31 SC]. Same principle is applicable in respect of some statutes.*

Creative interpretation had been resorted to by the Court so as to achieve a balance between the age old and rigid laws on the one hand and the advanced technology, on the other. The Judiciary always responds to the need of the changing scenario in regard to development of technologies. It uses its own interpretative principles to achieve a balance when Parliament has not responded to the need to amend the statute having regard to the developments in the field of science.”

62. Ld. Senior Advocate for the Plaintiff submitted that in the aforesaid cases the statutes / provisions before the Court were either antiquated / old / rigid, or the

Legislature had not contemplated the circumstance at the time of passing the law. It is submitted that the subject statute i.e. Section 31-D of the Act is of modern provenance and the Legislature was aware of service providers such as the Defendants at the time of enacting Copyright (Amendment) Act, 2012. It is further submitted that in the case of *All Kerala Online Lottery Dealers Association vs. State of Kerala and Ors. (supra)* and *State of Punjab and Ors. vs. Amritsar Beverages Ltd. and Ors. (supra)*, the provisions before the Court were procedural legislations. It is submitted that expropriatory legislations such as the present Section 31-D cannot be construed in a 'creative manner' to trample over the expropriated owner's rights.

63. Ld. Senior Advocate for the Plaintiff submitted that the Defendants must establish that they are 'broadcasting organizations' entitled to a license under Section 31-D of the Act. He submitted that the only two types of broadcasting as contemplated by Section 31-D are '**radio broadcasting**' and '**television broadcasting**'. In this respect, my attention was drawn to Section 31-D(3) which contemplates that the rate of royalty for radio broadcasting shall be different from the rate for television broadcasting and both such rates shall be fixed by the Appellate Board. He submitted that no other mode of broadcast is contemplated. The legislative command to the Appellate Board that it must fix separate rates for television and radio broadcasting is, as argued by the Plaintiff, to be the definition of the Appellate Board's exclusive jurisdiction to fix royalty rates. He submitted

that the Appellate Board's power to fix rate of royalty is circumscribed and limited to the fixation of 'television' and 'radio' broadcasting rates only. He further submitted that the Appellate Board has no jurisdiction to fix rates for any other form of broadcast or communication to the public. It can only exercise such power as is vested in it by the statute. He submitted that the law requires that the Appellate Board must trace its substantive power to fix rates for a subject from the Act itself.

64. Ld. Senior Advocate for the Plaintiff relied upon the case of *Super Cassettes Industries v. Music Broadcast (P) Ltd. (supra)* wherein the Hon'ble Supreme Court observed that the erstwhile Copyright Board did not have the power to grant an interim license in exercise of its power under Section 31 of the Act to grant a Compulsory License. The said decision was based on the rationale that there was no express statutory conferment of such power. Accordingly, he submitted that the power of the Appellate Board to fix royalty rates for internet broadcasting must be clearly and expressly defined and in the absence of such clear definition, it must be held that the Appellate Board does not have the power to fix royalty in so far as internet broadcasting is concerned.

65. In tandem, the Ld. Senior Advocate for the Plaintiff also referred to Rules 29 and 31 of the Rules and submitted that Rule 29 provides for the particulars of the notice required under Section 31-D of the Act. He submitted that a perusal of Rules 29(3) and 29(4) would reveal that the Rules only contemplate the

furnishing of details pertaining to 'radio' and / or 'television broadcasting'. He submitted that Rule 31 provides for the manner of determining royalties under Section 31-D. Once again, the said rule only contemplates 'radio' and 'television broadcasting'. Further, Ld. Senior Advocate for the Plaintiff relied upon the Report of the Rajya Sabha Parliamentary Standing Committee to point out that the object of Section 31-D was to ensure that the public had access to FM radio networks. According to him, therefore, the totality of all these provisions, make it clear that the Legislature intended to restrict Section 31-D licenses to 'radio' and 'television' broadcasting in their classic sense.

66. I have considered the above submissions advanced by the Ld. Senior Advocates appearing for the parties. Indeed, the Copyright (Amendment) Act, 2012 is a modern statute and cannot be termed as old or archaic. The Legislature was well aware of existence of prevalent digital technologies and trends, including the sharing, streaming and downloading of music when the Copyright (Amendment) Bill, 2010 was before it. The same is evident from a reading of the Statement of Objects and Reasons of the Copyright Amendment Act, 2012. The expropriatory nature of Section 31-D cannot be denied. The rights of such owner of a sound recording are given under Section 14(1)(e) and Section 30 of the Act. Section 31-D acts as a statutory exception to the rule that a copyrighted work is the exclusive property of its owner and he may deal with it as he may deem fit. It was only in 2012, vide the amendment to the Act, that the Legislature made additions to the

Act, including, *inter alia*, the subject Section 31-D. It would not be going far to say that the Legislature had intended specific circumstances where the Statutory License under the said section would constitute an exception to a copyright owner's exclusive rights. In view thereof, along with the caution advised by the Apex Court in *Super Cassettes Industries v. Music Broadcast (supra)*; *Union of India v. Board of Control for Cricket in India and Ors. (supra)*; and the *State of Madhya Pradesh v. Vishnu Prasad Sharma and Ors. (supra)* in respect of expropriatory legislations, Section 31-D must be construed strictly in conformity with the specific intention for which it was enacted.

67. Further, from a perusal of the Statement of Objects and Reasons of the Copyright Amendment Act, 2012 it seems that the Legislature was in fact aware of and cognizant of the digital technologies and of music downloading / streaming when the bill was discussed at the Parliament. Section 31-D(3) was a deliberate addition to include an exception to a copyright owners exclusive rights. The absence of express words in Section 31-D providing for a Statutory License in respect of internet streaming and / or downloading, was a conscious legislative choice. In view of the above and in the absence of an express statutory provision including internet broadcasting within the purview of Section 31-D, the scope of Section 31-D cannot be expanded to include the same. It appears from a reading of the Rajya Sabha Parliamentary Standing Committee Report, that the object of Section 31-D was to ensure that the public had access to FM radio networks. As

aforsaid, the legislation enacting the subject section is relatively recent and the Legislature was aware of services such as the services offered by the Defendants. Clearly, the Legislature did not intend to include internet broadcasting within the ambit of Section 31-D.

68. The factual matrix before the Courts in *Senior Electric Inspector & Ors. v. Laxminarayan Chopra & Anr. (supra)*, *All Kerala Lottery Dealers Association v. State of Kerala & Ors. (supra)*, and *State of Punjab & Ors. v. Amritsar Beverages Ltd. & Ors. (supra)* were completely distinct from the matter at hand. The statutes / provisions in consideration before the Court in *All Kerala Lottery Dealers Association v. State of Kerala & Ors. (supra)*, and *State of Punjab & Ors. v. Amritsar Beverages Ltd. & Ors. (supra)* were old and antiquated and thus called for the application of the doctrine of *contemporaneo expositio*. In *Senior Electric Inspector & Ors. v. Laxminarayan Chopra & Anr. (supra)* the Legislature could not have possibly “dreamt of” including wireless telegraphy within the purview of the Act. That is not the present case. Neither was the Legislature oblivious of the existence of services of the nature as those provided by the present Defendants at the time of introducing Section 31-D to the Act, nor can the said Section 31-D or the Copyright (Amendment) Act, 2012 be considered old / antiquated. Thus, in the facts of the present case, in my view the Defendants cannot draw any support from the said judgments.

69. Further, a bare perusal of the Rules 29 and 31 of the Rules also supports the view that Section 31-D is a statutory licensing regime meant only for ‘radio’ and ‘television’ broadcasting and not internet broadcasting. Rules 29 and 31 of the Rules are reproduced hereunder:

“Rule 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; and*
- (l) *Address of the place where the records and books of account are to be maintained for inspection by the owner of rights.*

Rule 31. Manner of determining royalties.-

- (1) *The Board 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 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 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 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 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 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.*

- (8) *The Board 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.*

The Board may revise the rates of royalties periodically, at least once in a year keeping in view the provisions of these rules.”

(Emphasis Supplied)

70. The notice requirements of Rule 29 are only in respect of (i) radio broadcasting, (ii) television broadcasting and (iii) performance (which is not applicable to the facts of this case). Since Rule 29 only contemplates issuance of notice for these three categories, it supports the submissions that Section 31-D covers only radio broadcasting and television broadcasting. Further, such view is also fortified by Rule 31 of the Rules which contemplates determination of royalties only in respect of television and radio broadcasting. Further, a perusal of the Rajya Sabha Parliamentary Standing Committee Report makes it clear that the objection of Section 31-D was to ensure that the public had access to works over the FM radio networks. The concerns raised before the Rajya Sabha Parliamentary Standing Committee were limited to ‘radio’ and ‘television’ industries, which reflects that, what was contemplated while introducing Section 31-D was radio and television broadcasting alone. Even in so far as other amendments were concerned, the Rajya Sabha Parliamentary Standing Committee understood ‘broadcast’ to mean

either radio or television broadcast alone. The following excerpts from the Rajya Sabha Parliamentary Standing Committee Report are relevant:

“9.12 The Committee observes that the main contention between authors/composers of film lyrics and music compositions and Film/Producers Music Companies is about the rights relating to film music. Film music rights are bundle of copyrights which include synchronization right, performing rights, mechanical reproduction right and sound recording right. Synchronisation right is that when a music or song is synchronised to a film, video, television or commercial etc. Performing rights are right to perform music in public specially in broadcasting (TV /Radio), restaurants, airlines, auditoriums or public functions etc. Mechanical reproduction rights are a royalty paid to a song writer whenever a copy of one of their songs is made. Sound recording rights are owned by producer or a recording company.

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.

15.3 Divergent views were expressed by different stakeholders on the viability of this amendment. Welcoming it as a positive move, the Indian Broadcasting Foundation pointed out that with pre-worked terms and conditions, a broadcasting organization would have far greater certainty in terms of its operation cost. Also number of disputes

arising due to arbitrary and unreasonable demands of copyright owners would likely to be quite low. However, very strong reservations were expressed by organizations like South India Music Companies Association, Indian Music Industry, Phonographic Performance Ltd., Indian Performing Right Society Ltd. and RPG Enterprises-Saregama on the following grounds:

- *the new regime of 'statutory licensing' of music to broadcasters appears to be discriminating as the copyright owner/author has been denied any say in the fixing of royalty.*
- *like music industry, the broadcasting (except AIR) industry is in the private sector.*
- *radio industry is risk-free and solely profit-oriented and already offered concessions by the Government. Reasons for music industry which takes risks in bringing out music being singled out are not known.*
- *television industry is a long established industry, not needing any support. However, with such a provision for broadcasting industry, Television industry may also seek concessional licensing for their programmes as well.*
- *it will drastically reduce the number of works, societies can administer by excluding all those works where the author has already assigned his rights."*

It is evident from the above paragraphs that the Rajya Sabha Parliamentary Standing Committee itself understood that 'broadcast' under Section 31-D was limited to either 'radio' or 'television' broadcasting only.

71. Further, the contention of the Defendants that they are broadcasting sound recordings over internet and that internet broadcasting is a type of audio

broadcasting and hence internet broadcasting falls within the term 'radio broadcasting' is misplaced. Firstly, there is nothing in the definition of the term 'broadcast' or other provisions of the Act concerning 'broadcast' which supports this submission. Digital downloading or surfing of music was in the public domain when the Copyright Amendment Bill 2010 was introduced and when the Copyright Amendment Act 2012 was passed. The Legislature was thus fully aware and cognizant of the digital technologies and of music downloading / streaming in 2010 and 2012. The same is also evident from the excerpts (reproduced in the preceding paragraph) of the Rajya Sabha Parliamentary Standing Committee Report. It is pertinent to note that despite the said position, the Legislature consciously decided not to specifically introduce the term 'internet broadcasting' in Section 31-D of the Act. There is one more factor which throws light on this aspect. Section 52 of the Act provides for 'Certain acts not to be infringement of copyright'. Section 52 (1) (b) and (c) of the Act which were introduced by the Copyright Amendment Act, 2012 are meant for providing protection to the Internet Service Providers which makes it evident that the technology pertaining to downloading/streaming over internet was very well within the knowledge of the Legislature and that the Legislature even made provisions for the protection of internet service providers. Despite the said position, the Legislature in its wisdom decided not to introduce the words 'internet broadcasting' in Section 31-D of the Act. This shows the conscious

choice of the Legislature in not including 'internet broadcasting' within the scope of Section 31-D of the Act.

72. I am therefore in agreement with the Plaintiff that the provisions of Section 31-D read with Rules 29 to 31 coupled with the legislative history preceding the passage of Copyright Amendment Act, 2012 clearly support the submission that Section 31-D contemplates only television and radio broadcasting and not internet broadcasting.

Whether License under the said Section 31-D can only be exercised upon fixation of the rate of royalty by the Appellate Board?

73. The Ld. Senior Advocate for the Plaintiff submitted that Section 31-D(1), as relied upon by the Defendants, cannot be read in isolation. He submitted that Section 31-D(1) is a prefatory clause that enables a broadcasting organisation to broadcast published literary, musical works and sound recordings. However, this enablement is not plenary or unfettered. This is borne from the fact that the words "*may do so*" are followed by and qualified by the words "subject to the provisions of this section". Thus, the Statutory License under this section is contingent upon compliance of Sections 31(2) to 31(8).

74. The Plaintiff has relied upon the conditions imposed under Section 31-D(2) of the Act. The Section imposes two conditions upon a broadcasting organisation i.e. (i) to give prior notice to the owner of the copyright and (ii) to pay royalties in

the manner and at the rate fixed by the Appellate Board. It is submitted that the obligation to pay is mandatory due to the inclusion of the words “*shall pay*” preceding the words “*owner of rights in each work*”. The use of the word “*and*” preceding the condition to pay royalties at the rate fixed by the Appellate Board indicates the obligation to pay royalties at the fixed rate in conjunction with the obligation to give notice to the owner. It is pointed out that the verbiage employed by the Legislature is “*at the rate fixed*”, which is in the past tense. Thus, the Legislature intended the rate to be fixed prior to the broadcast. If intention was to fix the rates subsequent to the broadcast, the words employed would be “*to be fixed*” or of similar nature.

75. To support the aforesaid interpretation the Plaintiff placed reliance on Rules 29, 30, and 31 of the Rules. Rule 30 of the Rules is reproduced below:

“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.”

76. The Ld. Senior Advocate for the Plaintiff submitted that similar to Section 31-D(2), Rule 29 imposes an obligation upon the broadcaster to give a prior notice to the owner informing its intention to pay royalty at the rate fixed by the Appellate Board. Even here the rule contemplates a prior fixation of the royalty rates. Furthermore, the third proviso of Rule 29 categorically states that such prior notice shall be sent only after the royalty to be paid is determined by the Board under Rule 31. It is also submitted that Rule 29(4) stipulates the particulars that a broadcaster must include in its notice to the owner. Rule 29(4)(k) requires the broadcaster to specify the details of the payment of royalties at the rates fixed by the Appellate Board. This requirement further posits that the fixation of rates has preceded the issuance of a notice. It is further submitted that by and under Rule 31 the Appellate Board is obligated to fix the rate of royalty either *suo motu*, or on receipt of a request from “any interested person”. This clearly indicates that on an application being made by any interested person or even *suo motu*, the Appellate Board may fix the rate of royalty which shall be applicable throughout the industry, including broadcasting organisation, before giving the notice under Section 31-D and Rule 29 of the Act. It is submitted that the Defendants were aware of the condition that prior fixation of royalty rates by the Appellate Board is

necessary, as the same is evinced by their letter addressed to the Plaintiff dated 24th November 2017 wherein it was stated:

“7. ... Since the Hon’ble Appellate Board is yet to notify the rates for such broadcast, we are tendering a sum of Rs, 10,00,000/- being the 1st tranche payment of royalty as was to you pursuant to the license agreement. ...”

77. The Ld. Senior Advocate for the Plaintiff submitted that the question of whether payment to be made in advance is neither relevant nor determinative. Even where royalty is fixed, there can be a provision for payment of royalty in advance. Advance in such cases is only a method of accounting or adjustment. It is submitted that a plain reading of Section 31-D(4) contemplates that the broadcaster if directed by the Board, will pay an ‘advance’ ; all that this means is that the Board may, if it considers appropriate, whilst fixing royalty, prescribe a methodology for making payment of royalty due; this mechanism may contemplate some payment being made upfront as an advance; whether this obligation is directory or mandatory, an advance is inherently a monetary obligation to make payment before the commission of an act. It is submitted that an advance must also be clearly a quantified sum of money; such quantification must logically precede actual payment, which itself must precede the broadcast; thus, quantification or ‘fixing’ must also be done in advance. It is submitted that since the section contemplates that a direction to pay an advance emanates from the Appellate Board, the authority must quantify this sum much prior to

broadcast. Consequently, in these circumstances and coupled with the inherent nature of an advance, a fixation of rates by the Board must necessarily precede any broadcast under Section 31-D. It is therefore submitted that the section clearly postulates that fixation of rates is a condition precedent to broadcast.

78. In response to the Plaintiff's interpretation of Sec 31-D of the Act, that fixation of royalty rates is a necessary precondition to grant of Statutory License under the section, it is submitted on behalf of the Defendants that if the scheme and language of Sections 31, 31-C and 31-D of the Act are considered and compared, it would be clear that the Statutory License under Section 31-D operates without prior fixation of royalty by the Appellate Board, and without requiring royalty to be paid to the owner in advance.

79. It is submitted by the Defendants that Section 31-C of the Act is available to anyone desirous of making cover versions of a sound recording and Section 31-C(2) specifically requires such person to pay royalties in advance to the copyright owner at the rate fixed by the Appellate Board. It is submitted that Section 31-D is available only to a defined / restricted class, i.e. broadcasting organisations and does not require royalty to be paid to the copyright owner in advance as is provided in case of Section 31-C(2). It is submitted that Section 31-D(4) provides that while fixing the royalty the Appellate Board may require the broadcasting organization to pay an advance even before the royalty is fixed by the Appellate Board. It is submitted that Section 31-D therefore makes a clear departure from

the scheme / language of Section 31-C and does not provide for payment of royalties in advance except as may be decided by the Appellate Board under Section 31-D(4). It is further submitted that Legislative intent behind Section 31-D was to enable broadcasting organizations to communicate sound recordings to the public by way of broadcast, without first going through the lengthy process of fixation of royalty rates by the Appellate Board.

80. Relying upon Section 31-D(4), the Defendants submitted that Section 31-D automatically kicks in upon giving prior notice and without fixation of rates. The Defendants argue that had the legislature intended for payment to precede broadcast under Section 31-D, it would have used language similar to that of Section 31-C.

81. Section 31-C of the Act is reproduced below:

“Section 31-C - Statutory licence for cover versions

(1) Any person desirous of making a cover version, being a sound recording in respect of any literary, dramatic or musical work, where sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work, may do so subject to the provisions of this section:

Provided that such sound recordings shall be in the same medium as the last recording, unless the medium of the last recording is no longer in current commercial use.

(2) The person making the sound recordings shall give prior notice of his intention to make the sound recordings in the manner as may be

prescribed, and provide in advance copies of all covers or labels with which the sound recordings are to be sold, and pay in advance, to the owner of rights in each work royalties in respect of all copies to be made by him, at the rate fixed by the Appellate Board in this behalf:

Provided that such sound recordings shall not be sold or issued in any form of packaging or with any cover or label which is likely to mislead or confuse the public as to their identity, and in particular shall not contain the name or depict in any way any performer of an earlier sound recording of the same work or any cinematograph film in which such sound recording was incorporated and, further, shall state on the cover that it is a cover version made under this section.

- (3) *The person making such sound recordings shall not make any alteration in the literary or musical work which has not been made previously by or with the consent of the owner of rights, or which is not technically necessary for the purpose of making the sound recordings:*

Provided that such sound recordings shall not be made until the expiration of five calendar years after the end of the year in which the first sound recordings of the work was made.

- (4) *One royalty in respect of such sound recordings shall be paid for a minimum of fifty thousand copies of each work during each calendar year in which copies of it are made:*

Provided that the Appellate Board may, by general order, fix a lower minimum in respect of works in a particular language or dialect having regard to the potential circulation of such works.

- (5) *The person making such sound recordings shall maintain such registers and books of account in respect thereof, including full details*

of existing stock as may be prescribed and shall allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such sound recording:

Provided that if on a complaint brought before the Appellate Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this section, the Appellate Board is, prima facie, satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty.

Explanation-For the purposes of this section "cover version" means a sound recording made in accordance with this section."

82. I have considered the submissions of the Ld. Senior Advocates for the parties.

Though I have held that 'internet broadcasting' is not covered within the ambit of Section 31-D of the Act, I am proceeding to consider the further aspects / issues discussed hereafter including the aspect whether License under the said Section 31-D can only be exercised upon fixation of the rate of royalty by the Appellate Board both, considering the importance of the issue and the express desire of both sides that there be a decisive pronouncement of this Court on a matter of general importance and on which both sides have provided me considerable assistance. Section 31-D(3) contemplates that the rate of royalty for radio broadcasting shall be different from the rate for television broadcasting and both such rates shall be fixed by the Appellate Board. While Section 31-D(1)

seems to be conducive to the Defendants' case, suggesting that a Statutory License is available to *any* broadcasting organisation, it stipulates that such license is conditional upon its conformity with the remaining provisions of the section. Section 31-D(1) cannot be read in isolation. Section 31-D(2) stipulates that the broadcasting organisation must send a notice, *in the prescribed manner*, to the owner informing of its intention to broadcast his copyrighted work. Such prescription is found in Rule 29 of the Rules. Once again, Sub rule 29(3) while stipulating different notice must be sent for radio and television broadcasting, does not contemplate any notice for internet broadcasting. Furthermore, Sub rule 29(4) only contemplates the furnishing of details of radio and television broadcasting. Similarly, Rules 29 and 30 do not contemplate any other broadcasting, except radio and television broadcasting.

83. Section 31-D(3) of the Act empowers the Appellate Board to fix the rate of royalty for radio and television broadcasting. The Appellate Board is a creature of the Act. The Hon'ble Supreme Court in the case of *Super Cassettes Industries v. Music Broadcast* (supra) demonstrated caution before expanding the scope of Section 31 to include grant of temporary Compulsory License. The Court ruled against the Appellate Board's ability to grant such a license in the absence of an express statutory provision conferring such power. Similarly, in the absence of an express statutory provision permitting the Appellate Board to fix the rate of

royalty for internet broadcasting, the same cannot be read in. As of present, the Appellate Board lacks jurisdiction to fix rate of royalty for internet broadcasting.

84. Further, a bare perusal of the procedure to obtain Compulsory License / other non-voluntary licenses under Sections 31, 31-A, 31-B, 31-C, 32 and 32A of the Act and Rules 7, 8, 11, 12, 18, 19, 27, 32, 34, 35, 39 and 40 of the Rules governing the procedure for the grant of / obtaining a Compulsory License / other non-voluntary licenses, and the procedure contemplated under Section 31-D would make it clear that the common thread underlying all the afore-quoted sections and their attendant Rules is that royalty has always been determined by the Appellate Board prior to the grant of licenses and the exercise of the same. While the basis for claiming a license and the conditions to be satisfied may vary under the aforesaid Sections 31, 31-A, 31-B, 31-C, 31-D, 32 and 32A, there is no difference in the requirement that royalty fixation must precede the license. Section 31-D is therefore only a departure from the old scheme of licensing to the limited extent that it does away with a hearing to the copyright owner and an inquiry for determining the necessity and / or requirement of a licence and the Registrar's act of issuing a license. It, however, does not do away with a prior determination of the rates for defining the statutory license to be exercised. Had such a radical departure been intended, the Legislature would have expressed its mind unequivocally and explicitly, including, by employing the verbiage "to be fixed" and / or like words to that effect in Section 31-D(2).

85. The Defendants' submission that had the Legislature intended fixation of royalty to precede broadcast under Section 31-D of the Act, the language used by the Legislature in Section 31-D(4) of the Act would be similar to that used in Section 31-C(2) of the Act is not the correct test to ascertain whether the Legislature intended prior fixation of royalty rates before exercise of Statutory License under Section 31-D. As already observed, advance payment of the royalty is merely the methodology of payment as directed by the Appellate Board exercising its discretion under Section 31-D(4). It is common ground that fixation of royalty rates would precede advance payment of royalty, as is done under Section 31-C(2). However, the absence of a mandate under Section 31-D to pay royalty in advance will not be fatal to the argument of the Plaintiff or necessitate an interpretation, that fixation of rate of royalty is not a precondition to broadcast under Section 31-D. Thus, in my view dissimilarity in the verbiage of Sections 31-C(2) and 31-D(4) will be of no pertinence to the right to broadcast prior to fixation of rate of royalty within Section 31-D.

86. The Plaintiff has next contented that, assuming internet broadcasting is contemplated under Section 31-D, the rate of royalty for the same has not been fixed by the Appellate Board and thus the Defendants are not entitled to a license. Section 31-D(2) imposes two conditions upon a broadcasting organisation i.e. (i) to give prior notice to the owner of the copyright and (ii) to pay royalties in the manner and at the rate fixed by the Appellate Board. The verbiage employed by

the Legislature is “*at the rate fixed*”, which is in the past tense. This leads to the construction that the rate of royalty must be fixed by the Appellate Board prior to the broadcast. This interpretation is fortified by Rules 29, 30, and 31 of the Rules. The third proviso of Rule 29 categorically states, that the notice to the owner may be sent only *after royalty to be paid is determined* by the Appellate Board. Rule 29(4)(k) stipulates that in its notice to the owner, the broadcaster must specify the details of the payment of royalties at the rates fixed by the Appellate Board. In view of the above, it is clear that prior fixation of the rate of royalty is a necessary condition to invoking Section 31-D. In my view, the prior fixation of the rate of royalty by the Appellate Board under Section 31-D of the Act is in fact the heart and soul of the concept of a Statutory Licence. A joint reading of the Act and Rules therewith elicits the interpretation that prior fixation of the rate of royalty is the fundamental and primary criteria for any statutory license to come into existence in the first place. Without prior fixation of rate of royalty, there is no question of existence of any statutory license. Hence, Statutory License under Section 31-D of the Act does not “automatically kick in” once notice is sent to the owner, without fixation of royalty rates by the Appellate Board.

87. To summarize the above:

- a. The internet broadcasting organizations cannot enjoy the benefits of a Statutory License under Section 31-D. 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 31-D

to radio and television broadcasting organisations. The facts of the matter do not occasion the application of the doctrine of *contemporaneo expositio*.

b. Prior determination of royalty rates is a necessary precondition for the exercise of rights in respect of a Statutory License under Section 31-D. 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 31-D.

88. Therefore, in my view, in the present case, assuming that 'internet broadcasting' was covered within the ambit of Section 31-D, the Defendants could not have exercised Statutory License under the said Section in the absence of pre-fixation of the rate of royalty by the Appellate Board.

ISSUE C: Whether Rule 29 of The Copyright Rules, 2013 ("The Rules) and the third proviso thereto are invalid?

89. The next issue before this Court is whether Rule 29 of the Rules and its third proviso which provide an interpretation that prior fixation of royalty rates is necessary before exercise of Statutory License under Section 31-D of the Act, are invalid.

90. It is submitted on behalf of the Defendants that Rule 29 of the Rules, and in particular the third proviso thereto, are *ex-facie* contrary to and *ultra vires* of Section 31-D and are therefore null and void. It is submitted that the language

and intent of Section 31-D clarifies that the fixation and payment of royalty are not a precondition to a Statutory License under Section 31-D. However, Rule 29, including its third proviso stipulate that notice under Section 31-D(2) shall be given only after royalty to be paid is determined by the Appellate Board under Rule 31. It is submitted that in such circumstances, the third proviso is in the teeth of the specific statutory provisions made in Section 31-D and is also destructive of the statutory language and scheme of Section 31-D. It is further submitted that it is a well settled law that a Rule / regulation cannot negate or provide contrary to a provision in the parent legislation. In support the Defendants relied upon the Hon'ble Supreme Court's decision in *State of Bihar & Ors. v. Anil Kumar and Ors.* dated 23rd March 2017 passed in Civil Appeals 4397-4400 of 2017.

91. In response, the Plaintiff submitted that the ratio in the case of *Anil Kumar* has no application to the present matter. It is submitted that Rules 29, 30 and 31 of the Rules only implement the legislative intent of prior fixation of the rate for a licence under the section. It is submitted that the said rules only injected certainty *qua* the licensing relations between the licensee and the copyright owner. Where rates are fixed prior in time, a broadcaster is put to notice of the rate for broadcasting the work. This prompts a conscious decision by the broadcaster keeping in mind its financial capabilities, to schedule the number of broadcasts it wishes to carry out. It is submitted that the Defendants'

interpretation, permitting the exercise of license without prior fixation of rates would lead to commercial chaos and uncertainty. Where no obligation is cast upon the broadcaster to initially approach the Appellate Board for fixing rates, the broadcaster may freely broadcast the copyrighted works without payment till such time, the rates are fixed. It is submitted that once the rates are fixed and the broadcaster is not satisfied with the quantum, it could simply refuse payment. It would thus cast an onerous obligation upon the copyright owner, whereby he must then sue the broadcaster for monetary damages for what, in the meantime, would be a very widespread dissemination of the Plaintiff's work to a very large section of the public. It is submitted that such an interpretation where fixation of rate is not a necessity, shall permit broadcasters to broadcast the Plaintiff's works with a mere notice without payment, thus compelling the Plaintiff to take action against every such infringer. It is submitted that such an interpretation is one sided and onerous against the Plaintiff. It is submitted that such interpretation would also run foul of the principle that expropriatory legislation must be construed in favour of the expropriated owner.

92. It is further submitted on behalf of the Plaintiff, that the Rules were framed under a general rule making power under Section 78 of the Act. It is submitted that the Rules thus form a part of the Act itself. It is submitted that it is a well settled principle that rules framed in exercise of a general rule making power are *prima facie* valid. It is submitted that it is well settled that the Court must be slow to

strike down or stay rules at the interlocutory stage and the Court must endeavour to interpret the Act and the rules harmoniously.

93. I agree with the submissions of the Plaintiff, more particularly that where rates are fixed prior in time, a broadcaster is put to notice of the rate for broadcasting the work which prompts a conscious decision by the broadcaster keeping in mind its financial capabilities. Section 31-D is an expropriatory legislation and the interest of the expropriated copyright owners must be considered while interpreting the said section. The Defendants' interpretation of the said section would push the copyright owners into a perilous position where 'internet broadcasting organizations' could override the copyright owner's exclusive right over their copyrighted works granted under the Act and use the works without their prior authorization / licence. According to the Defendants, Section 31-D does not expressly state that prior fixation of royalty rates is a necessary precondition to the exercise of Statutory License under Section 31-D. Hence, they argue that Section 31-D must be read in isolation without referring to Rule 29 of the Rules and its proviso which state that prior fixation of royalty rates is a necessary precondition to the exercise of Statutory License under Section 31-D. If this is accepted there would be no obligation upon internet broadcasting organizations to pay royalty to the owners until the Appellate Board decides to fix the royalty rates. The copyright owners would be left with no option but to approach Courts of law to seek some form of remedy.

94. The present matter is a fit case for the application of the doctrine of harmonious construction. The Plaintiff's interpretation of Section 31-D of the Act and Rule 29 of the Rules (including its third proviso) permits both, the said section and the said rule to survive. Additionally, such interpretation would also benefit the expropriated copyright owners affected by Section 31-D of the Act.

95. Therefore, the Defendants' challenge to Rule 29 of the Rules and its third proviso does not stand and the same are held valid.

ISSUE D: What is the bearing of the Government of India's Office Memorandum dated 5th September 2016 on the present matter?

96. The Defendants have relied upon the Government of India's Office Memorandum dated 5th September 2016 ("**said Memorandum**") in support of their interpretation of Section 31-D. It is submitted on behalf of the Defendants that the Government of India vide the aforesaid Office Memorandum has clarified that *"in view of the above, the words any broadcasting organization desirous of communicating to the public may not be restrictively interpreted to cover only radio and television broadcasting, as the definition of Broadcast read with communication to the public appears to include all kinds of broad cast including internet broadcasting. Thus, the provisions of Section 31-D of the Copyright Act, 1957 are not restricted to radio and television broadcasting only but cover internet broadcasting also."*

97. On the other hand, the Ld. Senior Advocate for the Plaintiff submitted that the said Memorandum is contrary to Section 31-D and Rules 29, 30 and 31 of the

Rules and the legislative history preceding the said Memorandum. It is submitted that Executive instructions cannot prevail or override substantive provisions of the statute or Rules that have been framed pursuant to a rule making power granted under the statute. The Hon'ble Supreme Court in the case of *State of Haryana v. Mahender Singh & Ors.* (2007) 13 SCC 606, *inter alia* held as follows:

“30. ...

It is now well-settled that any guidelines which do not have any statutory flavour are merely advisory in nature. They cannot have the force of a statute. They are subservient to the legislative act and the statutory rules. [See Maharao Sahib Shri Bhim Singhji v. Union of India and Ors. AIR 1981 SC 234 , J.R. Raghupathy and Ors. v. State of A.P. and Ors. 1988 (38) ELT 225 (SC) and Narendra Kumar Maheshwari v. Union of India.]

32. *Furthermore, if the Punjab Rules are applicable in the State of Haryana in view of the State Reorganisation Act, no executive instruction would prevail over the Statutory Rules.*

...”

98. It is submitted on behalf of the Plaintiff that the said Memorandum is contrary to the Government's own stand taken while negotiating the proposed WIPO broadcaster's treaty. It is submitted that in those negotiations, India has consistently taken the stance that broadcasts must be understood to mean only broadcasting in the 'traditional sense' and not through the internet or the web; the stance was recorded *inter alia* at para 281, in the report of the Standing

Committee of Copyright and Related Rights for the session held between 15th to 24th June 2011.

99. In my view, the interpretation given by the Department of Industrial Policy and Promotion on behalf of the Govt. of India, is contrary to the interpretation of Section 31-D, drawn under the Act and the Rules which I have observed hereinbefore. The said Memorandum does not seem to be drawing its power from any legislation. As pointed out above, the Hon'ble Supreme Court in the case of *State of Haryana v. Mahender Singh & Ors.* (supra) has held that guidelines without any statutory aid are merely advisory in nature. The Hon'ble Supreme Court has further held that such guidelines are subservient to the legislative act and the statutory rules. While I am bound by the Hon'ble Supreme Court's rationale, I also concur with their holding on the issue.

100. A perusal of the Report of the Standing Committee on Copyright and Related Rights (session held between 15th June 2011 and 24th June 2011) relied upon by the Plaintiff, makes it clear that the interpretation given by the Department of Industrial Policy and Promotion on behalf of the Govt. of India is contrary to its own stand taken while negotiating the proposed WIPO broadcaster's treaty. The said paragraph 281 of the Report of the Standing Committee on Copyright and Related Rights is reproduced hereunder:

“281. *The Delegation of India, while supporting the expert opinion of the differences between traditional platform and new platform by the*

Delegation of Iran, reiterated that there was no need to revisit and revise the mandate given by the General Assembly in 2007. That mandate given to the SCCR was the signal-based approach in a traditional sense. Traditional platforms meant, as explained by the Delegation of Iran, the broadcasting organizations and the cablecasting organizations, and not broadcasting over Internet or webcasting, simulcasting over Internet, podcasting or any other method of broadcasting.“

101. The said Memorandum lacks a ‘statutory flavour’ and cannot prevail over interpretation which is drawn under the Act and the Rules (which in-turn were formed under Section 70 of the Act). The interpretation of Section 31-D in the said Memorandum is inconsistent with the interpretation drawn by this Court and this Court is not bound by the said Memorandum.

ISSUE E: Whether pending the suit, the Defendants may be permitted to use the Plaintiff’s Repertoire upon payment of deposit?

102. The Defendants have proposed that upon monetary deposit with this Court, they may be permitted to broadcast the Plaintiff’s Repertoire over internet till such time that the Appellate Board fixes the royalty for internet broadcasting. This proposition is vehemently opposed by the Plaintiff. Since I have held that Section 31-D is not applicable to internet broadcasting at all, the question of

allowing the Defendants to broadcast the Plaintiff's Repertoire over internet upon payment of monetary deposit with this Court does not arise.

103. Further, even for the sake of argument, if it was to be assumed that internet broadcasting is covered under Section 31-D of the Act, it would not enable the Defendants to broadcast the Plaintiff's Repertoire by depositing any sum of money with this Court at this stage, since the manner and the rate of royalty for internet broadcasting has not been fixed by the Appellate Board till today. Further, since the power and jurisdiction to decide the manner in which the Royalty is to be paid and the rate at which it is to be paid is vested exclusively with the Appellate Board alone, this Court would not have jurisdiction to permit the Defendant to broadcast the repertoire of the Plaintiff before such manner and rate of the royalty has been fixed by the Appellate Board.

104. In any event, it is submitted on behalf of the Plaintiff that such permission if granted to the Defendants shall tantamount to this Court allowing a Compulsory License of the Plaintiff's works to the Defendants. The Plaintiff relied upon the judgment of a Division Bench of this Court in *Music Choice India Pvt. Ltd. v. Phonographic Performance Ltd. reported in 2010 112 (1) BOM LR 0470* holding that the issuance of such orders is impermissible since they amount to granting Compulsory License of the Plaintiff's works, which this Court lacks jurisdiction to grant. The relevant excerpt of the judgment is reproduced below:

“19. In the instant case, the Plaintiff has already filed an application / complaint under Section 31(l)(b) of the Act and thus, invoked the

jurisdiction of the Board for grant of compulsory license. No doubt, the said application is pending may be for the last more than two years. However, it is the exclusive jurisdiction of the Board to grant such a license. It is well settled, unless such a license is granted, the Plaintiff has no right to broadcast in the repertoire of the Defendant and if the Plaintiff does so without obtaining the license, such an act would fall within the ambit of Section 51 of the Act i.e infringement of the Copyright and consequently, it would be an offence under Section 63 of the Act. ... What is prayed by the Plaintiff in the suit filed by it before the learned Trial Judge is nothing short of compulsory license within the meaning of Section 31(l)(b) of the Act while its application for the very same purpose is pending before the Board, a statutory authority. Thus, the relief prayed for in the suit is impliedly a relief for grant of compulsory license which authority is exclusively vested with the Board. Such a relief cannot be granted by the Civil Court and therefore, in our opinion the learned Trial Judge was right in holding that the suit was not maintainable, as this Court on its original side lacks jurisdiction. The jurisdiction exclusively lies with the Board. At the same time, contentions of the Plaintiff that it has a vested right or a statutory right for a compulsory license cannot be accepted. It has a right to apply for a license under Section 31(l)(b) and in a given case, right to broadcast culminates only after such a license is granted. In a way, it is a contractual right regulated by a statutory authority and by entertaining the suit for the relief prayed for, undoubtedly, the provisions of Chapter IX, XI and XIII and other relevant provisions of the Act would be frustrated. The contentions that the Defendant has been dictating terms or it cannot be allowed to dictate the terms and therefore, the law must step in to the rescue of the Plaintiff cannot

be a ground to entertain the suit and the only remedy available to the Plaintiff as per the scheme of the Act is to prosecute its application pending before the Board for a compulsory license. It cannot file a suit for any interim arrangements pending in such an application and the Civil Court will have no jurisdiction to entertain such applications. Seeking such a remedy is to by pass regulatory provisions as well as the penal provisions as are set out in Chapter XI and XIII of the Act and the Civil Court cannot have such a jurisdiction to grant something which would frustrate the provisions of a statute. The observations made by the Apex Court in the case of Entertainment Network (India) Limited (Supra) and as reproduced herein above cannot be read as to create a vested right in favour of the Plaintiff or similarly placed the Applicant / Complainant to claim an interim compulsory license by filing a suit before the Civil Court. What is not provided by a Statute which is a complete code of itself, cannot be read in the judgment of the Supreme Court. The jurisdiction of the Civil Court cannot be allowed to be invoked to short circuit the statutory process of licensing and therefore, the Court would lack in its jurisdiction to entertain the suit. In that view of the matter, the learned trial Judge has stated that the relief prayed in the suit was innocuous or may be it is innovative. We, therefore, do not find any fault in the said observations.”

105. It is submitted that the ratio of *Music Choice India Pvt. Ltd. v. Phonographic Performance Ltd. (supra)* was that this Court does not have jurisdiction to grant Compulsory Licence under the Act; this ratio was followed by the Division Bench of this Court in *Radio One Ltd. v. Phonographic Performance Ltd. reported in*

2013 4 Mh.L.J. 643. The relevant excerpt of the judgment in *Radio One Ltd. v. Phonographic Performance Ltd.* (*supra*) is reproduced below:

“14. *The learned Single Judge, in our view, was in error, having correctly come to the conclusion that there was a breach on the part of the Defendant in complying with the terms of the licence, in directing that subject to a deposit of Rs. 11.50 lakhs, the Defendant would be entitled to the benefit of the broadcasting of songs from the repertoire of the Plaintiff on the terms and conditions as set out in the compulsory licence. Once prima facie a breach has been established and the termination follows the breach, it would be wholly inappropriate to direct that the Defendant may nonetheless continue to broadcast songs from the repertoire of the Plaintiff on the terms governing the compulsory licence. The licence was terminable and has been terminated for breach.*

15. *In Super Cassettes Industries Ltd. (supra), the Supreme Court has held that even the Copyright Board does not possess the power under Section 31(1) (b) to grant an interim compulsory licence. The judgment of a Division Bench of this Court in Music Choice India Private Limited (supra) similarly emphasises that exclusive jurisdiction to grant a licence is vested with the Copyright Board. This is a case where the Defendant has prima facie been guilty of a persistent breach of its obligation under the terms of the compulsory licence. The operative order of the learned Single Judge in substance grants a compulsory licence to the Defendant, in a suit instituted by the Plaintiff, a consequence which ought not to ensue at least on facts as found by the learned Single Judge. The Plaintiff has made out a strong prima facie case. The balance of convenience must necessarily*

weigh in favour of the Plaintiff since, to allow the Defendant to broadcast songs on the basis of the terms of the compulsory licence which has been validly terminated would amount to an infringement of the copyright of the Plaintiff. Moreover, admittedly the Plaintiff does not command a monopoly in respect of the entire market. The grant of an injunction may at worst be a matter of inconvenience but would not result in the closing down of the business of the Defendant.”

It is submitted that the ratio of these judgments apply to the matter at hand and this Court does not have the jurisdiction to grant a Compulsory License under the Act. It is further submitted that an order directing the Defendants to deposit a sum with this Court, thereby permitting Defendants to use the Plaintiff's Repertoire for their commercial activities would tantamount to grant of a Compulsory License.

106. In *Music Choice India Pvt. Ltd. v. Phonographic Performance Ltd. (supra)* the plaintiff therein had filed a suit against the copyright owner i.e. PPL, praying for an injunction restraining PPL from interfering with the plaintiff's use of the PPL's copyrighted works. In this judgment, the Division Bench of this Court held that grant of such relief would be nothing short of granting a Compulsory License which authority is exclusively vested with the Copyright Board. Accordingly, the Division Bench refused to pass any such order. Another Division Bench of this Court in *Radio One Ltd. v. Phonographic Performance Ltd. (supra)* upheld the ratio of *Music Choice India Pvt. Ltd. v. Phonographic Performance Ltd. (supra)*. In this

case, the original plaintiff in the matter brought an appeal before the Division Bench, challenging an order of a Single Judge of this Court which permitted the original defendant therein to continue broadcasting the plaintiff's works upon depositing a sum of Rs.11.5 Lacs with the Court. Relying upon *Music Choice India Pvt. Ltd. v. Phonographic Performance Ltd. (supra)* the Division Bench held that the grant of Compulsory License is in exclusive jurisdiction of the Copyright Board. It was further observed that the issuance of orders directing a deposit of money and permitting use of the plaintiff's repertoire is in substance a Compulsory License granted to the defendant in a suit for infringement brought by the Plaintiff.

107. The ratio in the case of *Radio One Ltd. v. Phonographic Performance Ltd. (supra)* and *Music Choice India Pvt. Ltd. v. Phonographic Performance Ltd. (supra)* are befittingly applicable to the present matter. Permitting the Defendants to continue exploiting the Plaintiff's Repertoire upon payment of a deposit in this Court would indeed be like granting a Compulsory License in favour of the Defendants. The Act empowers the Copyright Board to be the exclusive authority to grant a Compulsory License. In view thereof, this Court has no jurisdiction to grant a Compulsory License which is within the exclusive domain of the Copyright Board. Furthermore, permitting the Defendants to deposit money whilst permitting it to use the Plaintiff's Repertoire for its commercial

activities would amount to a grant of a Compulsory License, for which this Court being a Civil Court doesn't have the jurisdiction.

108. The Defendants proposition to permit them to broadcast the Plaintiff's Repertoire upon payment of monetary deposit with this Court till such time that the Royalty for internet broadcasting is fixed by the Appellate Board, is therefore rejected.

ISSUE F: Whether the Plaintiff is only interested in money and thus injunction should not be granted?

109. The Ld. Senior Advocate for the Defendants submitted that the Plaintiff is not entitled to interim injunction against the Defendants, since the Plaintiff has shown that it is interested only in money and that the Plaintiff is not genuinely interested in an injunction against the Defendants; instead the Plaintiff is looking to negotiate a better price for the license; that the Plaintiff was in fact keen to grant the Defendant No.1 a voluntary license to broadcast / utilize the Plaintiff's Repertoire and had also quantified the licence fee it sought from the Defendant No.1; that deposit of money would suffice to protect the Plaintiff's interest; that all that the Plaintiff wants is money and that this must weigh against the grant of interlocutory relief. The Defendants relied upon *Halsbury Laws of England: 4th edition: Vol. 9(2) Para 414 fn 4, and Banks v. EMI Songs Limited (Formerly CBS Songs Limited) and Ors.: (1996) EMLR 452.*

110. The Ld. Senior Advocate for the Plaintiff submitted that the Defendants' contention is fundamentally flawed and if accepted, then no copyright owner who wishes to commercially exploit his content can ever get an injunction. He submitted that the 'comparable strength' principle is the more appropriate test for assessing the case for interim relief. He submitted that this test was laid down in *S.M. Dyechem Ltd. v. Cadbury (India) Ltd.* reported in AIR 2000 SC 2114 to be applied whilst assessing the case for interim injunctive relief in trademark matters and the same principle was later approved by the Hon'ble Supreme Court in *Cadila Healthcare v. Cadila Pharmaceuticals* reported in AIR 2001 SC 1952. He submitted that like trademarks, copyright is an analogous specie of intellectual property and therefore, the comparable strength principle ought to be applied in respect of copyright matters as well. The relevant excerpt from the judgment in *Cadila Healthcare v. Cadila Pharmaceuticals (supra)* relied upon by the Plaintiff is reproduced below:

"21. Our attention was drawn to a recent judgment of this Court in S.M. Dyechem Ltd. Vs. Cadbury (India) Ltd. 2000ECR1(SC) where in a passing off action, the plaintiff, which was carrying on the business under the mark of "Piknik", filed a suit for injunction against the defendant which was using the mark of "Picnic" for some other chocolates sold by it. On the allegation that the defendant's mark was deceptively similar, the trial court had issued an injunction which was reversed by the High Court. On appeal, the decision of the High Court was affirmed. One of the questions, which this Court considered, was that for grant of temporary injunction, should the Court go by the

principle of prima facie case, apart from balance of convenience, or comparative strength of the case of either parties or by finding out if the plaintiff has raised a "tribal issue". While considering various decisions on the point in issue, this Court rightly concluded at page 591 as follows:

" therefore, in trade mark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience".

111. The Plaintiff relied upon the decision in *Phonographic Performance Ltd. v. Maitra* reported in 1998 1 WLR 870 which is cited in the extract of *Halsbury* (supra) referred to by the Defendants. This decision in *Phonographic Performance Ltd.* (supra) was rendered after the decision in *Banks* (supra) as also the judgments referred to in the footnotes in *Halsbury* (supra). In this case, Phonographic Performance Ltd. had filed a suit for infringement against the Defendant. While acknowledging that a case for infringement has been made out, the Single Judge limited the injunction for a period of six months. In Appeal, the Court of Appeal reversed the Single Judge's decision and granted injunction in favour of the Plaintiff. The Defendant in that case also had taken a defense that damages would be an adequate remedy which was negated by the Court of Appeal. The Plaintiff relied upon the following paragraphs from the said judgment:

"... At the heart of the judge's decision to limit the injunction in time was his view that the injunctions obtained by PPL were used as a lever to extract licence fees - a practice that he regarded as an abuse. Although PPL have,

since the judge first expressed his views, modified the letters they write, it remains their objective to make sure that all users of their rights pay the appropriate licence fee or stop infringing. The purpose of the injunction is to prevent unlicensed use. Inevitably it is an incentive to the injuncted person to obtain a licence or, when threatened with committal, to pay the fee which he should have paid or stop.

We do not take the same view as the judge. A person who exploits his property right by licensing is entitled, unless there are special circumstances, to prevent another from using that property right without his licence and to refuse to grant a licence save on his terms and conditions as to payment and use. In a case, such as the present, where the Defendant did not contest the allegation in the PPL's Statement of Claim, was well aware of PPL's rights and that he was infringing and shows an intention to continue to infringe, we can see no reason why the use of an injunction in the normal form to prevent further infringement could be an abuse. No doubt the consequence is that a Defendant is forced to pay if he wishes to use the repertoire, but PPL are entitled to use the rights assigned to them for the purpose of requiring payment of fees in return for a licence to do what would, in the absence of a licence, be an infringement of the rights. On the admitted facts of the 1997 cases, there were no grounds for suspending the injunction for 28 days which the judge said was intended to provide time for negotiation. The admitted facts were that the Defendant was a person who had, with full knowledge of the position, disregarded the proprietary rights of PPL. Whether or not the Defendant would be in a position to pay any damages or costs was not known. To allow him a further 28 days of infringement (which is also a criminal offence under s.107(3)(b) of the 1988 Act, if the offender knew or

had reason to believe that copyright would be infringed) was, in our view, wrong. ...

... It was suggested by Mr Silverleaf that it might be appropriate in the circumstances of the cases before us, where licences were available, to refuse to grant an injunction at all as damages would be an adequate remedy and, if necessary, to award damages in lieu of an injunction under Section 50 of the Supreme Court Act. That, it was said, would reflect the position and provide appropriate relief as PPL's desire was to maximise their return and not to refuse licences. Such a course would not be sufficient to safeguard what are the admitted rights of PPL for four reasons. First, upon the admitted facts the Defendants have an intention to continue to infringe PPL's rights. In those circumstances an injunction is the appropriate remedy to prevent that intention being carried out. Second, calculation of the damages for future infringements of copyright in lieu of the injunction would not be practical, as it would not be possible to estimate the length of time the infringement would continue. Damages for infringement of copyright are awarded as compensation for loss caused by past infringements, but they are rarely an appropriate remedy for unlicensed future use of copyright. Third, PPL are the owners of a statutory property right which they are seeking to enforce in the same way as they have done for many years. When Parliament enacted the 1988 Act it did not give these Defendants permission to perform sound recordings in public without the need for the copyright owner's licence or, apart from the right to apply to the Copyright Tribunal, a right to compel the copyright owner to grant a licence to do the restricted act (and without payment). It would therefore be surprising, absent special circumstances, if the Court framed an injunction in terms which would licence a Defendant's activities when Parliament did not

consider it was right to do so. Fourth, we can see no reason why a Court should have any sympathy with a Defendant who, as in this case, is aware of PPL's rights and that he is infringing them and then shows an intention to continue to do so. ...”

112. The Ld. Senior Advocate for the Plaintiff submits that in a previous matter before this Court in *Ram Sampath vs. Rajesh Roshan and Ors.* 2009 (40) PTC 78 (Bom), while granting an injunction the Ld. Single Judge also considered the choice of the plaintiff therein apropos the damages in the matter. The relevant excerpt from *Ram Sampath vs. Rajesh Roshan and Ors.* relied upon by the Plaintiff is reproduced below:

“22. As regards the contention that damages would be an adequate remedy and that the defendants were willing to give bank guarantee in the sum of Rs. 25 lakhs or such other amount as the court thinks fit, I must state that this offer is a pittance. The defendant 3 has given the music rights of producing the CDs and cassettes to defendant 4 and the minimum amount guaranteed by the defendant 4 to the defendant 3 is Rs. 2.5 crores. This amount can go up several folds by way of a royalty in the event the music is a hit. In any event this offer need not hinder me any further because the plaintiff through its counsel has unequivocally rejected the offer.”

113. Admittedly, the parties hereto had attempted to negotiate a license prior to the present suit. When the Defendants continued to use the Plaintiff's Repertoire even after the negotiations failed, the Plaintiff approached this Court. In view of

the above, the Defendants cannot argue that the Plaintiff is interested “only in money” and under that garb continue to use the Plaintiff’s Repertoire without paying for the same. In this context, it is important to note that the Plaintiff has not claimed any damages in the present suit. The Plaintiff’s action for injunction against a party for infringing upon its copyrighted work cannot be termed as motivated by money.

114. I do not accept the Defendants’ submission that the facts of *Phonographic Performance Ltd. v. Maitra (supra)* is distinguishable from the case at hand and reliance should not be placed on the same. The Defendants vide their notice dated 24th November 2017 addressed to the Plaintiff invoking Section 31-D have confirmed their position to use the Plaintiff’s Repertoire without obtaining a license from the Plaintiff. During the proceedings of the present matter, they have continued to use the Plaintiff’s Repertoire without obtaining a license. I have already observed hereinabove that the Defendants cannot be permitted by this Court’s order to continue using the Plaintiff’s Repertoire upon any conditions imposed by this Court, as that would amount to a Compulsory License which this Court is not authorized to issue. The Defendants are aware that the Plaintiff is the owner of the copyright within the Plaintiff’s Repertoire. The Defendants’ cessation of their purchase feature is an acknowledgment of the Plaintiff’s ownership of copyright within the Plaintiff’s Repertoire. I do not see

why the Defendants deserve protection when they are knowingly infringing upon the Plaintiff's copyrights and show every intention of continuing to do so.

115. The Defendants admittedly are using the Plaintiff's Repertoire, the ownership in the copyright of which is with the Plaintiff. I have already observed that the present suit and Notice of Motion moved by the Plaintiff are not motivated by money. Considering that the Defendants are knowingly infringing upon the Plaintiff's copyrights, grant of temporary injunction restraining the Defendants is necessary and is the appropriate remedy.

116. In so far as the balance of convenience is concerned, it is an admitted position that the Defendants are using the Plaintiff's entire repertoire on their platform. The Defendants currently host nearly 2.6 million sound recordings of other copyright holders. Thus, an injunction order restraining the Defendants from using the Plaintiff's Repertoire would preclude them from using 25,000 songs out of 2.6 million songs. The injunction order against the Defendants shall not bring their business to a standstill or cause irreparable injury to the Defendants. On the other hand, the Plaintiff's entire repertoire is being widely exploited by the Defendants without payment of any royalty. I am therefore of the opinion that the balance of convenience is in the favour of the Plaintiff and not the Defendants.

117. Recently, the music industry has experienced a rise of over the top service providers such as the present Defendants who seek safe harbour under Section

31-D to exploit copyrighted works, through either internet broadcast or download features, without seeking / obtaining a license from the owners thereof. In my view, such use of the copyrighted works, through internet broadcast or download features, without obtaining a license from the owners of the copyright amounts to usurpation of the exclusive rights of the owners to commercially rent, sell or communicate to the public their sound recordings. Apart from the fact that they are not carrying on 'radio' and 'television' broadcasting, even the Defendants' interpretation of the Act and Rules therewith not only sanctions the exercise of Statutory License under Section 31-D without any fixation of royalty but also absolves the service provider of any obligation to approach the Appellate Board to fix the royalty. This interpretation does not meet the legislative purpose behind enacting Section 31-D. I have already observed hereinabove, that the expropriatory nature of Section 31-D cannot be denied. In view of the reasons stated hereinabove, I am of the opinion that the Defendants cannot invoke a Statutory License under Section 31-D in respect of their impugned activities.

118. In view of what has been stated hereinabove, I am of the opinion that the Plaintiff has made out a prima facie case for grant of interim injunction against the Defendants. The injury or harm which would be caused to the Plaintiff, in case the *interim* injunction is not granted, is certainly irreparable. Considering the fact that I have come to a conclusion that in so far as the download and purchase feature of the Defendants' activities are concerned the same amount to

infringement of the Plaintiff's rights provided in Section 14(1)(e)(ii) of the Act; in so far as the on demand streaming services of the Defendants are concerned, the same amount to infringement of the Plaintiff's right provided in Section 14(1)(e)(iii) of the Act; and that the provisions of Section 31-D of the Act are not applicable to internet broadcasting, it is necessary to grant reliefs in favour of the Plaintiff in terms of prayer clause (a) of both the Notice of Motions. The present Notice of Motions are therefore allowed.

(S.J. KATHAWALLA, J.)