

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 16.11.2010
Pronounced on: 28.07.2011

+ **CS(OS) 1185/2006 & I.A. Nos. 6486/2006, 6487/2006, 7027/2006**

THE INDIAN PERFORMING RIGHT SOCIETY LTD. Plaintiff

Through : Sh. P.V. Kapur, Sr. Advocate with Mr. Ameet Datta,
Mr. Thomas George, Ms. Chetna Gulati & Ms. Alpana
Poddar, Advocates

versus

MR. ADITYA PANDEY AND ANR. Defendants

Through : Mr. Neeraj Kishan Kaul, Sr. Advocate with
Mr. Abhishek Malhotra, Advocate

CS(OS) 1996/2009 & I.A. No. 13692/2009

PHONOGRAPHIC PERFORMANCE LIMITED & ORS Plaintiffs

Through : Sh. P.V. Kapur, Sr. Advocate with Mr. Ameet Datta,
Mr. Thomas George, Mr. Himanshu Bagai, Mr. Ashwin Sapra and
Ms. Chetana Gulati,

versus

CRI EVENTS PRIVATE LIMITED & ORS Defendants

Through : Mr. S.K. Bansal, with Mr. Ranjit Kumar Rana, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT

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1. The plaintiff (hereafter, “IPRS”) seeks permanent injunction and other consequential reliefs against the defendant (hereafter, “SYNERGY MEDIA”) alleging that the latter is guilty of copyright infringement. IPRS has, in I.A. Nos. 6486/2006 and 7027/2006 claimed temporary injunction.

2. The brief suit pleadings are that IPRS is a non-profit making cooperative body constituted in August 1969 with the object of monitoring, broadcasting and enforcing the products, rights and privileges of its members, who include authors, composers, publishers of literary or musical works. It also claims to act on behalf of the members of other “sister” who have similar membership and claims to be the sole representative body and the sole national copyright society not only from India but the entire world. It is stated that after the amendment of the Copyright Act, 1957 (hereafter called, “the Act”), in 1994, the IPRS was re-registered in terms of Section 33(3) for which purpose it received a Certificate of Registration from the Registrar of Copyrights, dated 27.03.1996.

3. The works which the plaintiff claims to demonstrate are described under Section 2(o) and 2(p) of the Act. IPRS submits that it is affiliated to 194 and composers included within a federation known as CISAC at Paris. In support of its submission, the plaintiff has placed on record Assignment Deeds by 31 members from diverse fields like music directors, lyricists, composers, authors of musical works etc. It is alleged that IPRS is exclusively authorized to license the public performing rights underlying the musical and literary works created by its members.

4. IPRS has briefly described the phonographic performing society, which was incorporated under the Indian Companies Act and protects the rights of its members in sound recordings and is also entitled to collect and charge license fees from users of such sound recordings defined in Section 2(xx) of the Act. IPRS submits that its rights to demonstrate copyright content is in respect of public performance rights, which include the right of performing the public work in public, right of enacting work to the public by making it available for visual or audio enjoyment,

indirectly or directly to the public, including by diffusion etc. and the right to authorize any of such uses. On the other hand, it submits that PPRS's rights operate in a different field and extend to the exploitation of sound recordings. It is stated that even if a user secures license from Public Performance Rights Society (hereafter, "PPRS"), for the sound recording performance in the public, the IPRS would have the right to claim license fee. It is submitted that the logic of these separate rights is that, that while sound recording rights may inhere in one set or body of persons, for the same work, the other rights would continue to vest with the authors and with the latter artists, composers, directors, lyricists etc. IPRS submits that the latter body of copyright owners cannot be expected to chase diverse users such as shops, aircraft, hostels, clubs, offices, bars, discos etc. IPRS submits that the enabling provision under Section 62(2) of the Act that entitles a plaintiff to institute legal proceedings against the alleged infringer of copyrighted material or content at a place where it (the plaintiff) is incorporated or carries-on business facilitates the enforcement of its members' rights.

5. IPRS submits that in terms of the scheme formulated by the rules, which are governed by the provisions of the Act, it can and frames guidelines and tariffs for the structured collection of fees, having regard to the user organization, the event or the nature of the public performance right in question. IPRS also says that under the rules, it cannot collect more than 15% of the revenues derived from such royalties as administrative expenses, and the rest is distributed to its members. It also states that tariffs are fixed on the basis of pre-determined formulae and guidelines after involving all the copyright owners.

6. It is stated that "SYNERGY MEDIA" (hereafter, "SYNERGY") is a company involved in broadcasting business and was granted licenses under the FM-Office-2 Stage by the Central Government. It has proposed to launch broadcasting services in various cities, such as Jaipur, Surat, Raipur etc. IPRS submits that SYNERGY contacted it for license and a series of meetings took place in that regard in May 2006 when the tariff scheme was disclosed. IPRS relies upon e-mail exchanges with SYNERGY in this regard. It states that on 25.05.2006, in the course of a telephonic conversation, SYNERGY stated that it would challenge its (IPRS's) rights to claim and collect royalty. IPRS alleges that SYNERGY has a clear and discernable intention to violate the copyrights, which it is entitled to administer and in respect of which it is also an assignee. IPRS asserts that it's the owner of public performance rights and musical and literary works in

the music by virtue of Assignment Deeds it has placed reliance upon and filed on the record. On the strength of these allegations, it claims permanent, and also a temporary injunction.

7. SYNERGY, in its written statement submits that IPRS has failed to disclose that in separate suits pending before the Court on identical facts against other radio broadcasters, being Suit Nos. 632/2006 and 666/2006, it failed to secure an *ad interim* injunction against the alleged infringers arrayed as defendants. SYNERGY relies upon a decision of the Supreme Court in *Indian Performing Rights Society Limited v. Eastern India Motion Pictures Association*, AIR 1977 SC 1443 (hereafter called “the Eastern IMPA” case), which was subsequently followed by the Calcutta High Court. On strength of the above, it is submitted that the composer of the musical work, or its author do not possess any rights in the works once those rights are assigned in favour of the producer of a cinematograph film and as a consequence, IPRS cannot claim or legitimately secure any license or authorization fee. SYNERGY’s substantive argument is that the works being broadcast by it are sound recordings, which are also part of the cinematographic film, which in turn is owned by the producer of the film. The producer transfers the right in the sound recording to recording companies, such as HMV, which in turn, assigns the right of communication to the public, including the broadcast of sound recording to Phonographic Performance Limited, (hereafter, “PPL”). It is submitted that the PPL issues licenses to concerned broadcasters, including SYNERGY. The latter also asserts that it has obtained license from PPL, which is conceded in the suit and evidenced by the documents on record. It, therefore, claims that no further authorization or license has to be secured from anyone, much less the IPRS. SYNERGY denies that it entered into negotiations with IPRS for securing licenses from it, as is alleged.

8. IPRS argues that copyright comprises a ‘bundle of rights’. It is submitted that before 1911, in the United Kingdom, the Composer did not have any legal right to prevent others from reproducing his compositions/musical works in the form of “Music Boxes” or Piano rolls. There was no recognition accorded to these “Mechanical contrivances”, which were the forerunners of Phonograms. IPRS relies on the judgment of the Chancery Division Court in the case of *Gramophone Co. Ltd. v. Stephen Carwardine & Co.*, LR [1934] 1 Ch 450, where, for the first time, it was held that the owner of a special copyright, under Section 19 (of the UK Act), in a record had the sole right to use the record for “public performance.” The Court had held that:

“I see no reason for thinking that the copyright in the original work is interfered with by the creation of a special copyright in what I have called for brevity a record, except to the extent to which the right has been derogated by the express language of s. 19 or a necessary interference therefrom” and also that, “The conception of co-existing copyrights is a familiar one in copyright law.”

9. IPRS next relies on the Statements and Object of Reasons of the Copyright Bill 1955 (dated 19th August 1955) which, at Clause 2(4) stated that:

“(4).A cinematograph film will have a separate copyright apart from its various components, namely story, music, etc.”

Reliance is also placed on the notes on clauses appended to the 1955 Bill stated in explanation to Clause 13, which read as follows:

“Clause 13- This clause roughly corresponds to Section 1(1) of the UK Act and describes the works in which Copyright shall subsist. It provides that a separate copyright shall subsist in a Cinematograph film as distinct from its various component parts. Sub-clause 2(i) gives effect to the recommendation made in Article 2 of the Universal Copyright Convention, 1952 which provides that the works of nationals and residents of a Convention country wherever published should have protection of copyright. Sub-clause (4) makes it clear that the copyright in a cinematograph film shall not affect the separate copyright in each of its various component parts.”

After deliberations in the Joint Committee, the Copyright Act, 1957 (“the Act”) thereafter came into effect on 4th June 1957. It is submitted that by Section 13(1) copyright subsists in certain “works” namely-*“original literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) sound recordings.* Section 14 of the Act mandates certain exclusive rights in respect of the said works. Therefore, says IPRS, copyright law provides to an owner a “bundle of property rights”, which may be bundled together. These rights can co-exist being owned by many owners or by one owner as the case may be, subject to operation of law or contract between the parties involved. *Copinger & Skone James On Copyright, (15th Edition-Page 13)* is relied on in support.

10. It is submitted that the ability to ‘exploit’ a work or exercise ‘exclusive rights’ admittedly, depends upon ownership or a license, which details the period and extent of ownership/license in respect of a given work. Unlicensed/unauthorized ‘use’ as per Section 51 read with Section 14 amounts to an infringement of Copyright. Elaborating on this, it is contended that ownership or the right to lawfully exercise an exclusive right arises under the Act by:

- a. the “creation” or “authorship” of a work subject to the exceptions in Section 17 of the Act; or
- b. assignment under Section 18 (read with Section 19) of the Act – where the terms of a written assignment would per force contain the extent of ownership/exploitation right etc.; or
- c. voluntary license under Section 30 of the Act (read with Section 19) [where the terms of a written license mandates the extent of ownership/exploitation right]; or
- d. compulsory or involuntary license under Section 31 or Section 52(1)(j) of the Act.

11. IPRS says that subject to a few exceptions (through the provisos to Section 17 of the Act), Section 17 provides that the author is generally ‘first owner’ of copyright. In India, when music/lyrics are commissioned for a film, it is governed by Section 17(d) or as per 17(c) of the Act. The rights, which would have normally vested in the Author of the Lyrics or the Music Composer, would vest, as per the Supreme Court, in the Film Producer as first owner of the works. The result is that there emerges one owner, i.e. The Film Producer of four different/distinct/separate works, viz:

- the cinematograph film itself,
- the sound recording
- the lyrics, and
- the musical composition. It is stated that these works though forming part of the film continue to retain their separate copyright identity, as is clarified by Section 13(4). There would also be other components, i.e. ‘parts’ of the film, which would be owned by the film producer such as:

- a. Script and Screenplay [Literary works];
- b. Photographs [‘Stills’]
- c. Artworks [Set Design/Costumes]

12. It is emphasized that there is no ‘work’ known as “music” or “a single piece of music.” Music comprises of a combination of the labour and creativity of authors of the literary work (lyric), the musical work (tune), the recording of the performance of the lyrics and music by a performer. Consequentially, a sound recording is not the ‘sum total’ of lyrics and musical works but only one manner of ‘fixation’. The mere fact that one perceives (aurally) a combination of

distinct works, as a ‘single piece of music’ (submits IPRS) does not ‘merge’ the separate copyrights in each work. In other words, by combining separate and distinct copyrights, the individual copyrights are not extinguished. Reliance is placed on the judgment reported as *Sawkins v. Hyperion Records*, (2005) 3 All ER 636 and *Chapell & Co v. Redwood Music Ltd.*, 1981 RPC 337 at 347. Similarly, IPRS relies on *Nimmer on Copyright*, 2008 Edn. (page 2-175/2.10) to say that sound recording must be distinguished from the object, on which it is recorded and from the underlying musical work. *Vincent Nelson’s – The Law of Entertainment & Broadcasting* [1995], is cited to the following effect, at Para 9.02, page 129:-

“The fact that music and words are combined together for the purposes of performance or recording does not cause the separate and distinct copyrights to merge”.

IPRS says that the exclusive rights accruing to literary works and musical works include under Section 14(a)(iii), (a) the right to perform the work in public and (b) the right to communicate the work to the public. Section 2(ff), which includes the substance of the definition of the old Section 2(q), thus implies that the Act takes into account the fact that literary and musical works would be communicated to the public by sound recording or film. This, according to IPRS, highlights the impact of Section 13(4) of the Act, which mandates separate existence of copyright despite the incorporation of literary works or musical works in sound recordings or films. IPRS disputes SYNERGY’s contentions and says that if the mandate of the Act, is that use of a sound recording precludes need for a license for the use of the ‘underlying works’, this ‘exclusive right’ would not have been granted in the case of lyrics or musical compositions, as it has been granted for films [Section 14(d) (iii)] and sound recordings [Section 14(e)(iii)] and the exclusive right for lyrics and musical compositions [Section 14(a)(iii)], would have stopped at the right to ‘perform the work in public’ (*i.e. the ‘live acoustic performance’*) and/or would have excluded the communication to the public right of lyrics and musical compositions in respect of use of the said ‘underlying works’, as part of sound recordings or films. It is, therefore, submitted that there is no ‘competition’ between lyrics and musical works used in a sound recording or film and the sound recording or film right itself and further that reproduction/making of sound recordings or films/public performance or communication to the public/adaptation/translation etc., of lyrics or musical works is mandated by the extent of authority provided by the author/owner of the works, as deemed by the law (Section 17) or by private contract (Assignment – Section 18 and 19 and License – Section 30).

13. It is urged that harmony is maintained by specific provisions of the Copyright Act, 1957, which mandate ownership and also dictate the mode and form of assignments or licenses, i.e. an authority to do an act. To emphasize this, it is submitted that in case of ownership – as in the case of Section 17(b) or (c) – a sound recording producer/film producer will be able to exercise his rights in a sound recording, as well as the underlying works (lyrics and musical compositions) separately without need for further permission from the author or composer, as he becomes the ‘first owner’ of the lyrics and musical compositions. An owner, assignee or licensee’s ability to exercise the rights in a sound recordings or film does not ‘extinguish’ the parallel and subsisting rights in relation to lyrics and musical composition, but rather grants or may transfer title or interest in the said underlying works in favor of the owner (producer) of the sound recording or film enabling the producer to exercise the rights in the sound recordings and film.

14. The IPRS next submits that it collects royalty not only for Indian works (film music and non-film music) but also by way of Reciprocal Agreements represents the interests and rights of foreign Sister Copyright Societies in ‘International Works’ within India; for this purpose, it relies on Section 34 (2) of the Copyright Act, 1957.

15. IPRS submits that the decision in *Indian Performing Right Society Limited v. Eastern Indian Motion Pictures Association and Others*, (1977) 2 SCC 820 (“the Eastern MPA judgment”) did not deal with a so-called “merger doctrine” in Copyright Law in India, i.e. nowhere in the judgment did the Court say that the identity & legal basis of the works in question, i.e. lyrics and musical compositions were ‘extinguished’, as a result of incorporation in a film or sound recording. The Court only held that given that the Copyright Act, 1957 saw fit to grant a separate copyright to a film producer in relation to a film with an economic imperative to ‘enjoy’ the work, the manner in which the rights of the author/composer would be defeated *qua* engagement or employment of an author/composer to create lyrics or musical compositions for a film was contained in Sections 17(b) and Sections 17(c). As a result, the author or composer could not assert rights *qua* their lyrics or music, as these were then deemed to be owned by the film producer (“the first owner”) unless there was an agreement to the contrary. Reliance is placed on the judgment of the Division Bench of the Madras High Court in the case of *Muthoot Finance Limited v. The Indian Performing Right Society Limited and Ors.*, OSA No. 64 of 2009, where the Division Bench (DB) upheld that the order of injunction granted by the Single Judge in Appeal, against a Radio Broadcaster [in *IPRS v. Branch Officer, The Muthoot Finance Pvt.*

Limited & Muthoot Finance Pvt. Ltd. v. IPRS and Anr., O.A. No. 1318 of 2008 and application No. 37 of 2008 in O.A. 1318 of 2008 in CS No. 1180 of 2008] in favor of IPRS.. The Division Bench and Single judge both considered application of the 1977 case and held the case inapplicable in that said case. It is submitted that therefore, when recorded music is played in public, two licenses are payable, namely, one to the IPRS for performing or communicating to the public the musical composition/lyrics and the other to PPL for communicating the Sound Recording of the music to the public by playing the sound recording.

16. It is lastly submitted that one of the amendments to the Act in 1994 was that the old definition of *performance* at Section 2(q) was amended to mean “*live acoustic performances*” with reference to ‘performers rights’ while the substance of the definition of the old Section 2(q) was incorporated into Section 2(ff) which defines ‘communication to the public’. The old Section 2(q) is reproduced below:

(q) “performance” includes any mode of visual or acoustic presentation including by any such presentation by the exhibition of a cinematograph film, or by means of radio-diffusion, or by the use of a record, or by any other means and, in relation to a lecture, includes the delivery of such lecture.

Thus, says IPRS, the right to communicate to the public in effect includes making any ‘work’ [See Section 2(y) ‘Work’ means (i) literary, dramatic, musical or artistic work (ii) sound recording (iii) cinematograph film], available to public for being heard or enjoyed by the public by any means of display or diffusion. IPRS relies on a letter of 15.10.1997 issued by the Central Government, to the Phonographic Performance Ltd., which clarified that:

“Since public performance of music involves both mechanical rights in sound recording as well as rights of composers, performers, etc. who have contributed towards the making of the music, licences from both the societies governing these rights are required to be taken for playing recorded music whose copyright administration vest in these societies. You may accordingly advise prospective licencees.”

17 SYNERGY, the defendant, argues that:

(a) No right remains in the musical work or literary work, regardless of who owns it, once a sound recording is created (which is later broadcast by the Defendant No.2). The Copyright Act recognizes copyright in a musical work, literary work and sound recordings. The musical notation created by the composer is “musical work” whereas the lyrics created by the lyricist are “literary works”. In the case of a “sound recording” the person who takes the initiative and

responsibility for creation of the sound recording (it may be the sound recording company or a producer of the film), is its producer/author/owner. It is the sound recording that brings together the musical work and the lyrics to create/produce a song, which is then broadcast over the defendant's radio station. Neither the musical notations, nor the words that form the lyrics, are independently broadcast. It is argued that the musical works and literary works for a cinematograph film are created only when the producer of the film commissions and engages the composer and lyric writer to create the respective works. The composer and lyric writer therefore, do not create the works independent of the film. They are paid for their works by the producer, who takes the initiative and responsibility to create the film and hence, is its producer and author.

(b) By virtue of proviso (b) and (c) of Section 17 of the Copyright Act, 1957, the producer is also the owner of copyright not only in the cinematograph film work, but also in the constituent elements thereof, i.e., the script, the dialogues, the screenplay, the story, as well as the music and the lyrics. In this regard, SYNERGY relies on the IPRS judgment; and of the Calcutta High Court in *EIMP v. PRS*, AIR 1978 Cal 477 (DB).

(c) Once the producer receives the musical notation, as well as the written words of the lyrics, he may either produce a sound recording himself/itself or may engage a sound recording company to create a sound recording based on the said composition and lyrics, which is the exercise (by the producer of its right) under Section 14(a)(iv). The producer of the film or the sound recording company, as the case may, be who creates the sound recording in exercise of the right/license is a separate producer in relation to the sound recording. He owns the sound recording upon its creation and all rights in respect of it spelt out in Section 14(e).

18. It is further argued that the object of the producer (of the sound recording) paying money for purchasing the right to make the sound recording is to further reproduce the work (i.e. sound recording) or communicate it to the public or exploit other rights available to the owner of sound recording under Section 14(e) of the Copyright Act. There would be no reason for the sound recording producer to pay once for acquiring the right to make the master sound recording and then pay separately for each reproduction thereof or each communication to the public. It is urged that if the plaintiff's argument were to be accepted, then for each reproduction of the sound recording a separate royalty would be due from the producer of the sound recording to the owner of the rights in the underlying musical works and lyrics.

19. SYNERGY submits that acceptance of the plaintiff's argument, that the underlying words and music are necessarily and automatically reproduced upon reproduction of the sound recording, there was no reason for the Parliament to provide for a separate and distinct right under Section 14(a)(iv) (right to make cinematographic film or sound recording in respect of the work), when the right of reproduction under Section 14(a)(i) already existed. The legislative intent in providing for a separate exclusive right in making of a sound recording based on the lyrics and music makes it clear that the owner of the musical work and accompanying lyrics can continue to exercise its rights of reproduction in relation to other reproductions, even after losing its copyright in making of a sound recording and its natural and consequent exploitation by way of communication to the public/broadcast. Thus, even on a harmonious reading of Section 14(a)(iii) and 14(e)(iii), the right in 14(a)(iii) can be effectively exercised in relation to other communications to the public of the musical works and lyrics other than that sound recording, in respect of which the rights have been transferred.

20. It is thus argued that the other bundle of rights that are or may be available to the owner of the musical works and lyrics respectively are not extinguished. The owner of the musical work and lyrics retains the separate rights as protected by Section 13(4) to separately exploit the said musical works and lyrics, otherwise than as part of the sound recording, for instance by way of public performance, as held by the Supreme Court in the IPRS judgment. It only means that the once the sound recording is created, any exploitation of the SOUND RECORDING will not attract automatic exploitation of the musical work or the lyrics, so as to enable receipt of separate royalties from the user of the sound recording. It is also submitted that the law declared by the Supreme Court in the IPRS judgment, does not permit the plaintiff the right to claim any license fee in respect of communication to the public, of sound recordings for songs that are part of a cinematographic film. Only if the musical work and accompanying lyrics are performed live or not as part of the sound recording can the lyricist or music composer claim any royalties in respect thereof. It is further submitted that since the defendant's radio stations are broadcasting/communicating to the public only the original sound recordings, in respect of which the defendants have agreed to pay PPL, hence, there is no requirement to take a separate license from the plaintiff in respect of the said sound recordings.

21. In relation to the authorities from the U.K. and Australia relied upon by the plaintiff, the defendant urges that the structure of Section 19(2)(b) of the Copyright Designs and Patents Act,

1988 (U.K.), differs from Section 14(a)(iii) of the Copyright Act, 1957. The latter (Section 14(a)(iii)) only provides that the relevant exclusive right, in relation to a literary or musical work, is performing the work in public or communicating the work to the public, the CDPA (UK Act) goes further to say that performance of the literary and musical works would also take place when a sound recording of such work is acoustically presented in public. The two provisions are reproduced below to highlight the distinction:

“XXXXXX XXXXXX XXXXXX

Indian law

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

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

(i) xxxxxxxxxx

(ii) xxxxxxxx

(iii) to perform the work in public, or communicate it to the public;

(iv) xxxxxxxxxx

XXXXXX XXXXXX XXXXXX”

“XXXXXX XXXXXX XXXXXX

UK Law

Section 19 of CDPA 1988: 19 Infringement by performance, showing or playing of work in public.

(1) The performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work.

(2) In this Part “performance”, in relation to a work—

(a) xxxxxxxx

(b) in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film [or broadcast] of the work.

XXXXXX XXXXXX XXXXXX”

22. SYNERGY therefore, emphasizes that in view of the above distinction between the two provisions, the UK CDPA specifically provides that when a sound recording is acoustically performed in public, the underlying literary and musical works are also performed and further provides that such performance of the underlying musical and literary works is an act restricted

by copyright, for which separate license would be required. It is further submitted that that as per Section 106(4) of the US Copyright Act, 1976, there is no exclusive right of communicating the sound recording to the public. Thus, there is no provision corresponding to Section 14(e)(iii) and hence there is no society that collects royalties akin to PPL, for terrestrial radio broadcasts. The right of communication to the public is limited only to the musical works and lyrics. Thus, the only right in relation to communication to the public that is available under the US law is the right akin to Section 14(a)(iii). Accordingly, there is only one person/entity that is to be paid once a terrestrial radio station such as the defendant herein broadcasts songs to the public. Counsel for the defendant says that this distinction is crucial, especially in view of the Supreme Court's the IPRS judgment, as such a distinction renders it unnecessary to read two provisions such as 14(a)(iii) and 14(e)(iii) harmoniously, since there is only one provision under US law, which is similar to only 14(a)(iii).

23. The defendant argues in the alternative, that assuming that the rights in the musical works and lyrics are also exploited with exploitation of the sound recording, the plaintiff has not demonstrated its ownership in the rights claimed. This aspect becomes vital when considering the factum whether a *prima facie* case exists at all in favor of the plaintiff. It is submitted that the plaintiff society can only own the rights that are owned by its members. Synergy challenges the notion that the plaintiff's members are, in fact, the owners of copyright in musical works and accompanying lyrics. This inquiry is also the mandate of the Act, since, as per Section 18 of the Act, only an owner of a work or a prospective owner may be a member of the plaintiff.

24. SYNERGY argues that the main objects of the plaintiff indicate the following:

1. The members of the plaintiff include the lyric writers and composers.

It is submitted that, as per the decision of the Supreme Court of India, lyric writers and composers cannot be members of the plaintiff as their rights are defeated by the producer of the film or sound recording company.

2. The members also include a category of "PUBLISHERS".

It is submitted that the Copyright Act, 1957, does not define or recognize the term, "Publisher".

In view of the fact that Section 16 states that:

"No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of the Act...."

Hence *prima facie*, a “Publisher” cannot own any copyright.

25. It is submitted that assuming *arguendo* that a publisher includes film producers and sound recording companies, the plaintiff has not been able to demonstrate, on facts:

1. whether even these publisher members have assigned rights in favor of the plaintiff;
2. how many have done so, and
3. what are the works in which such rights have been assigned.

This, SYNERGY says, is evident from the following:

- (i) While an alleged list of approximately 1500 members is filed (not stated that this is an extract of the Register of Members or Register of Agreement), only 30 alleged assignment deeds have been filed by the plaintiff;
- (ii) Of these 30 alleged assignments, only 7 pertain to alleged category of publishers. Thus, even if the plaintiff’s submission were to be accepted, the plaintiff has only filed documents of 7 alleged members in support of its claimed rights.
- (iii) Of these 7 deeds of assignment, only 2 pertain to film producers, who between them have assigned none of their works to the plaintiff, as the schedule of works pertaining to the said film producers is blank.
- (iv) Of the balance 5 deeds of assignment, which pertain to sound recording companies, attention is drawn to pages 222-223, 230-231, 234-235, 250-251 and 254-255. A perusal of these pages demonstrates various infirmities.

The works allegedly assigned by the sound recording companies, as publisher members are not listed; there is a vague reference to all works of the said members and a further reference to the filing of such works with the plaintiff, which has not been shown. In view of the provisions of Section 19(2), which requires specific identification of the works assigned, the assignments are not valid and hence not liable to be relied upon. It is stated that there is a reference to an MoU of 1993 between the IPI and the plaintiff, which has not been filed in the proceedings, especially as the alleged assignments are subject to the terms of the said MoU. Furthermore, all deeds of assignment of the authors and composers demonstrates a baseless distinction between works in existence, as on 25.08.1969 and works created thereafter in proviso to clause 3. It is unclear as to what is the basis of the same, or the arrangement set-out in paragraph (ii) of the said proviso to

clause 3. Therefore, argues SYNERGY, the plaintiff has not been able to establish even a *prima facie* case of its alleged ownership of rights.

CRI Events- the Second suit

26. In the second suit, both IPRS and PPRS have joined together as plaintiffs. Besides reiterating the sum and substance of the pleadings in the other suit (CS (OS) 1185/2006) vis-a-vis the nature of copyrights and their independent operation, the plaintiffs also describe the mechanism by which licenses are granted to those seeking authorization in respect of the copyrights administered by the two societies. The first and second defendants are hereby collectively referred to as CRI Events. They engage themselves in event management, catering to premium brands such as Airtel, Vodafone, Alcatel and Cox & Kings etc. These defendants, argue the plaintiffs' societies, organize several events for their customers such as consumer promotion contests, dealer meets, exhibitions, fashion shows, theme parties, merchandising, product launches etc. The plaintiffs have placed on the record copies of the defendant companies' website indicating their business activities etc. The third defendant is a banquet hall located at Rajokri, Mahipal Pur, Delhi. It hosts different events and functions in its premises for its customers, which includes CRI Events.

27. The plaintiff societies allege that the third defendant permitted CRI Events to use its premises and organize an event where works comprising their (the plaintiff societies') repertoire were communicated to the public, which amounts to infringement of the copyrights. It is alleged that the third defendant despite knowledge that licenses were required from the plaintiffs and that holding of unauthorized events involving the performance or communication of the plaintiffs' copyright works to the public amounts to an infringement, did so.

28. The plaintiff societies allege further that CRI Events is a member of the Event and Entertainment Management Association (EEMA), created to protect and develop the overall business interest of Event and Live Entertainment Management companies. That Association filed a Writ Petition before this Court being W.P.(C). No. 5422/2008, for a direction to frame standards particularly for determination and levying of royalty for various copyright works administered by them (the two plaintiff societies). The plaintiff societies allege that all members

of the EEMA, including the defendants, have declined their obligation to pay license fee or seek authorization from the plaintiffs on the ground that litigation is *sub-judice*.

29. It is stated that sometime in May, 2009, the plaintiffs became aware that CRI Events were organizing a special event for Airtel Ltd. on 30.05.2009 in the premises of the third defendant, upon which, they (the plaintiffs) wrote two letters on 28.05.2009 to the defendants requesting them to pay the requisite license fee for performing or communicating to the public the sound recordings being part of the repertoire of the PPRS. The defendants did not respond to those letters nor seek any license or authorization. The suit further alleges that the plaintiffs deployed Mr. P.K. Gupta and Mr. Balwant Singh, employed with the PPRS' Delhi Office, to visit the premises at Nitesh Kunj, Rajokari where the defendants' were organizing the Airtel Dealers Meet. It is alleged that Mr. P.K. Gupta ascertained that the sound recordings belong to the repertoire of the first plaintiff's library and literary and musical works belonging to the repertoire of the IPRS were communicated to the public over loud speaker.

30. The plaintiffs rely upon the affidavit deposed to by Mr. P.K. Gupta, describing four songs with description of their author, composer, publisher and the owner of the sound recordings. The plaintiffs further state that a criminal complaint has been lodged against the CRI Events in respect of the alleged copyright violation.

31. CRI Events admit to being engaged in the business of coordinating events, functions, shows etc. for their clients who could be either individual or business entities. These services extend to providing venue, food and beverage, playing/performance of music either through Disc Jockeys (DJs) or through artists, orchestras, light and sound, décor, sitting management, according to the client's specifications. It is stated that CRI Events does not reproduce or perform or publish any work in which copyright subsists. It merely acts as a coordinator, under no liability to secure any license from the plaintiffs. In the written statement, CRI Events broadly categorizes the kind of businesses it manages in to three classes - where individuals are clients, marriages, specific get-together events such as birthday parties and social, religious and philanthropic events. In the case of clients involved being business entities, the events organized are dealer meets and other similar events, parties etc. for welfare of employees and staff, which may include sports meets etc., celebrations on days of national and other importance etc. It is stated that in all these types of events, the guests do not pay for entry and there is no profit motive, which can be attributed in the event. As against these, the defendants contrast the other

classes of events such as ticketed music shows, parties like New Year, Diwali and other gathering where entry tickets are to be paid for, etc.

32. It is urged that in the events where guests do not pay, there is a pre-existing nexus between the organizers and participants discernable of the nature of the function. This is contrasted with events where someone pays money for gaining entry; there is generally no pre-existing relationship exists between the organizers and the participants. Having regard to these, urges the CRI Events, playing or performance of copyright works in functions where entry is free and restricted to specific participants would not amount to public performance for which licenses are required. Learned counsel for CRI Events relies on the decision in *Duck v. Bates*, (1884) 12 QBD 79. In that case, it was held that performance of a dramatic work by a group of amateurs before an audience of nurses and others in a hospital was not held to be a “public performance”.

33. CRI Events also alleges that the license fee demanded by the two plaintiffs’ societies is arbitrary, as they do not have any objective standard for determination of such fee. The plaintiffs’ societies’ rights to administer the copyrights is also challenged by the defendants on various grounds. It is alleged that the plaintiffs have not disclosed the details of the works in which they have authority to issue license nor have they disclosed valid and subsisting deeds which grant such authority. The CRI Events also contest that the suit and the accompanying documents lack in details regarding originality of works over which the plaintiffs claim rights.

Analysis and Reasoning

34. From the above discussion, it is evident that two questions arise for consideration in this case: (1) the extent of the song writer’s copyright and whether it extends to excluding the communication to the public without authorization, of the musical work embodied in a sound recording; (2) does hiring of a place hired by an employer and its use by the Event Manager for the purpose of communication of musical works or sound recordings, amount to public performance within the meaning of the Act.

35. The first question framed by this Court arises in both the suits but was primarily argued in IPRS’ suit against SYNERGY. IPRS contends that Section 13(1) clearly stipulates that copyright subsists in *inter alia* original musical and artistic works and also in sound recordings. It roots its claim essentially on a joint reading of Section 13(4) and Section 14(a)(iii). The submission is that if a song writer allows his work to be embodied in a sound recording, secondary copyright forming the sound recording no doubt encompasses the copyright owner’s

right to communicate the sound recording to the public by virtue of Section 14(e). IPRS submits that this, however, does not detract from the separate and independent right of the song writer whose copyright in the work and the concomitant right to authorize its communication to the public subsists, unless it is proved that such right has also been parted to the owner of the sound recording. IPRS contends that in either case, the merger of ownership does not have the effect of merging the two copyrights. Reliance is also placed on the definition of communication to the public, under Section 2(f)(f), which includes the making of any work available for being seen or heard by the public directly or by means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work, thus made available. It is submitted that the aural perception of one song played through means of a sound recording encompasses authorized elements does not in any manner deflect from the separate copyrights, which subsist and should exist by virtue of Section 13(4).

36. SYNERGY and also CRI events, on the other hand, contest IPRS' submissions and state that once the song writer or creator of a musical work parts with his copyrights in the making of a film or a sound recording, that copyright is subsumed with the right directly flowing from Section 14(d) and (e), which entitle the copyright owner of the film or the copyright owner of the sound recording to communicate the entire film or the entire sound recording, which includes either the entire song so recorded or a part thereof to the public. In other words, it is submitted that the reference in Section 14(a)(iv) to authorize the sound recording in the work to be communicated to the public or perform it in public excludes the rights to communicate the sound recording or the film to the public, which may or may not include the song. Counsel for the defendants, in both cases, argue that the right of the song writer or music composers dealt in Section 14(a)(iv) can thus be construed harmoniously as extending only to live public performance or authorizing recording of such live performances other than, as sound recordings. The second limb of this argument is that the sound recording copyright owner's right to communicate it to the public is an entire bundle, which cannot be separated, and the user or

licensee of such sound recording cannot be compelled to pay a separate authorization or license fee to the creator of the music or the song writer. In this regard, the defendants placed reliance upon the judgment of the Supreme Court in the Eastern MPA case. Before proceeding further, it would be useful to recapitulate and analyze the decision cited by the parties in support of the rival contentions. *Relevant provisions*

37. Section 2 of the Copyright Act defines various terms such as adaptation [Section 2 (a)]; “artistic work” is defined in Section 2 (c); it means painting, sculpture, drawings, an engraving or a photograph regardless of whether they possess artistic quality, works of architecture or other works of artistic craftsmanship. Section 2 (d) defines author, which is as follows: -

“(d) “author” means, -

- (i) *in relation to a literary or dramatic work, the author of the work;*
- (ii) *in relation to a musical work, the composer;*
- (iii) *in relation to an artistic work other than a photograph, the artist;*
- (iv) *in relation to a photograph, the person taking the photograph;*
- (v) *in relation to a cinematograph film or sound recording, the producer; and*
- (vi) *in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.”*

38. “Cinematograph films” and “communication to the public” are defined by Section 2 (f) and Section 2 (ff) as follows: -

“(f) “Cinematograph film” means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and “cinematograph” shall be construed as including any work produced by any process analogous to cinematography including video films;

(ff) “communication to the public” means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the works 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.”

“Exclusive license” is defined in Section 2 (j) as follows: -

(j) "Exclusive licence" means a licence which confers on the licencee or on the licensee and persons authorised by him, to the exclusion of all other persons (including the owner of the copyright), any right comprised in the copyright in a work, and "exclusive licensee" shall be construed accordingly.”

Section 2 (m) defines “infringing copy” as follows: -

“(m) "infringing copy" means,-

xxxxx In relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

(iv) In relation to a programme or performance in which the 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;] (emphasis supplied).

Section 2(xx) defines “sound recording” as under:

“...a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.”

Section 2 (uu) defines “producer”, in relation to a cinematograph film or sound recording, as a person who takes the initiative and responsibility for making the work.

39. For the purposes of this case, it would be also necessary to consider Sections 13, 14, and 51. They read as follows: -

“13. Works in which copyright subsists- (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say -

(a) Original, literary, dramatic, musical and artistic works,

(b) cinematograph films, and

(c) [sound recordings]

(2) Copyright shall not subsist in any work specified in sub section (1), other than a work to which the provisions of Section 40 or Section 41 apply, unless-

(i) In the case of published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India,

(ii) In the case of an unpublished work other than [work of architecture], the author is at the date of the making of the work a citizen of India or domiciled in India; and

(iii) In the case of [work of architecture], the work is located in India

Explanation- In the case of a work of joint authorship, the conditions conferring copyright specified in this sub section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist-

(a) In any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) In any [sound recording] made in respect of a literary, dramatic or musical work, it in making the [sound recording], copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a [sound recording] shall not affect the separate copyright in any work in respect of which a substantial part of which, the film, or as the case may be, the [sound recording] is made.

(5) In the case of a work or architecture, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods or construction.”

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

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

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub clauses (I) to (vi)

(b) In the case of a computer programme,-

(i) to do any of the acts specified in clause (a)

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme:

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.]

(c) In the case of an artistic work,-

(i) to reproduce the work in any material form including depiction in three dimensions of a two dimensional work or in two dimensions of a three dimensional work;

(ii) to communicate the work to the public;

(iii) to issue copies of the work to the public not being copies already in circulation;

(iv) to include the work in any cinematograph film;

(v) to make any adaptation of the work;

(vi) to do in relation to an adaptation of the work any of the acts specified in relation to the work in sub clauses (i) to (iv);

(d) In the case of a cinematograph film-

(i) to make a copy of the film, including a photograph of any image forming part thereof;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the film to the public

(e) In the case of a sound recording-

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

(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.]”

*“51. **When copyright infringed** - Copyright in a work shall be deemed to be infringed -*

(a) When any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any conditions imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright, or]

(b) When any person -

(i) makes for sale on hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) Distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) By way of trade exhibits in public, or

(iv) Imports [***] into India, any infringing copies of the work:

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

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

40. It would also be necessary to notice the changes brought about by the amendment to the Copyright Act, 1957 after 1994. A new species of copyright ("sound recording) was introduced. Further, the definition clause was also amended. These changes, in the definition clause, are shown below in a tabular form:

Pre 1994 Amendment		Post 1994 Amendment	
Provision	Text	Provision	Text
Section 2(d)- "author" means	(i) in relation to literary or dramatic work, the author of the work; (ii) in relation to musical work, the composer; ... (v) in relation to a cinematograph film, the owner of the film at the time of its completion; and (vi) in relation to a record, the owner of the original plate from which the record is made, at the time of making the plate.	Section 2(d)- "author" means	(i) same (ii) same (v) in relation to cinematograph film or sound recording, the producer.
Section 2(f)-	Includes the sound track, if	Section 2(f)-	Means any work or visual

Cinematograph film	any, any cinematograph shall be construed as including any work produced by any process analogous to cinematography. Explanation.- For the purposes of this clause, "video films" shall also be deemed to be work produced by a process analogous to cinematography.	Cinematograph film	recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films.
Section 2(ff)-Communication to the public	Means communication to the public in whatever manner, including communication through satellite.	Section 2(ff)-Communication to the public	Means making any work available for being seen or heard or otherwise enjoyed by public directly or by means of display or diffusion other than by issuing copies of such work regardless of whether any member of public actually sees, hears or otherwise enjoys the work so made available. Explanation.- For the purposes of this clause, 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.
Section 2(o)-Literary work	Includes tables [compilations and computer programmes, that is to say recorded on any disc, tape perforated media or other information storage device, which, if fed into or located in a computer or computer based equipment is capable of reproducing any	Section 2 (o)-Literary work	Includes computer programmes, tables and compilations including computer databases.

	information]		
Section 2(p)- Musical work	Means any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced.	Section 2(p)- Musical work	Means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.
Section 2(q)- Performance	Includes any mode of visual or acoustic presentation, including any such presentation by exhibition of cinematograph film, or any means of	Section 2(q)- Performance	In relation to performer's right, means any visual or acoustic presentation made live by one or more performers.
		Section 2(qq)- Performer	Includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.
		Section 2(uu)- Producer	In relation to a cinematograph film or sound recording, means a person who takes the initiative and responsibility for making the work.
		Section 2(xx)- Sound recording	Means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.

Cinematograph films are defined in wide terms under Section 2(f); in relation to them the producer is deemed to be an author [Section 2(d)(v)]. By virtue of Section 13, copy right subsists, in relation to “(a) Original, literary, dramatic, musical and artistic works, (b) cinematograph films, and (c) sound recordings”. Section 13 (4) has been heavily relied on in this case; it enacts that “...The copyright in a cinematograph film or a [sound recording] shall not

affect the separate copyright in any work in respect of which a substantial part of which, the film, or as the case may be, the [sound recording] is made.”

41. Section 14 categorically provides that copyright “means the *exclusive right to do or authorizing the doing of any of the acts mentioned in Section 14 (a) to (e) or any “substantial part thereof”*. For the purposes of this case, the content of copyright in respect of cinematographic films is spelt out in Section 14 (e). A joint reading of the controlling provisions of the earlier part of Section 14 with clause (e) implies that in the case of sound recordings, copyright would mean the doing or authorizing the doing- in respect of work (i.e. the sound recordings) or any substantial part thereof –

(i) making a copy of the recording;

(ii) selling or giving on hire or offer for sale or hire any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions,

(iii) to communicate the film to the public.

42. In the Eastern MPA judgment, which all parties in this case relied on, the Supreme Court likened the various rights – to the lyrics, music, screenplay and still photographs, other design effects, etc. as a “*bundle of exclusive rights*”. The Court examined the impact of the authors’ rights (i.e. the lyricist or screenplay writers, as opposed to the copyright owner of a cinematograph film), to examine whether there was an obligation by the film owner to pay royalty or seek authorization from the creator/ author of the literary or musical work, and held as follows–

“16. The interpretation clause (f) of section 2 reproduced above, which is not exhaustive, leaves no room for doubt when read in conjunction with section 14(1) (c) (iii) that the term "cinematograph film" includes a sound track associated with the film. In the light of these provisions, it cannot be disputed that a "cinematograph film" is to be taken to include the sounds embodied in a sound track which is associated with the film. Section 13 recognises 'cinematograph film' as a distinct and separate class of 'work' and declares that copyright shall subsist therein throughout India. Section 14 which enumerates the fights that subsist in various classes of works mentioned in Section 13 provides that copyright in case of a literary or musical work means inter alia (a) the right to perform or cause the performance of the work in public and (b) to make or authorise the making of a cinematograph film or a record in respect of the work. It also provides that copyright in case of cinematograph film means among other rights, the right of exhibiting or causing the exhibition in public of the cinematograph film i.e. of causing the film in so far as it consists of visual images to be seen in public and in so far it consists of

sounds to be heard in public. Section 13(4) on which Mr. Ashok Sen has leaned heavily in support of his contentions lays down that the copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made. Though a conflict may at first sight seem to exist between section 13(4) and section 14(1) (a) (iii) on the one hand and section 14(1) (c) (ii) on the other, a close scrutiny and a harmonious and rational instead of a mechanical construction of the said provisions cannot but lead to the irresistible conclusion that once the author of a lyric or a musical work parts with a portion of his copyright by authorising a film producer to make a cinematograph film in respect of his work and thereby to have, his work incorporated or recorded on the sound track of a cinematograph film, the latter acquires by virtue of section 14 (1) (c) of the Act on completion of the cinematograph film a copyright which gives him the exclusive right inter alia of performing the work in public i.e. to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyric or musical work for the performance of the work in public. In other word, a distinct copyright in the aforesaid circumstances comes to vest in the cinematograph film as a whole which in the words of British Copyright Committee set up in 1951 relates both to copying the film and to its performance in public. Thus if an author (composer) of a lyric or musical work authorises a cinematograph film producer to make a cinematograph film of his composition by recording it on the sound track of a cinematograph film, he cannot complain of the infringement of his copyright if the author (owner) of the cinematograph film causes the lyric of musical work recorded on the sound track of the film to be heard in public and nothing contained in section 13(4) of the Act on which Mr. Ashok Sen has strongly relied can operate to affect the rights acquired by the author (owner) of the film by virtue of section 14(1)(c) of the Act. The composer of a lyric or a musical work, however, retains the right of performing it in public for profit otherwise than as a part of the cinematograph film and he cannot be restrained from doing so. In other words, the author (composer) of lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the sound track of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound track associated with the film by utilising such sound track or from communicating or authorising the communication of the film by radio-diffusion, as section 14(1)(c) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things. In such cases, the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work. Any other construction would not only render the express provisions of clauses (f), (m), (y) of Section 2, Section 13(1) (b) and Section 14(1)(c) of the Act otiose but would also defeat the intention of the Legislature, which in view of the growing importance of the cinematograph film as a powerful media of expression, and the highly complex technical and scientific process and heavy capital outlay involved in its production, has sought to recognise it as a separate entity and to treat a record embodying the recording

in any part of the sound track associated with the film by utilising such sound track as something distinct from a record as ordinarily understood.

17. *On a conspectus of the scheme of the Act as disclosed in the provisions reproduced above particularly clauses (d),(v),(f)(m),(v)and (y) of Section 2, Sections 13(1) and 14(1)(c), provisos (b)and (c) to Section 17 and sections 22 and 26 of the Act, it is, therefore, abundantly clear that a protectable copyright (comprising a bundle of exclusive rights mentioned in section 14(1)(c) of the Act) comes to vest in a cinematograph film on its completion which is said to take place when the visual portion and audible portion are synchronized.”*

In the concurring opinion of Krishna Iyer, J., it was observed that:

.....

“Copyright in a cinema film exists in law, but Section 13(4) of the Act preserves the separate survival, in its individuality, of a copyright enjoyed by any 'work' notwithstanding its confluence in the film. This persistence of the aesthetic 'personality' of the intellectual property cannot cut down the copyright of the film qua film. The latter right is, as explained earlier in my learned brother's judgment set out indubitably in Section 14(1)(c). True, the exclusive right, otherwise called copyright, in the case of a musical work extends to all the sub-rights spelt out in Section 14(1)(a). A harmonious construction of Section 14, which is the integral yoga of copyrights in creative works, takes us to the soul of the subject. The artist enjoys his copyright in the musical work, the film producer is the master of his combination of artistic pieces and the two can happily co-exist and need not conflict. What is the modus vivendi ?

21. *The solution is simple. The film producer has the sole right to exercise what is his entitlement under Section 14(1)(c) qua film, but he cannot trench on the composer's copyright which he does only if the 'music' is performed or produced or reproduced separately, in violation of Section 14(1)(a). For instance, a film may be caused to be exhibited as a film but the pieces of music cannot be picked out of the sound track and played in the cinema or other theatre. To do that is the privilege of the composer and that right of his is not drowned in the film copyright except where there is special provisions such as in Section 17, proviso (c). So, beyond exhibiting the film as a cinema show, if the producer plays the songs separately to attract an audience or for other reason, he infringes the composer's copyright. Anywhere, in a restaurant or aeroplane or radio station or cinema theatre, if a music is played, there comes into play the copyright of the composer or the Performing Arts Society. These are the boundaries of composite creations of art which are at once individual and collective, viewed from different angles. In a cosmic perspective, a thing of beauty has no boundary and is humanity's property but in the materialist plane on which artists thrive, private and exclusive estate in art subsists. Man, the noblest work of the Infinite Artist, strangely enough, battles for the finite products of his art and the secular law, operating on the temporal level, guardians material works possessing spiritual values. The enigmatic smile of Mona Lisa is the*

timeless heritage of mankind but, till liberated by the prescribed passage of time, the private copyright of the human maker says, 'hands off'.

22. *The creative intelligence of man is displayed in multiform ways of aesthetic expression but it often happens that economic systems so operate that the priceless divinity which we call artistic or literary creativity in man is exploited and masters, whose works are invaluable, are victims of piffling payments. World opinion in defence of the human right to intellectual property led to international conventions and municipal laws, commissions, codes and organisations, calculated to protect works of art. India responded to this universal need by enacting the Copyright Act, 1957.*

(emphasis added)

The Supreme Court, of course was dealing with the statute when there was no separate sound recording copyright; that species of right was part of the copyright to the cinematograph film itself. However, the Court's ruling was categorical, because it was held that if the author of any musical work parts with a portion of his copyright, authorizing a film producer to make a cinematograph film in respect of his work and have his work incorporated or recorded on the sound track of a cinematograph film, the copyright owner of the film acquires (due to section 14(c))- upon completion of the film "*a copyright which gives him the exclusive right inter alia of performing the work in public i.e. to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyric or musical work for the performance of the work in public.*"

43. The plaintiffs in both the suits urge that with the amendment of 1994, the situation has changed, and the sound recording owner has become the copyright proprietor of a sound track created by him, or under his authority. This no doubt confers the right to do or authorize the doing of various things by virtue of Section 14. However, his authorization to anyone including a broadcaster to communicate the sound recording or broadcast it to the public, does not detract from the separate copyright vesting in the author of the musical work, by virtue of Section 14(a), which operates independently, enjoining the person seeking to broadcast the lyrics, to secure permission of the composer or the lyricist. The plaintiffs urge that the definition of "communication to the public" and the structure of the separate rights inhering in every owner, by virtue of Section 13(4) strengthens this interpretation. They have relied on several rulings of courts in the UK and Australia, to say that public performance rights of lyricists operate

independently of the sound recording owner/ copyright proprietors' right to authorize the broadcasting of sound recordings.

44. At this stage, it would be necessary to consider the legal provisions existing in the UK and the USA. The relevant provision of the Copyright laws in the USA, read as follows:

“U.S. Copyright Act (found in Title 17 of the United States Code)

§106. Exclusive rights in copyrighted works

Subject to sections 107 through 122 [17 USC § §107 through 122], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”

Provisions of the UK Copyrights, Designs and Patents Act, 1988

“5A. Sound recordings and films

(1) In this Part—

“sound recording” means—

(a) a recording of sounds, from which the sounds may be reproduced, or

(b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced,

regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced; and

“film” means a recording on any medium from which a moving image may by any means be produced.

(2) Copyright does not subsist in a sound recording or film which is, or to the extent that it is, a copy taken from a previous sound recording or film.

.....
9. Authorship of work.

(1) In this Part “author”, in relation to a work, means the person who creates it.

(2) That person shall be taken to be—

(aa) in the case of a sound recording, the producer;

(ab) in the case of a film, the producer and the principal director;]

(b) in the case of a broadcast, the person making the broadcast (see section 6(3)) or, in the case of a broadcast which relays another broadcast by reception and immediate re-transmission, the person making that other broadcast;

(c)

(d) in the case of the typographical arrangement of a published edition, the publisher.

(3) In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

.....
16 The acts restricted by copyright in a work.

(1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom—

(a) to copy the work (see section 17);

(b) to issue copies of the work to the public (see section 18);

(ba) to rent or lend the work to the public (see section 18A);]

(c) to perform, show or play the work in public (see section 19);

(d) to communicate the work to the public (see section 20);]

(e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);

and those acts are referred to in this Part as the “acts restricted by the copyright”.

(2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.

(3) References in this Part to the doing of an act restricted by the copyright in a work are to the doing of it—

(a) in relation to the work as a whole or any substantial part of it, and

(b) either directly or indirectly;

and it is immaterial whether any intervening acts themselves infringe copyright.

(4) *This Chapter has effect subject to—*

- (a) *the provisions of Chapter III (acts permitted in relation to copyright works), and*
- (b) *the provisions of Chapter VII (provisions with respect to copyright licensing).*

.....

19. *Infringement by performance, showing or playing of work in public*

(1) *The performance of the work to the public is an act restricted by the copyright in a literary, dramatic or musical work.*

(2) *In this part, “performance” in relation to a work-*

(a) includes delivery in the case of lectures, addresses, speeches and sermons, and

(b) in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film or broadcast of the work.

(3) *The playing or showing of the work in public is an act restricted by the copyright in a sound recording, film or broadcast.”*

.....

20. *Infringement by communication to the public*

(1) *The communication to the public of the work is an act restricted by the copyright in—*

(a) *a literary, dramatic, musical or artistic work,*

(b) *a sound recording or film, or*

(c) *a broadcast.*

(2) *References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include—*

(a) *the broadcasting of the work;*

(b) *the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.”*

45. The above provisions would reveal that sound recording rights are not co-extensive, or *pari materia* with provisions of the Copyright Act, in India. In the USA, for instance, by virtue of Section 106 (6) a sound recording copyright proprietor’s ownership is restricted to do, i.e. perform, or authorize the performance of sound recordings in the following manner:

“in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”

In the case of literary, artistic or dramatic works, the content of the copyright owner’s right encompasses the right to perform (or authorize performance of the work) as follows:

“to perform the copyrighted work publicly”

In other words, except the right, to perform the work by means of digital audio transmission, the sound recording copyright owner does not have other exclusive rights; the owner of the artistic or literary works has wider, and more exclusive rights.

46. So far as the UK enactment goes, the wording of Sections 16, 19 and 20 of the Copyright, Designs and Patents Act amply clarify that each infringement, and even the method of communicating the work to the public is defined specifically in relation to the nature of the copyright. In view of these observations, this Court is of opinion that the decisions cited on the question of copyrights, and the amplitude of the various right rights, cannot be blindly replicated or followed, having regard to the difference in structure, in the Indian enactment, and the judgment in the Eastern MPA case, of the Supreme Court.

47. It would be relevant, at this stage, to deal with the plaintiffs' argument that "fixation" or tangibility of a work does not determine the existence of the right. This contention was made in the context of whether the existence of a sound recording copyright in relation to a work, per se subsumes the copyright of the author or owner of a musical or literary work. In this context, the judgment in *Sawkins* may be usefully noticed. The Court observed, *inter alia*, that:

"53. In the absence of a special statutory definition of music, ordinary usage assists: as indicated in the dictionaries, the essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it. Music must be distinguished from the fact and form of its fixation as a record of a musical composition. The score is the traditional and convenient form of fixation of the music and conforms to the requirement that a copyright work must be recorded in some material form. But the fixation in the written score or on a record is not in itself the music in which copyright subsists. There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or of improvisations of sounds by a group of people with or without musical instruments should not be regarded as "music" for copyright purposes.

*54. The fact that in musical copyright the sounds are more important than the notes in the text is recognised, for example, in the approach to infringement. The test of substantial reproduction is not a note-by-note textual comparison of the scores. It involves listening to and comparing the sounds of the copyright work and of the infringing work. So it is possible to infringe the copyright in a musical work without taking the actual notes. See **Austin v. Columbia Gramophone Co** [1917-23] Macg. Cop. Cas. 398*

55. *In principle, there is no reason for regarding the actual notes of music as the only matter covered by musical copyright, any more than, in the case of a dramatic work, only the words to be spoken by the actors are covered by dramatic copyright. Added stage directions may affect the performance of the play on the stage or on the screen and have an impact on the performance seen by the audience. Stage directions are as much part of a dramatic work as plot, character and dialogue.*

56. *It is wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators, if they are the product of a person's effort, skill and time, bearing in mind, of course, the "relatively modest" level (see Laddie, Prescott & Vitoria on The Modern Law of Copyright and Designs 3rd ed para 3.58) of the threshold for a work to qualify for protection. The work of Dr Sawkins has sufficient aural and musical significance to attract copyright protection."*

48. There is no difficulty in appreciating the plaintiffs' contention that the existence of copyright in a work, does not preclude the existence of another copyright in relation to it, if it comprehends a multitude of original, copyrightable works. The ruling in *Stephen Carwardine & Co.* informs this; so does the intent and structure of Section 14 of the Copyright Act. Thus, when a lyricist or music composer, creates an original musical work – the lyrics and the score, he becomes entitled to exercise all the rights enumerated in Section 14(a), i.e. to reproduce the work in any material form; issue copies of the work to the public; to perform the work in public, or communicate it to the public; to make any cinematograph film or sound recording in respect of the work; to make any translation of the work; to make any adaptation of the work; and to, in relation to a translation or an adaptation of the work do any of the acts specified in relation to the work in sub clauses (i) to (vi). However, the Court has to take into consideration the interpretation given to the statute by the Supreme Court. That was no doubt during a time when sound recording copyrights did not independently exist, and were perceived as part of the copyright in a film. The Court had then ruled, (in the Eastern MPA judgment) that if the film owner or copyright proprietor wishes to exhibit the film, including the songs, he is not required to seek authorization or separate license from the music composer or the lyricist, for "communicating the work (i.e. the lyrics) to the public", since that is an integral part of the film. That was the interpretation given to Section 14(c) of the Act. Parliament amended the Act, in 1994. A new copyright in "sound recording" was introduced. The content of this right, unlike the US law, or the UK law (the latter being specific) extends to making any other sound recording

embodying it; to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions; and to communicate the sound recording to the public. In a sense, a textual reading of the two rights (i.e. Sections 14(a) and 14(e)) would suggest that the plaintiffs' arguments have substance and merit. This can even be said to be reinforced by the seeming preservation of separate copyrights, under Section 13(4). Yet, the Court cannot be oblivious of the binding Eastern MPA, and the anomalous consequences which would follow if the plaintiffs' arguments are accepted. The Eastern MPA ruling is categorical:

“...the author (composer) of lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the sound track of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound track associated with the film by utilising such sound track or from communicating or authorising the communication of the film by radio-diffusion, as section 14(1)(c) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things. In such cases, the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work. Any other construction would not only render the express provisions of clauses (f), (m), (y) of Section 2, Section 13(1) (b) and Section 14(1)(c) of the Act otiose but would also defeat the intention of the Legislature....”

If one notes that sound recording copyrights, post 1994, have been carved out of the pre-existing copyright in respect of films, an acceptance of the plaintiffs' arguments would lead to two kinds of copyrights. In such case, for instance, the copyright proprietor of a film, who happens to own the sound recording, can authorize the broadcast or communication to the public of the film including the sound recording part, (as a composite work) without license from the author of the lyrics or the composer. However, if the copyright owner of a sound recording is different from the owner of the copyright in the film, (assuming the plaintiffs are correct in their submission) a separate authorization from the lyricist or the composer would be necessary. This is despite the fact that a sound recording is “work” under the Act, and is capable of an independent copyright, under Section 13(1). This anomaly is further aggravated if one sees that the sound recording in a film, the communication of which is authorized by the film copyright owner, would not require separate authorization from the author of the musical or literary work, whereas in the case of an

owner of the copyright in the sound recording, an identical authorization by the sound recording copyright owner (for communicating the sound recording to the public) would be insufficient, and possibly two more authorizations, or licenses from the lyricist and/or the composer, would be required. Thus, the unity of ownership (of the film owner, in respect of the film and the sound recording, embodied in the film) works to the advantage of the licensee, who, having once obtained authorization from the owner or copyright proprietor of the film, does not have to revert to the copyright owner of the musical work; in the case of a sound recording copyright proprietor, when the whole of the sound recording “work” is licensed to be communicated to the public, yet, the licensee, (unlike the licensee of a film, who too can communicate the whole of the work, and not merely the musical work) would be compelled to approach the author of the literary or musical work. Thus the interpretation suggested by IPRS would lead to discrimination in regard to identical content of copyrights of two different “works” which undermines the purposes of the Act and is also illogical. This aspect has been highlighted, not just to disclose the anomaly, but the fallacy in the plaintiff’s argument, which would result in two kinds of copyrights, differing in content and character, where the statute plainly decrees the fullest extent of what is permitted. The Act unambiguously points to the film copyright content including the authorization to communicate the work to the public (which, according to the Eastern MPA judgment, extends to permitting such communication of the sound recording parts alongwith the cinematograph film, without separate license from the author of the musical work); it also unambiguously points to an identical right to the copyright owner of a sound recording to authorize the communication of the work to the public (i.e. of the sound recording). Two different approaches to identically phrased rights, one carved out of a pre-existing right, would render the quality of the license obtained from the sound recording copyright owner inferior. The reasoning in Eastern MPA is not only reinforced but extended by the creation of the sound recording copyright, post 1994. The Court therefore, deems it appropriate to adopt an interpretation consistent with the one indicated in the Eastern IMPA judgment.

49. Without getting into niceties about the “fixation” of copyright in a material object, and whether each copyright in the work, exists in a disembodied manner – as is urged by the plaintiffs, who rely on Section 13(4), there is another aspect which cannot be ignored. When a sound recording is communicated to the public- by whatever means, it is the whole “work” i.e.

the lyrics, the score, the collocation of sounds caused by the equipment and the capturing of the entire aural experience. The musical or literary work, *per se* which is the subject matter of the copyright under Section 14(a) is not communicated or broadcast; nor is there a method of separating that element, while communicating the entire work, i.e. the sound recording, to the public. Without in any manner detracting the originality or undermining the effort of the lyricist or music composer, there can be no gainsaying that the Parliamentary recognition (by the 1994 amendment) that sound recordings are capable of original and creative effort, uniquely blending sound, modern technical skill, score and lyrics, means that the content of a sound recording is perceived in law, as different from that of a musical or literary work, though there may be a coalescence of the two, but not necessarily so, all the time. Therefore, it would be unjustified to say that when a sound recording is communicated to the public, or played, in the public, or broadcast, the musical and literary work is also communicated to the public, *through the sound recording*. That would be to attribute to the one wishing to communicate that work to the public, (i.e. the sound recording) an intention to do something else (i.e. communicate the musical or literary work to the public), which is not correct. Yet again, a given musical or literary work may in itself, not be popular, and instances of these last years reveal that the sound recording containing other elements, including the performer's efforts, may be critical in popularizing them, or rendering them commercially viable. The transformative nature of a sound recording, which uses a musical and literary work (authorized, of course, to be embodied in the sound recording) as *an element*, therefore, has to be recognized. Having regard to these aspects, the plaintiff's contentions about the authorization of a sound recording copyright owner being insufficient, and the authorization of the copyright owner of a musical and literary work, being additionally required, when the sound recording is broadcast, cannot be accepted. It is therefore, held that once a license is obtained from the owner or someone authorized to give it, in respect of a sound recording, for communicating it to the public, including by broadcasting, a separate authorization or license is not necessary from the copyright owner or author of the musical and/or literary work. However, this would not mean that the musical and/or literary work can be otherwise "performed" in the public, (as opposed to communication of a sound recording to the public) without authorization. In such event, the author/owner's license or authorization is necessary. In other words, it is clarified that the other "bundle of rights" which authors or owners of musical or literary works are entitled to enforce, remain undisturbed.

CRI Events:

50. In the second suit, CRI Events admit that they are engaged in the business of coordinating events, functions, shows etc. for their clients who could be either individual or business entities. Their services extend to providing venue, food and beverage, playing/performance of music either through Disc Jockeys (DJs) or through artists, orchestras, light and sound, décor, sitting management, according to the client's specifications. CRI Events argues that it does not reproduce or perform or publish any work in which copyright subsists, but acts as a coordinator. It has categorized the businesses it manages in to these classes – first, where individuals are clients, marriages, specific get together events such as birthday parties and social, religious and philanthropic events. In the second class, where the clients involved are business enterprises, the events organized are dealer meets and other similar events, parties etc. for welfare of employees and staff which may include sports meets etc., celebrations on days of national and other importance etc. It is stated that in all these types of events- which is involved in the present case- the guests do not pay for entry and there is no profit motive, which can be attributed in the event. The defendants contrast other classes of events such as ticketed music shows, parties like New Year, Diwali and other gathering where entry tickets are to be paid for, etc. It is urged that where the patrons or guests do not pay, and there is a pre-existing nexus between the organizers and participants, the performance –of either the sound recording, or the literary or musical work, is not in “public” and there is no consideration flowing, vis-à-vis the viewer or patron, paid to the organizer of the performance. *Duck v. Bates*, (1884) 12 QBD 79 is relied on for this purpose.

51. The plaintiffs, however, dispute this submission and argue that the absence of any consideration paid by the viewer of the event, does not diminish the public nature of the performance. It is submitted that even the entry restriction in this regard, is irrelevant. What is important is that the performer- whether he is an individual one, or contracted for by an event organizer, plays the music, or the work, for commercial purpose, and a consideration. It is argued that such events are not charitable, and do not in any case fall within the fair use categories, mentioned in Section 52 of the Copyright Act.

52. The enactment uses the phrases “public performance” and “communication to the public” in relation to a copyrighted work. The question what is “public” ought not to be considered in the abstract, and in isolation, but in the context of the definition of “infringement” of a copyrighted

work, under Section 51. It would therefore, be necessary to examine a few judicial authorities in this regard.

53. *Harms v. Martans Club*, 1927 (1) Ch. 526 was a dispute which arose out of the performance of a musical number at the Embassy Club in London before an audience of 150 members and 20 guests. That was a proprietary club run by the defendants who furnished entertainment on the premises and derived a profit from it. Payment for the entertainment provided by the proprietors was made not by an admission fee paid on each occasion but by an entrance fee paid on joining the club and an annual subscription thereafter. Great care was exercised in preventing any undesirable persons from becoming members but, subject to that, membership was open to anyone who was prepared to pay the substantial sums charged for the privilege. Upon these facts the Court of Appeal held that there had been a presentation “in public” of the musical composition in question. In *Jennings v. Stephens*, [1936] Ch. 469 the dispute was in relation to the performance of a play by a dramatic society at a meeting of a women's rural institute, which used to hold monthly meetings of a social or educational nature and, in particular, to encourage music, drama and dancing. Every female inhabitant of the village above a certain age was expressly or tacitly invited to become a member. The Court held that the presence or absence of visitors was not the decisive factor, nor did it matter whether the performance was paid or gratuitous, nor was it conclusive that admission was free or for payment, nor was the number of the audience decisive. Accepting the antithesis posed in the earlier cases, as between performance in public and domestic or quasi-domestic performance, the Court observed that the true criterion seemed to be the character of the audience; and, holding that the quality of domesticity or quasi-domesticity seemed to be absent, concluded that the performance was in public within the meaning of the statute. In *Ernest Turner Electrical Instruments, Limited v. Performing Right Society, Limited*, 1943 Ch. 167, the plaintiffs employed 500 to 600 persons at their factory. To prevent boredom and to increase efficiency and output, the plaintiffs relayed to their employees, while they were at work, musical programmes broadcast by the BBC and also gramophone records played at the factory and relayed through amplifiers and loud speakers. The sole right to perform in public some of the musical works relayed belonged to the defendant society and, after correspondence between the plaintiffs and the society on the question whether the performance of those works by the plaintiffs constituted an infringement of copyright, the plaintiffs brought proceedings for a declaration that the

performance at their factory of the music in question did not constitute an infringement of the society's copyright. By their defence, the society contended that the plaintiffs had shown no cause of action, and, by their counterclaim, they alleged that on August 14, 1942, the plaintiffs had performed in public four musical works, the sole right to perform which in public was vested in the society. The society, therefore, claimed an injunction to restrain the plaintiffs from infringing their copyright by performing or authorizing the performance in public of the specified works, or any other musical work of which the right of performance was in the society, without their consent. The Court negated the plaintiff employers' contentions. It was held, in the course of the judgment, that:

“So far as regards the music, the workpeople are an audience. The fact that it assists their work appears to be entirely irrelevant. While the performances are being given, the workpeople are doing two things at once. They are working and they are enjoying music as they would normally enjoy it in their leisure hours. They are, so far as the music is concerned, an audience listening to music, and the fact that they are working at the same time does not alter that. The position is like that of a housewife who listens to the music on her receiving set while she is doing her work. The matter can be tested by considering what the position would be if the proprietors of these businesses decided, with a view to keeping their workpeople in good heart and temper, from time to time to give them broadcast performances or gramophone performances after their work was over. The object would be the same, and the result in substance would presumably be the same. It would seem that precisely the same principles are applicable in the present case as if these concerts were given in the factory to the workpeople after they had laid down their tools.

*When those considerations are borne in mind, the answer to the present question appears to me to be beyond doubt. It is a question of law whether these performances are performances "in public" within the language of the statute, but, in answering that question of law, the chief guide to the court is the guide of common sense. Some cases on their facts fall on one side of the line, and some on the other. In the present case, having regard to the character of the audience and all the relevant facts which bear on the matter, I have no doubt that these performances were performances "in public." In *Jennings v. Stephens* I ventured to suggest that the primary matter to consider was the relationship of the audience to the owner of the copyright rather than the relationship of the audience to the performers. I am confirmed in that view by a consideration of the present cases. When the legislature, by the Copyright Act, conferred on the owner of copyright a monopoly, it, no doubt, intended that that monopoly should be a real, and not an illusory, right of property, and it is, therefore, in my opinion, important to consider whether a particular performance is calculated to whittle down that monopoly to any substantial extent. To take a case at one end of the scale, a purely domestic performance, or what is sometimes called a quasi-domestic performance, is not calculated to whittle down the value of the monopoly. It cannot have the substantial effect of depriving the owner of the copyright of the public from whom he receives the value of the work of his brain and his imagination. At the other end of the scale is a performance unquestionably*

in public, such as one at a public theatre or a public concert hall. Obviously, if that were permitted, it would whittle down the value of the monopoly. The monopoly is confined to performances in public, and, in considering whether a performance is in public, its effect on the value to the copyright owner of his statutory monopoly is, I venture to think, a consideration of great importance..”

These formulations have been followed, and applied in later decisions, including *Performing Right Society v. Rangers F.C. Supporters' Club, Greenock*, 1974 SC 149: 1975 RPC 626. Many of these views were approved, and followed in *Garware Plastics v. Telelink*, AIR 1989 Bom 331, where the Bombay High Court held (the facts being that copyright infringement was alleged by exhibition of films and copyrighted works, through cable network to residents of a apartment block) that:

“26. The last test which has been applied in such cases is the test of ascertaining the character of the audience in view of the purpose of the Copyright Act. The Copyright Act is meant to protect the owner of the copyright against unauthorised performances of his work, thereby entitling him to earn monetary gain from his intellectual property. The audience which watches such video films would have otherwise paid for watching the film. In fact, the audience does pay the defendants for watching the film. The author of the copyright is, therefore, directly affected as he is deprived of earnings from his intellectual property. What is more, an audience which pays for watching the film cannot be considered as a domestic audience of the person broadcasting the film.”

54. In the present case, CRI Events’ contentions that the performance is not for consideration, is inaccurate. The performers are paid some amount; according to CRI, they have to ensure that if copyrighted works are exhibited, performed or played, the appropriate authorizations are to be secured. The commercial element is clearly discernable; however, CRI does not involve itself in the specifics of this form of entertainment; it is an overall event organizer, which charges fee from its client, i.e. the company or individual, which wishes to get the event performed. Although the event sponsor does not directly have any relationship with the performer, its object in holding a dealer’s meet, or some other corporate event, is clear; it is to increase efficiency. The performance of the work, or the sound recording is not “domestic”. The event sponsor, who is the client of CRI Events, pays for these services, which include the performance of the work/ sound recording. Having regard to these facts, and the objects of the Copyright Act, it is held that such performance is “public”, and requires to be licensed. In case the performance involves playing the sound recording, authorization of the PPRS is necessary. In case the performance is of the work without the sound recording, authorization of the IPRS is

necessary. If both kinds of works are performed, the licenses from both societies have to be obtained. In the case of CRI Events, no such authorization was obtained, or given to it.

55. In the light of the above conclusions – which are *prima facie* in nature, and do not preclude the plaintiffs in both cases, from establishing and proving their case- the following directions are issued:

(i) In the Synergy suit, (i.e. CS(OS) 1185/2006) the applications for temporary injunctions, i.e. IA Nos., 6486/2006, 7027/2006 and 6487/2006 are disposed of by stating that the defendants do not have to secure a license from the plaintiffs;

(ii) In the CRI suit, (i.e. CS(OS) No.1996/2009) the applications, i.e. IA Nos. 13691/2009, 13692/2009 are disposed of with the directions that in case the defendants wish to perform the sound recording in public, i.e. play them, a license from PPRS is essential; in case the musical works are to be communicated or performed in the public, independently, through an artiste, the license of IPRS is essential. In case the defendant wishes to hold an event involving performances or communication of works of both kinds to the public, the license or authorization of both IPRS and PPRS are necessary. The defendant is accordingly restrained from communicating any of such works to the public, or performing them, in the public, without such appropriate authorization, or licensing pending adjudication of the suit.

56. All pending applications for temporary injunctions in the above two suits are disposed in terms of the above directions.

CS(OS) Nos. 1185/2006 & 1996/2009

Both the suits shall be listed before the Regular Bench, according to Roster allocation, on 23rd August, 2011, for directions.

28th July, 2011

(S.RAVINDRA BHAT)
JUDGE