

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
INTERIM APPLICATION (L) NO. 8813 OF 2021
IN
COMMERCIAL IP SUIT (L) NO. 8229 OF 2021**

Sony Music Entertainment India Private Limited ...Applicant/
Plaintiff
Versus
KAL Radio Limited & Anr ...Defendants

**Mr Janak Dwarkadas & Mr Viraag Tulzapurkar, Senior
Advocates, with Amit Jamsandekar, Vighnesh Kamat, Vaibhav
Shukla, Vinita Muley, Aishwaryajeeta Tawde, i/b VVJ Law
Partners, for the Applicant/Plaintiff.
Mr Abhishek Malhotra, for the 1st Defendant.**

**CORAM: G.S. PATEL, J
(Through Video Conferencing)
DATED: 18th June 2021**

PC:-

1. Heard through video conferencing.
2. Mr Dwarkadas for the Plaintiff makes an application for urgent ad-interim reliefs. Having heard him and Mr Malhotra for

the Defendant briefly, I am inclined to make a time-limited ad-interim order operative only for about a fortnight from today.

3. The Suit is an action in copyright infringement seeking an injunction and damages. The Plaintiff (“**Sony India**”) is part of an international conglomerate which manufactures and provides a range of products and services. Among these is its media arm, which provides film, television and music content. Sony India is the owner inter alia of various sound recordings (including the literary and musical works in those). These form part of its Indian repertoire. The 2nd Defendant is Sony Music Entertainment (“**Sony Music**”), a New York-based music label. It acquires, owns and controls copyright in various works and distributes music in various genres. Sony India is Sony Music’s exclusive licensee in India for the international music and sound recordings in which Sony Music has copyright. This is Sony India’s “international repertoire”.

4. Sony India was a member of the Phonographic Performance Limited (“**PPL**”) prior to 2010. There is no dispute that, in the past, the 1st Defendant (“**KAL Radio**”), a broadcasting organisation within the meaning of the Copyright Act 1957, previously used Sony India’s copyright-protected works under licenses it obtained from PPL. The Copyright Board, by an order and judgment of 25th August 2010, determined a license fee in regard to the compulsory licensing regime under Section 31 of the Copyright Act. There is something of a litigation history about that, but that can be looked into later, if necessary. What demands

immediate attention is Section 31-D of the Copyright Act 1957, introduced by the 2012 Amendment. It reads:

“31-D. Statutory license for broadcasting of literary and musical works and sound recording.— (1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section.

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

(3) The rates of royalty for radio broadcasting shall be different from television broadcasting and the Appellate Board shall fix separate rates for radio broadcasting and television broadcasting.

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

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

(6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners of rights.



- (7) The broadcasting organisation shall—
- (a) maintain such reports and books of account, and render to the owners of rights such reports and account; and
 - (b) allow the owner of the rights or his duly authorised agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may be prescribed.
- (8) Nothing in this section shall affect the operation of any license issued or any agreement entered into before the commencement of the Copyright (Amendment) Act 2012.”

(Emphasis added)

5. As we can see, there is now a *statutory* right to obtain a license. But it requires notice in the prescribed form to the holder of copyright, and payment of a fee (including an advance, if so ordered).

6. Various broadcasting organisations filed applications before the Intellectual Property Appellate Board (“**IPAB**”), now disbanded, seeking statutory licenses under Section 31-D read with Rule 31 of the Copyright Rules 2013. On 31st December 2020, the IPAB determined these royalty rates and the payment mechanism for statutory licensing for FM radio broadcast. There are various challenges against that order pending before the Delhi High Court. That need not detain us today.

7. On 5th February 2021, KAL Radio emailed Sony India seeking information about its copyright-protected works. On 9th



February 2021, Sony India replied saying that these copyright-protected works had been part of KAL Radio's broadcasts for many years. It had even previously reported usage. Sony India nevertheless gave KAL Radio a list.

8. On 12th February 2021, KAL Radio emailed a notice to Sony India, purportedly under Section 31-D read with Rule 29 of the Copyright Rules 2013, claiming an entitlement to a statutory license. It forwarded a cheque of Rs. 64,750/-.¹ On 24th February 2021, Sony India replied.² It said that KAL Radio's notice was not in conformity with Section 31-D and the relevant rules. The cheque for Rs.64,750/-, supposedly 25% advance for February 2021, had been quantified without basis and was bereft of the details that Section 31-D contemplated. Sony India returned the cheque and demanded that KAL Radio comply with the rules.

9. In early March 2021, while monitoring KAL Radio's broadcasts, Sony India's representative found that KAL Radio was broadcasting, on various FM radio stations, recordings from Sony India's Indian repertoire.

10. On 9th March 2021, KAL Radio emailed a royalty calculation and a log file of some of its radio channels for January 2021. It admitted use of Sony India's copyright-protected works. It also enclosed a cheque, this time for Rs.67,514/-.³

¹Ex "F", pp. 44-47.

²Ex "G", p. 48.

³ Ex "H", p. 49-51.

11. Sony India says that reports from AirCheck showed that KAL Radio had indeed been broadcasting Sony India's copyright-protected works.

12. Mr Dwarkadas submits that this constitutes infringement and is immediately actionable. KAL Radio does not have a license. It has not validly got even a statutory license. He is, he submits, immediately entitled to an ad-interim injunction.

13. Mr Malhotra took instructions over the lunch recess but those instructions were that KAL Radio wanted to press its case that it is entitled to broadcast Sony India's works. He submits that the scheme of Section 31-D entitles a broadcasting organisation to use the works 'the moment it sends a notice and payment'. He submits that the Sony India was not made out prima facie case. He also submits that the balance of convenience is clearly with KAL Radio because greater prejudice will be caused to it than to Sony India. As to the question of irretrievable prejudice, he submits Sony India can always be later compensated in money.

14. I disagree. The fact of the matter is that KAL Radio does not have even a statutory license. It cannot show that it is fully compliant with Section 31-D and Rule 29. Demonstrably, at this prima facie stage, its notice is non-compliant. The details that it is provided by its email 12th February 2021 do not conform to the requirements of Rule 29, set out below.



29. Notice to owner for communication to the public of literary and musical works and sound recordings. —

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

Provided that in case of communication to the public by way of broadcast or by way of performance of a newly published literary or musical work or sound recording or any combination thereof, which has been published within the said period of five days of such communication and which do not form part of the scheduled programmes, the notice shall be given before such communication to the public:

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

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



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

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

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

- (a) Name of the channel;
- (b) Territorial coverage where communication to public by way of radio broadcast, television broadcast or performance under sub-rule (3) is to be made;
- (c) Details necessary to identify the work which is proposed to be communicated to the public by way of radio broadcast, television broadcast or performance under sub-rule (3);
- (d) Year of publication of such work, if any;
- (e) Name, address and nationality of the owner of the copyright in such works;
- (f) Names of authors and principal performers of such works;
- (g) alterations, if any, which are proposed to be made for the communication to the public by way of radio broadcast, television broadcast or performance of the works, reasons thereof, and the evidence of consent of the owners of rights, if required, for making such alteration;
- (h) Mode of the proposed communication to public, i.e., radio, television or performance;



- (i) **Name, if any, of the programme in which the works are to be included;**
- (j) **Details of time slots, duration and period of the programme in which the works are to be included;**
- (k) **Details of the payment of royalties at the rates fixed by the Board; and**
- (l) **Address of the place where the records and books of accounts are to be maintained for inspection by the owner of rights.”**

(Emphasis added)

15. In particular, the first notice of 12th February 2021 does not have the names of the programmes in which the copyright protected works are to be included, nor the details of time-slots, durations and period of programmes in which the works are to be included. These are mandated by Rule 29. KAL Radio has only said that the works for which it seeks a statutory license ‘will be used in various radio programmes’.⁴ It does not specify how it has computed the advance. In none of the communications that KAL Radio addressed am I able to discern any logical or apparent basis of its computations. The revised calculation is marginally more than the first, but again without disclosed basis.

16. Mr Malhotra submits that there is ‘sufficient’ compliance with the Act and the Rules, and that Rule 29 — or parts of it — will need to be ‘read down’ so that strict compliance is unnecessary. Prima facie, that is entirely untenable. KAL Radio cannot decide

⁴ Ex “F”, pp. 44–47, at p. 45.

which part of the Rules it wants to apply and which it does not and simply discard those Rules that it finds inconvenient. In opposition to Sony India's copyright infringement civil action, it cannot mount a challenge to the validity of the Rules, or seek that these be read in any manner other than what their plain language and meaning demand.

17. Prima facie, the entire scheme of Sections 31 to 31-D is a departure for the general principles in copyright law in regard to licensing. These provisions force the grant of licenses under various conditions. Generally, copyright licensing is a matter of contractual volition in an arms' length transaction. A copyright-owner may assign his or her copyright in whole or in part, or may license it subject to agreed conditions. Section 31-D on the other hand, for instance, compels a copyright owner to grant a license, and the statutory regime itself sets out the terms and conditions. Section 31-D therefore deprives a copyright-owner of the freedom of choice in licensing. That is a deprivation of a species of property. For that reason, such statutory licensing is rigidly controlled by statute. Prima facie, it must follow, therefore, that the provisions of Section 31-D must receive a strict construction and there can be no room for a liberal or more free-wheeling interpretation of the kind Mr Malhotra suggests. This is, of course, only a very tentative prima facie view. Ordinarily, I would not have ventured this far at this stage. It is Mr Malhotra's submission (perhaps in a continuation of his you-have-no-choice construct) that leaves me with no other option. I must, therefore, conclude — albeit prima facie — that Mr Malhotra is not correct in his submissions. If these are to be accepted, they would drive a coach and four through the entire

edifice of the Copyright Act. Prima facie if Mr Malhotra's formulation is to be accepted, one might as well do away with all copyright protection. In effect, his submissions amounts to saying that his client can interpret the statute and the rules as loosely as it wishes, need not conform to the statutory regime, and none can deny his client a 'right' to use someone else's copyright-protected material. KAL Radio need not specify in what program the works are to be included. It need not give details of time-slots, durations and program periods. It need not provide the basis for its computations of license fees.

18. Mr Malhotra's attempt to justify this saying that FM radio shows are 'dynamic' is too feeble to warrant acceptance. It suggests that radio show hosts or radio jockeys are entirely clueless about what they are going to present on which show or when, and that content of every radio show or broadcast is entirely unknown beforehand. That is not even remotely credible. *First*, the *genre* of the radio show is an automatic filter — a jazz standard is hardly likely to feature in a Bollywood Top Hits show. *Second*, *within* a genre, the broadcasting organization has a further drilled-down choice foisted on it: it simply restricts its shows to those works in which it has a statutory license. So: in a Bollywood hits broadcast, KAL Radio would be confined to those works that do not belong to Sony India. Nobody suggests that the copyright in every single work in every single genre vests only in Sony India.

19. The 'compelling' component of Section 31-D is actually bidirectional not unidirectional. Just as a copyright owner or holder is compelled — subject to strict compliance — to comply with the

statutory licensing regime of Section 31-D and the companion rules, the statutory licensee is *also* compelled negatively to *not* use the copyright-protected works *unless* it has obtained a statutory license. That can only be done by demonstrating strict compliance with the statute and the rules.

20. Notably, Sony India has not refused the license at all. What it said in its email response was only two things. *First*, that the notice under Section 31-D by KAL Radio was defective and non-compliant. This is *prima facie* correct. *Second*, Sony India said that the basis of the computation was undisclosed. That is also *prima facie* correct.

21. There is also the third aspect, viz., that KAL Radio admittedly broadcast parts of Sony India's repertoire without a valid statutory license. That cannot be permitted to continue.

22. Further, KAL Radio's notice does not make it clear whether it intends or proposes to use only Sony India's Indian repertoire or the international repertoire (of which Sony India is the exclusive licensee from Sony Media) That is yet another lacuna in its notice.

23. I am more than sufficiently satisfied that the Plaintiff has a *prima facie* case for a time-limited ad-interim injunction in terms of prayer clause (a) at page 12 which reads thus:

(a) That pending the hearing and final disposal of the present suit, Respondent No.1, its servants, directors, agents or any other persons/entity claiming through or under them be restrained by a temporary order and injunction of this Hon'ble Court from

broadcasting/communicating to the public on the Respondent No.1's FM radio stations through the Impugned Programmes and/or illegally exploiting, the Applicant's Copyrighted works, i.e., its Indian and International repertoire, details and particulars of which are given in Exhibit B to the Plaint, without complying the provisions of Section 31-D of the Copyright Act and the Rules framed thereunder, so as to infringe the Applicant's copyright in the same in any manner;"

24. This ad-interim injunction will continue only until 2nd July 2021. Affidavit in Reply is to be filed and served on or before 23rd June 2021. Affidavit in Rejoinder, if any, is to be filed and served on or before 28th June 2021. I will hear both sides on 30th June 2021.

25. These are only prima facie views. All contentions are expressly kept open.

26. All concerned will act on production of an ordinary copy of this order.

(G. S. PATEL, J)