

## THE “*UNDERLYING*” CONUNDRUM OF COPYRIGHT IN A SOUND RECORDING

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### Abstract

*Copyright is a bundle of rights - of which the three classes of “work” i.e., a literary, dramatic, musical or artistic work; a cinematograph film; and a sound recording, are mutually exclusive. It is in this context this paper seeks to analyze the contentious issue of separate license in respect of such literary and musical works even when a license is secured from the copyright holder in the sound recording. While discussing the issue the paper also deals with the context as to how and why the issue arose and the legal and commercial framework pertaining to the rights involved being literary and musical and sound recording rights. It also seeks to discuss the various cases on the issues that has dogged the Indian Courts. Finally, the papers seek to give reasons as to why under the framework under the Copyright Act, 1957, there is indeed a requirement for obtaining a license for the “literary and musical rights” along with a license for “sound recording” in as much as sound reproduction does not lead to extinction of rights in the lyrics and musical composition.*

**Keywords:** Copyright, Sound Recording, Conundrum, Exploitation.

### 1. Introduction

Music available or heard in India today may be categorized into three broad categories, film music, non-film music and international music. Whatever be the category, music generally consists of different components or elements, made by a team of persons comprising different talents. To name, music has lyrics (or words of a song), which is written by a “*lyric writer*”; then there is the “*music composer*” who provides the melody or the tune; another category is the “*performers*”<sup>1</sup> who actually “sing” the words written by the lyric writer. Under the Copyright Act 1957,<sup>2</sup> (Act), lyric writers and music

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<sup>1</sup> The Copyright Act, 1957 (Act 14 of 1957), s. 2 (qq).

<sup>2</sup> *Id.*, s. 2(y).

composers create works, which are recognized as “literary” and “musical works” as defined under section 2(o) and 2(p)<sup>3</sup> of the Copyright Act (hereinafter the Act) respectively. The persons who “sing” (performers) have a separate “*neighbouring right*” which is termed as “Performance Rights” under section 38 of the Act.<sup>4</sup> The “author” for both a literary work is the author of the work and that of the musical work is the “composer.”

Another very important component of “*music*” is the “*sound recording*”<sup>5</sup> rights. Sound Recording Rights are derivative<sup>6</sup> rights drawn out of original copyright like literary and musical works. Courts have also recognized that a sound recording is a derivative work emanating from certain underlying works.<sup>7</sup> So, when a CD is made out of the original literary and musical works or, the same is uploaded onto any website or application, a sound recording rights gets created. In other words, once a sound recording comes into existence, it takes on a life of its own<sup>8</sup> and generates along with it another form of copyright called the sound recording copyright.<sup>9</sup> Interestingly, the “author” in relation to a sound recording is the “producer.”

Under the scheme of the Act, literary, musical and sound recordings are all “work,”<sup>10</sup> in which copyright subsists.<sup>11</sup> The Act, also permits the holder of copyright, to exploit or authorize, the exploitation of the work and do such acts as mentioned in section 14. Section 14, encompasses the “economic rights” granted exclusively to the holder of copyright. What is however, interesting to note is on one hand, “to communicate the sound recording to public” is a specific economic right granted under section 14(e)(iii) *qua* sound recording and on the other, section 14(a)(iii) permits the holder of copyright literary and musical work to “perform the work in public, or communicate it to the public.”

This, provokes and ignites the conundrum, whether the communication to the public, of a sound recording also amounts to a communication to the public, of literary and musical works, embodied in the sound recording under the Copyright Act 1957, and, if so,

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<sup>3</sup> *Id.*, s. 2.

<sup>4</sup> *Supra* note 1, s. 38.

<sup>5</sup> *Supra* note 1, s. 2(xx).

<sup>6</sup> A derivative right is the legal permission to develop a new work derived from an original work protected under copyright law.

<sup>7</sup> *Music Broadcast Pvt. Ltd. v. Indian Performing Right Society Ltd.*, (2011) 47 PTC 587.

<sup>8</sup> *Bishop v. Stevens*, [1990] 2 SCR 467.

<sup>9</sup> *Supra* note 1, s.13(1).

<sup>10</sup> *Supra* note 1.

<sup>11</sup> *Supra* note 1, s. 13(1)(a) & s. 13(1)(c).

whether a separate license in respect of such literary and musical works can be asserted by the owner of copyright in such works in addition to the license secured from the copyright holder in the sound recording.

In a digital world, that we are in today, it is primarily the “sound recording rights” that gets exploited as the instances of “performances”<sup>12</sup> where “literary” and/or “musical” rights gets exploited are occasional and limited. So, the conundrum as to exploitation of the underlying literary and musical work along with the exploitation of the sound recording, is a matter of great economic and commercial relevance.

## 2. Genesis of the Conundrum

The bedrock and cornerstone to the conundrum lies in the fact that “music” or “content” today in view of technological advancements, has huge economic and commercial value. It is also for this reason that “Copyright Law” has had a transformative journey from being the “cinderella” amongst the various rights that encompass Intellectual Property Rights (IPR), to become its “showstopper”. The ascent of Copyright started with the opening up of the Indian Economy and various measures taken towards it including issuance of Radio licenses, till then, “music rights” were exploited only through traditional mediums like Cassettes, CD’s. The impelling force however was the launch of “call back tones” and “caller tunes” by mobile companies which suddenly swelled and spiraled the commercial and economic value of music rights. The increase in valuation and demand for content, also signaled spark, glitter and sheen for music rights amongst both the owners as also people seeking to exploit such rights.

In no time, a situation arose when the holders of copyright wanted to maximize their returns on investment and the users seeking to exploit the copyright would refuse to play ball and seek out ways and means to shell out the minimum for exploitation of copyright. The Radio Licenses were given by the Government of India in the year 2001, these organizations sought and obtained licenses from both holders of copyright in both sound recording rights Phonographic Performance Limited (PPL) on one hand and literary and musical rights on the other, from Indian Performing Rights Society (IPRS), both Copyright Societies at that point of time for administering their respective rights. IPRS license gave the Radio Licenses an “infancy discount.” It was the claim of IPRS that the

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<sup>12</sup> *Supra* note 1, s. 2(q).

Radio Licensees violated the terms of the License Agreement and that in view of the change of circumstances and huge growth of Radio Industry, they were no longer entitled to the “infancy discount.” The Radio Industry countered this challenging the very right of IPRS to issue Licenses, triggering a long legal saga, a question, that been one of the most important and contentious issue that has dogged the copyright litigation roster of Indian Courts, whether exploitation of the derivative work (sound recording) also cause exploitation of the underlying works (literary and musical rights).

### **3. Flow of Music Copyrights**

The manner in which the music rights flow, depends on the category of music. In the “film music” category, although the “author” is the first producer of the lyrics and the composer the “author” of the musical composition, yet the manner in which provisions of the Act is designed, the “producer” of the “cinematograph” becomes the “first owner” of the copyright in not only the “literary and musical right” but also the “sound recording.” The “lyric writer” and the “music composer” normally is engaged based on a “contract of service” rather than a “contract for service.” In other words, the rights of the composer and the lyricist in relation to lyrics (literary works) and musical compositions (musical works) are distinct rights which vested in the film producer (who is the first owner under section 17) and such rights were components of the bundle of rights. The film producer, as the “owner” then converts the lyrics and musical compositions into a new copyright - sound recording, which also then forms part of the bundle of rights, either himself (in the cinematograph) and/or transfers the same to a sound recording company. The sound recording company then commercially exploits the said “sound recording right” through different mediums including applications, websites etc.

### **4. Broad Scheme of the Copyright Act**

The broad scheme of the Act is to provide protection not only to the creators and owners of copyright but also to the public at large. Copyright Law protects originality and any independent creation. The creators and their assignors are given exclusive rights for exploitation to the exclusion of others. We have already discussed how “copyrights” are “a bundle of rights” and each of these rights can be exploited either individually or in bundles.

The vesting of individual rights can take place collectively, but what vests are still individual rights and capable of such distinction by virtue of section 14(a) and section 14(e)

of the Copyright Act – which are also known as the “economic rights.” Thus, since individual rights are segregable, any transfer which passes on from the film producer to the sound recording company must obviously include the transfer of three separate rights namely right in lyrics, right in musical composition and right in the sound recording.

Literary Works, Musical Works, Sound Recordings and Cinematograph Films are distinct classes of works under section 13<sup>13</sup> of the Act with distinct rights under section 14 as stated earlier. Thus, when the owner of a literary and/or musical work allows the making of a sound recording under section 14(a)(iv), distinct rights arise under section 14(e) like producing different sound recording in any medium, using the same for commercial purpose, making the work available to the public etc. and thus, the right under section 14(a)(iii) as regards performing the work in public cannot impact the right enshrined under section 14(e)(iii).

It is to be noted however that the exclusive rights in section 14 are “subject to the provisions of the Act” meaning that the rights enumerated in section 14 are tampered or restricted by provisions in the Act such as, the “first owner provision” under section 17; the “assignment provisions” under section 18 & 19; the “license provisions” under section 30 read with section 30A; the “fair dealing provisions” under section 52; the “compulsory license provisions” under section 31; and so on.

The copyright in literary, musical or dramatic works comprises of (under section 14(a)), *inter alia*, the following different exclusive rights- (i) right to perform the work in public, or communicate it to the public,<sup>14</sup> (ii) right to make any cinematograph film or sound recording in respect of the work<sup>15</sup> etc. Copyright in sound recording also comprises of (section 14(e)) right to communicate it to public.<sup>16</sup>

Therefore, the “communication to the public” right under section 14(a)(iii) is distinct from and not a sub-set of the right to “make” a cinematograph film or a sound recording under section 14(a)(iv). So also, right to communicate the sound recording right to public.

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<sup>13</sup> *Supra* note 2.

<sup>14</sup> *Supra* note 1, s. 14(a)(iii).

<sup>15</sup> *Supra* note 1, s. 14(a)(iv).

<sup>16</sup> *Supra* note 1, s. 14(e).

## 5. The Basis - 1977 Supreme Court Judgment

The basis on which the argument that only a singular sound recording license is sufficient to communicate to the public and there is no need of a separate license in respect of such literary and musical works is premised on the argument that literary and musical right gets subsumed in the sound recording rights and hence the owner of copyright in musical and literary right cannot assert another license in such works in addition to the license secured from the copyright holder in the sound recording, is primarily premised on the ratio of the celebrated 1977 judgment of the Supreme Court in the case of *Indian Performing Right Society v. Eastern Indian Motion Pictures Association*<sup>17</sup> (EIMPA case) wherein it was held<sup>18</sup> that once an author/composer “parts with a portion of his copyright,” the distinct film copyrighted in favour of the film producer allows the producer to exploit the film without any further interference from the author of the literary and musical work. Therefore, applying the same logic to sound recordings, there is no requirement for obtaining a separate authorization from the owners of the literary and musical work when exploiting a sound recording embodying the literary and musical works.

### 5.1. Reliance on EIMPA Case Misplaced

The reliance in my view on EIMPA case, is quite misplaced as the EIMPA case, arose from a contest between authors/composers on the one hand and the film producers on the other, all claiming ownership of the copyright in the literary and musical works incorporated in the “sound track” of the film. It did not deal with the issue of exploitation, and if or how many copyrights would be exploited by any third party when that cinematograph film is communicated to the public. It is also interesting to note that when the said issue (as in the EIMPA) arose the members of IPRS consisted only of authors and composers. However, as a consequence of the said judgment, copyright owners (producers and their assignees *i.e.* music companies) joined IPRS and assigned the administration of the musical and literary rights in respect of communication of the said right to public to IPRS.

The essence and import of the EIMPA case, is exemplified on an analysis of the order of the Calcutta High Court in *Eastern Indian Motion Pictures Association v. IPRS*,<sup>19</sup>

<sup>17</sup> *Indian Performing Right Society v. Eastern Indian Motion Pictures Association* (1977) 2 SCC 820.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Calcutta High Court in Eastern Indian Motion Pictures Association v. IPRS*, AIR 1974 Cal. 257.

against which an appeal came to be filed in the Supreme Court, which culminated in the EIMPA case. A reading of the said judgment clarifies that the EIMPA case was a contest on ownership between authors/ composers on the one hand and the film producers on the other.<sup>20</sup> The High Court held that, in light of the employment or commissioning of the authors/composers and section 17<sup>21</sup> of the Act, the copyright in the underlying works belonged to the producer and not the authors/composers. Hence, the copyrights could not have been assigned to IPRS. It was further held that “an assignee cannot have a right higher than the right of an assignor. A composer of music for valuable consideration who composes for the first time for a cinematograph film does not acquire any copyright in the music unless there is a contract to the contrary. section 17 of the Copyright Act is the only section that speaks of the first owner of the copyright and under proviso (b) in a cinematograph film the first owner is the person at whose instance the film is made. In our opinion, therefore, when a composer of a lyric or music composes for the first time for valuable consideration for the purposes of a cinematograph film, the owner of the film at whose instance the composition is made becomes the first owner of the copyright in the composition. The composer acquires no copyright at all either in respect of the film or its sound track which he is capable of assigning. In these circumstances, assignment, if any, of the copyright in any future work is of no effect. The composer can claim a copyright only on the basis of an express agreement reserving his copyright between him and the owner of the cinematograph film.”<sup>22</sup>

The Supreme Court in the EIMPA case, in my view, only dealt with the question of ownership in as much as the Court was considering, whether the right of the lyricist and composer can be assigned and whether a producer of a cinematograph can defeat the same through a contract of service. The Supreme Court held that the rights of the author/composer could be defeated under section 17<sup>23</sup> proviso (b) or (c) and that by commissioning or employing the authors/composers, the film producer would be the first owner of copyright in the literary and musical works incorporated in the film. The authors/composers could not, therefore, assign any rights in the literary and musical works

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<sup>20</sup> *Id.*

<sup>21</sup> *Supra* note 1, s. 17.

<sup>22</sup> *Supra* note 19, para 32 and 33.

<sup>23</sup> *Supra* note 1, s. 17.



incorporated in the film to IPRS.<sup>24</sup>

## 5.2. Two Licenses or One - The Litigations

The Radio Companies, took recourse to various remedies, for redressal of their argument that once a license for the sound recording is secured from the copyright holder, there was no necessity of a separate license in respect of such literary and musical works.

The first of these, was an arbitration proceeding initiated by Entertainment Network India Private Limited (Radio Mirchi) against IPRS. The sole arbitrator (Justice Sujata Manohar) based came to pass an award holding that no license from IPRS was required to be taken. Appeals against the said award filed by IPRS is pending before the Bombay High Court.<sup>25</sup>

Then, in the case of *Music Broadcast Pvt. Ltd. v. Indian Performing Right Society Ltd.*,<sup>26</sup> the Bombay High Court held when a sound recording is aired on an FM station, the viewers do not see or hear the method or hardware used to make the sound recording because the case concerned the broadcasting of sound recordings on an FM station, hence no license of the “literary and musical rights” was needed. The Bombay High Court in the process also affirmed that there was no reason to hold that the law laid down in respect of underlying works in a cinematographic film, would not be applicable in the case of incorporation of underlying works in sound recordings. An appeal is also pending against the said judgment.

Then again, in *Radio Today Broadcasting Ltd. v. Indian Performing Rights Society*,<sup>27</sup> this issue arose in the context whether the appellant needed permission from the copyright holders of the underlying works to broadcast the sound recordings. The Calcutta High Court ruled that a royalty was required to be paid to the copyright owners of the underlying works when the sound recordings incorporating them.

The main case, however, in this saga is the case of *Indian Performing Rights Society v. Aditya Pandey Ors.*<sup>28</sup> before the Delhi High Court. The Single Judge [Justice Ravindra Bhatt (as he was then)] ruled against IPRS and held that a separate license is not

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<sup>24</sup> *Supra* note 19, para 17.

<sup>25</sup> Appeal no. 626 of 2016 and Appeal no. 628 of 2016, Bombay High Court.

<sup>26</sup> (2011) 47 PTC 587.

<sup>27</sup> *Radio Today Broadcasting Ltd. v. Indian Performing Rights Society*, (2007) 34 PTC 174.

<sup>28</sup> (2012) 50 PTC 460.



required to be procured since there is no “separate communication of the underlying literary and musical works” on the communication of a sound recording to the public, thus denying the copyright holders of the underlying works the right to receive royalty on the exploitation of the sound recording incorporating such works. In an appeal filed by IPRS, the Division Bench<sup>29</sup> of the Delhi High Court upheld the order passed by the Single Judge. The Supreme Court in the case of *International Confederation of Societies of Authors and Composers (ICSAC) v. Aditya Pandey*<sup>30</sup> held that all observations, findings and views expressed by the Delhi High Court in the original and appellate proceedings would “have no legal effect,” wherein the Court held as under:

27. The object of an interim exercise by the court is to find a reasonable solution to the matter which should govern the parties until disposal of the suit where the main controversy is required to be decided. Having perused the order of the learned Single Judge as well as the Division Bench, I am of the view that the order of the Single Judge, set out in opening part of the judgment of my learned Brother (which has been affirmed in appeal by the Division Bench of the High Court), strikes a reasonable note to find a workable solution during the pendency of the suit. I therefore fully agree with the views expressed by my learned Brother that the order of the High Court needs to be upheld.

28. However, while saying so I would like to take note of two disturbing trends which have emerged from the facts of the present cases. The suits, by now, are over 10 years old; yet, there has been no substantial progress therein. The parties to the suits seem to have lost all interest in prosecuting the same, perhaps, because the exhaustive orders at the interim stage had virtually foreclosed the issues in the suits. It is evident from the order dated 24-8-2016 passed by the Joint Registrar of the High Court in *Indian Performing Right Society Ltd. v. Aditya Pandey* that due to repeated adjournments sought on behalf of the plaintiff and on account of the failure of the plaintiff to file affidavit evidence of witnesses, the right of the plaintiff to lead evidence has been closed. In the other suits i.e., OS No. 666 of 2006 and OS No. 1996 of 2009 there has, again, been persistent defaults on the part of the plaintiffs and

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<sup>29</sup> *Indian Performing Right Society Ltd. v. Ad Venture Communication Pvt. Ltd.* (2012) 52 PTC 621.

<sup>30</sup> (2017) 11 SCC 437.

the said suits now stand transferred to the competent civil court from the Delhi High Court. The pendency of the suits, for a period of over 10 years with no progress and the conduct of the plaintiffs in not filing/placing their evidence before the learned trial Judge, though vehemently contesting the present appeals (against interim orders) are facts which are difficult to reconcile. Equally difficult is to accept the fact that the International Confederation of Societies of Authors and Composers (ICSAC), though not a party to any of the suits but have been allowed to contest the interim matter before this Court on the basis that the order of the High Court adversely affects the Societies' rights, has chosen not to implead itself as a party to the suits and pursue the same.

29. Having said what was felt required and necessary we dispose of all the appeals by holding all observations, findings and views expressed by the High Court in the original as well as appellate proceedings before it to be of no legal effect, whatsoever, insofar as the merits of the suits are concerned which will now be expedited and heard and disposed of within a year from today.

Thus, the Court held that the recording company/label, as the producer of the sound recording, has an independent copyright in its work and can thus grant permission for the broadcast or public communication of the film, including the sound recording part (as a composite work), without obtaining permission from the composer or author of the lyrics. Therefore, in support of such authorization, the recording companies alone should get the royalties for transmitting or broadcasting a song to the public through a third party (event organizers), rather than the song's lyricists and composers. The Court also acknowledged that the underlying literary and musical works that are included in a cinematic film or sound recording are protected by a distinct copyright. When a sound recording or a number of sound recordings are created, such underlying works do not cease to exist. According to the Court's interpretation of section 14(a) of the Act, the owner of copyright for literary and musical works has the only right to transmit or perform the work in public. On the other hand, the owner of a sound recording's copyright is only permitted to share the work in public communication under section 14(e) of the Act. Accordingly, the Hon'ble Court made it clear that the copyright in a sound recording that is not a component of a cinematograph film shall not impact the author's entitlement to an equal share of any royalties or other payments due for the Respondent's use of the work

in any way.

Interestingly, in the same judgment the Court also observed that post the introduction of the 2012 amendments, the legal position in this regard has changed. The court explicitly emphasized on the effect of the newly introduced section 19(10) and held that copyright holders of underlying works in sound recordings not forming a part of any cinematographic film shall have the right to receive an equal share of royalties on the exploitation of such sound recordings.

Recently, this issue also came to be urged before the Intellectual Property Appellate Board (IPAB) in relation to a Statutory License application filed by Radio Companies under section 31D of the Act.<sup>31</sup> In the said order, IPAB while providing new rates for the radio royalty system, completely overhauled the existing structure of royalty acquisition and set royalty rates for underlying works in the sound recordings when the sound recordings are broadcasted through radio.<sup>32</sup> The IPAB order is however under challenge with appeals being filed before the Division Bench of the Delhi High Court by both the Radio Companies as also the copyright holders.

Interestingly, a single judge bench of the Delhi High Court in the case of *Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd.*,<sup>33</sup> passed a verdict which denied royalty to the authors of underlying works on the exploitation of the sound recordings incorporating them. Though the infringement suits in this case were filed prior to the 2012 Amendment, the court held that even if the amendments<sup>34</sup> were to be made applicable in deciding the present case, it would not have any effect on the legal position at all.<sup>35</sup> However, subsequently this judgement has been stayed by a Division Bench of the Delhi High Court and has been directed not to be relied upon or used as a precedent in any further proceedings.<sup>36</sup>

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<sup>31</sup> Intellectual Property Appellate Board, available at: [https://ipab.gov.in/ipab\\_orders/delhi/OP-\(SEC-31D\)-1-to-9-2020-CR-NZ-and-OP-\(SEC-31D\)-1-2020-CR-WZ.pdf](https://ipab.gov.in/ipab_orders/delhi/OP-(SEC-31D)-1-to-9-2020-CR-NZ-and-OP-(SEC-31D)-1-2020-CR-WZ.pdf) (last visited on July 30, 2022).

<sup>32</sup> Adyasha Samal, "IPAB's First Statutory License Order Overhauls Radio Royalty System," *Spicy IP*, available at: <https://spicyip.com/2021/01/ipabs-first-statutory-license-order-overhauls-radio-royalty-system.html>. (last visited on July 31, 2022).

<sup>33</sup> *Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd.*, (2021) 85 PTC 190.

<sup>34</sup> New changes introduced in the Amendment of 2012 Act: Copyright Board, Relinquishment of Copyright, Compulsory Licensing, Provision for the disabled, License for Cover Version, Copyright Societies, Enforcement & Protection Measures and Provisions for Library and Library Services.

<sup>35</sup> *Supra* note 32.

<sup>36</sup> *Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd.*, 2021 SCC OnLine Del 158.

## 6. Amendments of 2012 by Copyright Act (Amendment) Act, 2012

The amendment of the Copyright Act in the year 2012<sup>37</sup> has introduced a number of provisions intended to provide relief to the authors and copyright owners of underlying works. The Parliamentary Standing Committee Report on the Copyright (Amendment) Bill of 2010,<sup>38</sup> clarifies the legislative intent. Section 1.3 of the Report enumerates the statements of objects and reasons appended to the said Bill. Clause (vi) of the said section clearly mentions that the proposed amendments seek to “ensure that the authors of the works, in particular, author of songs included in the cinematographic films or sound recordings, receive royalty for the commercial exploitation of such works.”<sup>39</sup>

The 2012 Amendment, as previously stated, considerably altered the structure of sections 18 and 19. The third and fourth proviso to section 18(1), mandates that when the author of a literary or musical work assigns his copyright for the purpose of incorporating the literary or musical work in a sound recording that is not part of a cinematographic film, he cannot assign or waive the "right to receive royalties to be shared on an equal basis with the assignee of copyright" and any agreement that seeks to assign the right to receive royalty would be void. A corresponding provision was also made in section 19(9) and section 19(10) of the Act. Section 18 and section 19, thus in a way makes the accrument of royalty in underlying works in sound recordings evident.

Interestingly, the single-judge bench of the Delhi Court while delivering the judgement *Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd.*<sup>40</sup> interpreted the term “utilization of such work in any form” in section 19(10) to mean “utilization of such work in any form other than its utilization through sound recordings.” Such an interpretation, in my view, would be misplaced, in view of the legislative intent and the very language of the provisions of the Act. A reading of section 19(9) reveals that the provision states that royalties will be paid on the use of the underlying work in whatever form, but specifically excludes the public communication of the underlying work "together with the cinematographic film in a cinema hall." section 19(10), goes on to add that royalties will be paid on any use of the underlying work in any form. If the

<sup>37</sup> The Copyright (Amendment) Act, 2012, (Act 27 of 2012).

<sup>38</sup> Parliament of India, Rajya Sabha, Department Related Parliamentary Standing Committee on Human Resource Development, 227<sup>th</sup> Report (2010).

<sup>39</sup> *Supra* note 38, para 1.3.

<sup>40</sup> *Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd.*, (2021) 85 PTC 190.

legislature had intended to exclude "utilization through sound recordings" from section 19(10), it would have stated so clearly like in the case of section 19(9) where an exemption has been made for. As a result, a reasonable interpretation of section 19(10), as well as the fourth proviso to section 18(1) and section 19(3), would lead to a conclusion that the underlying works subsumed in sound recordings that are not part of any cinematographic film do, in fact, incur royalty (through a license) when such sound recording is exploited.

### **7. Doctrine of Merger and Import of Section 13(4)**

Another argument is of that the "literary and musical rights" gets merged or subsumed within the "sound recording" and hence there is no necessity to take a separate license. This argument also, in my view, is misplaced. The counter to this argument is based on several reasons.

Firstly, section 13(4) of the Act, states that when a sound recording is made in connection with an underlying work, the sound recording's copyright does not impair the underlying work's independent copyright in any manner.<sup>41</sup> The words "separate copyright" as used in this section can be interpreted to allude to copyright in underlying works *i.e.*, literary and musical rights. Further, throughout the Act "rights" and "copyright" are treated differently, *e.g.*, sections 18(1), 18(2), 19(2), etc. Copyright is the entire "bundle" of rights in section 14(a). Maintaining the integrity of this, "copyright" would require that no single right contained in this bundle is cut down on/ restricted including the section 14(a)(iii)<sup>42</sup> right. Thus, "merger theory" propounded by the respondents is inconsistent with section 13(4).<sup>43</sup>

Secondly, the manner in which a sound recording is created also repudiates the merger argument. A sound recording embodying a literary and/or musical works can only be created with the authorization of the owner of the copyright in the works otherwise the sound recording would be an infringement and would not enjoy copyright protection [section 13(3)(b)]. The Act mandates that authorization may be given to the producer of the sound recording only in any one of the following three ways: Employment/Commissioning under section 17, assignment under section 18 and 19 and

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<sup>41</sup> *Supra* note 1, s. 13(1).

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.* at 6.

license under section 30 read with section 30A). All assignments or licenses under the Act are required per force, by virtue of section 19 of the Act, to be in writing (for licenses section 19 is to be read with section 30A of the Act). There is no basis for oral assignments or licenses under the Act. The “communication to the public” right is distinct from the right “to make a sound recording.” Each right may be assigned or licensed without the other. Therefore, the exploitation of a literary/musical work as part of a sound recording or a cinematograph film will always depend upon the terms of the license/assignment *i.e.*, contract between the owners involved. For instance, a producer may be licensed only the right to make a sound recording or a cinematograph film (the section 14(a)(iv) right), with the “communication to the public” right under section 14(a)(iii) in the literary and musical work being withheld. In terms of the Act the above “withholding” would tantamount to a “contract to the contrary” as referred to in section 17(b). In such case even a film producer in India would infringe the rights of the author. In light of the above, if the “merger theory” *qua* a sound recording, argument is accepted, and the producer of a sound recording becomes entitled by virtue of section 14(e) to do certain acts irrespective of rights accorded by section 14 (a) to literary & musical works, then sections 18, 19, 30 and 30A will have no meaning and be rendered otiose *qua* literary and musical works.

Thirdly, the principle of the “co-existence of copyrights” has been recognized since the inception of the sound recordings copyright. In *Gramophone Co. Ltd. v. Stephen Carwardine & Co.*<sup>44</sup>, the Chancery Division Court held, that a special copyright under section 19 of the Imperial Copyright Act, 1911 (the Indian Copyright Act, 1914) in favour of phonograms also allowed for the “public performance” of phonograms and that this “special copyright” was *in addition to* the copyright in the underlying works and *not to their detriment/prejudice*. Justice Maugham held that the “concept of co-existing copyrights is a familiar one in copyright law.” This principle is also seen in various clauses in the Act itself namely section 13(4), section 52 (1) (y),<sup>45</sup> section 31, section 31D and the rules made in respect of the said provision, *etc.*

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<sup>44</sup> *Gramophone Co. Ltd. v. Stephen Carwardine & Co*, [1934] 1 Ch. 450.

<sup>45</sup> *Supra* note 1, s. 54.

## 8. Conclusion

The discussion above demonstrates that there are overwhelming reasons as to why when a sound recording comprising any underlying work (that is not part of a cinematographic film) is exploited, the underlying work will undoubtedly be subject to royalties and the same may be exploited through a separate license even though a sound recording license has been obtained by the person seeking to exploit the same. If there was no legislative mandate, the Amendment Act of 2012 makes it explicit, loud and clear and rightly so, why should the authors and composers who created the music be deprived of their due. The need for the same was nicely summed up in the speech of Mr. Kapil Sibal (the then Minister for Human Resource Development), while moving the motion for consideration of the Copyright (Amendment) Bill, 2010, wherein he said: “We are in the midst of a new era, which I call the digital era. We need to understand its complexity and to ensure that key stakeholders are protected and are conferred with rights, so that they could take benefit of the new technologies in this new era. We have been witnessing a situation in the past where certain key stakeholders have had access to rights and other stakeholders, who are the creators of intellectual property, have been denied that access.”<sup>46</sup>

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<sup>46</sup> Rajya Sabha, “Supplement to Synopsis of Debate, Dated May 17, 2012”, *available at*: <http://164.100.47.5/newsynopsis1/englishsessionno/225/Supp.%20Synopsis%20English%20dated%2017.5.pdf> (last visited on July 31, 2022).