

# THE BACKGROUND SCORE TO THE COPYRIGHT (AMENDMENT) ACT, 2012

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*The Copyright (Amendment) Act, 2012 stands to correct the legislative imbalance of rights assigned to composers and lyricists and is a path-breaking remedy for the copyright regime in India. The build-up to the amendment demonstrates the undying efforts of the otherwise passive composers and lyricists. In order to understand the context of the amendment and the manner in which these new provisions are likely to be interpreted by courts, the paper attempts to appreciate Mr. Javed Akhtar's contribution to the movement and describes the long, contentious history between authors and music labels and the nature of their conflict. The panacea was sought in the form of a legislative amendment addressing the concerns of the composers and lyricists for the purpose of protecting their rights. These include protecting the composers and lyricist from unfair contracts through a statutory right to remuneration, protection from the assignment of copyrights in future technologies by the authors and a change in the manner in which copyright societies were administered, as they were primarily controlled by the music labels. However, the extent to which the amendments will succeed in achieving its objectives would largely depend upon the collective efforts of the authors and the judiciary alike.*

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\* Prashant Reddy T., B.A.LLB (Hons.), National Law School of India University, Bangalore; Masters of Law (Law, Science & Technology) Candidate 2013, Stanford Law School. Most of the primary sources used in this article were secured by filing applications with the Copyright Office under the Right to Information Act, 2005 during my time as a Research Associate to Prof. Shamnad Basheer, the Chair Professor for IP Laws at the WB National University of Juridical Sciences, Kolkata (NUJS). The original intent of the RTI applications was to scrutinize some of the regulatory filings of copyright societies but due to either an act of commission or omission, I was given partial copies of an investigation being conducted by the Registrar of Copyrights into the affairs of copyright societies. This article would never have been completed without the gracious assistance of several people. In particular, I am indebted to Prof. Basheer, for convincing the Copyright Office that the RTI Act was not a figment of my imagination and urging them to respond to my initial RTI applications. I am also grateful to Mr. Manab Ghosh at NUJS, who took care of all the logistical work involved in filing the RTIs, collating the responses and scanning them into a digital format for wider public dissemination on Spicy IP. Without Manab *da*, I would have probably never even found the post offices in Kolkata. I would also like to thank Dr. Silke Von Lewinski, Achille Forler, Ananth Padmanabhan (Advocate, Madras High Court) and the readers of Spicy IP for their comments and pointers on earlier versions of this article which were published on Spicy IP. Last but not the least I would like to thank the Editors of the NUJS Law Review, especially Ms. Aparajita Lath, for all their editorial assistance. It goes without saying that all mistakes, if any, remain mine. Disclosure: During the course of this paper I was professionally consulted by a music publisher on the history of Indian copyright societies.

## I. INTRODUCTION

On August 24, 2012, the Parliament of India hosted a rare event - a 'shukrana' or a concert of gratitude, by some of the most famous musicians and lyricists, who had lobbied with the Parliament for the enactment of the Copyright (Amendment) Act, 2012 ('Copyright Amendment').<sup>1</sup> Unlike previous amendments to the Indian Copyright Act, which was originally enacted in 1957, the debate over the amendments in 2012, was public and vocal, leading to several divisions within Bollywood.<sup>2</sup> For the first time in the history of Indian copyright law, musicians and lyricists ('authors') headed by the noted poet & lyricist, Javed Akhtar, shed their passive silence on the subject of copyright law and lobbied with the Parliament to amend the law in their favour.<sup>3</sup>

Much of the debate played out like a conventional Bollywood movie, where the 'small guys' would take on the might of a massive industry with deep pockets and end up winning hands down. In this case, the battle was one wherein a handful of musicians and lyricists took on the combined might of the biggest music labels in India and concluded it with a victory.<sup>4</sup> At one point of time, the producers of Bollywood cinema and music labels felt so threatened by the amendments that they almost hit the streets in protest – a first for the debate on copyright law in India.<sup>5</sup> Despite this stiff opposition from film producers and music labels, our Parliament which otherwise agreed on precious little, unanimously enacted the Copyright Amendment to bring about revolutionary

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<sup>1</sup> Gargi Parsai, *Music Industry's Shukrana for MPs*, THE HINDU (New Delhi) August 24, 2012, available at <http://www.thehindu.com/news/national/article3813111.ece> (Last visited on December 18, 2012).

<sup>2</sup> Subhash K Jha, *Stop Interfering, Aamir: Javed Akhtar*, THE TIMES OF INDIA Feb 16, 2010, available at [http://articles.timesofindia.indiatimes.com/2010-02-16/news-interviews/28118553\\_1\\_javed-akhtar-aamir-khan-javed-saab](http://articles.timesofindia.indiatimes.com/2010-02-16/news-interviews/28118553_1_javed-akhtar-aamir-khan-javed-saab) (Last visited on December 18, 2012).

<sup>3</sup> IBN Live, *Lata Mangeshkar Joins Javed Akhtar's Fight for the Copyright Bill*, May 21, 2012, available at <http://ibnlive.in.com/news/lata-mangeshkar-joins-javed-akhtars-fight-for-the-copyright-bill/260010-8-66.html> (Last visited on December 18, 2012).

<sup>4</sup> Vickey Lalwani, *Industry Divided on Copyright Amendment*, THE TIMES OF INDIA (Mumbai) May 20, 2012, available at [http://articles.timesofindia.indiatimes.com/2012-05-20/news-and-interviews/31779033\\_1\\_javed-akhtar-lyricists-amendment](http://articles.timesofindia.indiatimes.com/2012-05-20/news-and-interviews/31779033_1_javed-akhtar-lyricists-amendment) (Last visited on December 18, 2012); See also Bollywood Life, *Javed Akhtar Wins the Fight for Copyright Amendment Bill*, May 18, 2012, available at <http://www.bollywoodlife.com/news-gossip/javed-akhtar-wins-the-fight-for-copyright-amendment-bill/> (Last visited on December 18, 2012).

<sup>5</sup> *Filmdom up in Arms against Copyright Act Bill*, THE TIMES OF INDIA (Hyderabad) June 10, 2012, available at [http://articles.timesofindia.indiatimes.com/2012-06-10/hyderabad/32155355\\_1\\_film-industry-royalty-trade-bodies](http://articles.timesofindia.indiatimes.com/2012-06-10/hyderabad/32155355_1_film-industry-royalty-trade-bodies) (Last visited on December 18, 2012); See also Shabana Ansari, *Copyright Act: Filmmakers Decide to Take Protest Ahead*, DNA (Mumbai) December 25, 2010, available at [http://www.dnaindia.com/mumbai/report\\_copyright-act-filmmakers-decide-to-take-protest-ahead\\_1485842](http://www.dnaindia.com/mumbai/report_copyright-act-filmmakers-decide-to-take-protest-ahead_1485842) (Last visited on December 18, 2012).

changes to the Indian copyright law.<sup>6</sup> Even the listing of the Bill for debate and its subsequent passing by the Parliament was not without drama.<sup>7</sup>

In the ordinary course of events, a reading of the report of the Parliamentary Standing Committee on the Copyright (Amendment) Bill, 2010 ('Bill') along with the parliamentary debates on the subject, should have provided future generations with the historical and political context of the amendments. Unfortunately, that is not the case with the Copyright Amendment. While the Standing Committee's report does provide some background for the amendments dealing with the rights of authors in the music industry, the parliamentary debates reveal clueless Parliamentarians, save for Mr. Javed Akhtar, who were only vaguely aware of the fact that some of the most famous musicians were getting exploited by music labels and copyright societies.<sup>8</sup>

It is in this backdrop that this article tries to examine the historical reasons for the manner in which the Copyright Amendment was drafted and more importantly, the reasons that pushed the ordinarily passive composers and lyricists to lobby for the revolutionary amendments. In particular, the first part of this paper will explain the key events in Javed Akhtar's skirmishes with copyright law and his losing battle at the Indian Performing Right Society ('IPRS'), a copyright society which was originally under control of composers and lyricists before it was taken over by music labels – an act which sparked off the lobbying efforts behind the Bill. Understanding Akhtar's experience is important because he played a key role in lobbying for the amendments.

The second part of the article will deal with the substantial law behind the amendments, especially the shift that the amendments made from an Anglo-Saxon model of copyright law to a more European style of *droit d'auteur* model, wherein the author's rights are now protected under very strong statutory remuneration rights. Although lopsided contracts appear to have been one of the primary reasons for the amendments, technology had a significant

<sup>6</sup> Shawn Fernandes, *Amendment to Indian Copyright Act Passed in Parliament*, ROLLING STONE (India) May 23, 2012, available at <http://rollingstoneindia.com/amendment-to-indian-copyright-act-passed-in-parliament/> (Last visited on December 18, 2012).

<sup>7</sup> Subhash K Jha, *The Drama Behind Copyright Amendment Bill*, THE TIMES OF INDIA May 22, 2012, available at [http://articles.timesofindia.indiatimes.com/2012-05-22/news-interviews/31815651\\_1\\_parliamentary-affairs-full-support-lok-sabha](http://articles.timesofindia.indiatimes.com/2012-05-22/news-interviews/31815651_1_parliamentary-affairs-full-support-lok-sabha) (Last visited on December 18, 2012).

<sup>8</sup> Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report On The Copyright (Amendment) Bill, 2010, November 23, 2010, available at <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf> (Last visited on December 18, 2012) (It was presented to the Rajya Sabha on November 23, 2010 and laid before the Lok Sabha on November 23, 2010); Official Debates of Rajya Sabha, *The Copyright (Amendment) Bill, 2010*, available at [http://rsdebate.nic.in/bitstream/123456789/603476/1/ID\\_225\\_17052012\\_p443\\_p496\\_25.pdf#search="Javed Akhtar"](http://rsdebate.nic.in/bitstream/123456789/603476/1/ID_225_17052012_p443_p496_25.pdf#search=) (Last visited on May 23, 2013); See *infra* note 22, Part II (Even the Oscar winning composer, A.R.Rahaman, was unable to obtain a royalty-sharing agreement with T-Series (the biggest label in the music industry)).

role to play in the overall calculations, especially the booming market for mobile ringtones. The music labels have condemned most of these amendments as unreasonable restrictions on the fundamental right to transact business in the music industry, especially when they were the ones investing capital and bearing the risk of failure.<sup>9</sup>

Whether the above discussed restrictions can be deemed to be unreasonable or not, will depend, at least partially, on the history of unequal relations between the authors and music labels. Towards this end, this article sets out on the task of describing the long and tortured history between them. It is important to understand this relationship and the nature of the conflict between these two important players, in order to understand the context of the amendments and the manner in which these new provisions are likely to be interpreted by courts.

## II. A BASIC PRIMER ON COPYRIGHT TRANSACTIONS RELATING TO INDIAN ‘FILM MUSIC’

Given the esoteric nature of copyright law, it may help to explain the basics of Indian copyright law in the context of Bollywood. This explanation is significant because unlike other music markets around the world, film music constitutes the largest chunk of not only the Indian music industry but also the Indian cultural market space.<sup>10</sup> A single music CD of the latest Bollywood block-buster that you pick-up at a music shop or download from the internet is a bundle of different rights, each of which is granted separate protection under the Copyright Act, 1957 (‘Copyright Act’). This bundle of rights usually extends to the three standard ‘works’ in any music CD, namely musical work, literary work and sound recording.

The ‘musical work’<sup>11</sup> is the musical melody and the ‘literary work’<sup>12</sup> is the lyrics that are sung alongside the musical work. Every musical and literary work is protected separately by an individual copyright, which vests in the owner of the copyright certain specific rights such as the right to reproduce or perform a work.<sup>13</sup> As per the Copyright Act, the composer of the

<sup>9</sup> *Id.*, ¶9.3, ¶ 10.4.

<sup>10</sup> See generally Prachi Pinglay, *Plans to Start Indian Music Awards*, BBC NEWS (Mumbai) December 10, 2009, available at [http://news.bbc.co.uk/2/hi/south\\_asia/8405891.stm](http://news.bbc.co.uk/2/hi/south_asia/8405891.stm) (Last visited on May 30, 2013).

<sup>11</sup> The Copyright Act, 1957, § 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.

<sup>12</sup> The Copyright Act, 1957, § 2(o): “literary work” includes computer programmes, tables and compilations including computer literary data bases.

<sup>13</sup> The Copyright Act, 1957, § 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

musical work is deemed to be the ‘author’ of the musical work and the person penning the lyrics is deemed to be the ‘author’ of the literary work.<sup>14</sup>

The third ‘work’ is ‘sound recording’ which is created when the musical work and the literary work are recorded onto a fixed medium such as a CD or a cassette in a recording studio.<sup>15</sup> The producer responsible for the recording is deemed to be the ‘author’ of the sound recording.<sup>16</sup>

Therefore, a simple CD will have at least three different copyrights – one belonging to the composer of the musical work, one belonging to the author of the lyrics and another belonging to the producer of the sound-recording. While authorship of a work can never change, the ownership of any of these copyrights can change depending on the contractual obligations of the authors. This has been further discussed in detail in the paper.

In the case of film music, the composer, lyricist and producer of the soundtrack may license to the producer of the cinematograph film, only the rights to synchronize their works with the cinematograph film. They may retain the right to exploit their works in other forms such as ringtones for mobile phones and public performances in hotels and restaurants. § 13(4) of the Copyright Act recognizes the fact that a ‘sound-recording’ incorporated in a cinematograph film can continue to have an individual copyright, separate and distinct from the copyright in the cinematograph film.<sup>17</sup> Similarly, this provision also recognizes that a musical work and literary work incorporated in a ‘sound-recording’ can have individual copyrights that are distinct from the copyright in the sound recording.<sup>18</sup> This would mean that the law recognizes each category of works as a separate property right that is protected by itself

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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).

<sup>14</sup> The Copyright Act, 1957, § 2(d)(i) & (ii): “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.

<sup>15</sup> The Copyright Act, 1957, § 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.

<sup>16</sup> The Copyright Act, 1957, § 2(d) (v): “author” means (v) in relation to a cinematographer sound recording the producer.

<sup>17</sup> The Copyright Act, 1957, § 13(4): The copyright in a cinematograph film or a [sound recording] 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 [sound recording] is made.

<sup>18</sup> *Id.*

despite being incorporated into another work. Thus, the composer of a musical work or the author of a literary work can continue to maintain copyright in their works despite licensing the same to the producer for the creation of a ‘sound-recording’. The same stands true for a ‘sound recording’ that is incorporated into a cinematograph film.

In the case of Bollywood, the producer of the cinematograph film usually owns the copyright in the ‘sound-recording’. Unless, these film producers have the capacity to market their ‘sound-recordings’ (CDs, ringtones etc.), the normal industry practice is to licence or assign the copyrights in these ‘sound-recordings’ to music labels such as Saregama, T-Series (Super Cassettes Industries Ltd.), Tips etc.

An illustrative example of ownership of the copyright in different works in a typical Bollywood soundtrack is as follows: In *Om Shanti Om* (the ‘super hit’ movie released in 2007), the music was composed by the composer duo, Vishal-Shekhar, lyrics were authored by Javed Akhtar and the producers of the sound recording were Shah Rukh Khan & Gauri Khan, both of whom were also the producers of the movie.<sup>19</sup> The music label responsible for publishing and marketing the music was T-Series. As explained earlier, the concept of authorship is distinct from ownership and in this particular case, T-Series owned the copyrights in the music, lyrics and the sound recording.<sup>20</sup>

In India, composers and lyricists often assign away their entire copyright to the producer of a movie for a one time lump-sum payment.<sup>21</sup> According to some insider accounts from the music industry, in the seventies, there were several composers and lyricists who entered into royalty sharing agreements with producers because producers often lacked the finances to purchase the entire copyright in the music. For the last few decades however, it is rare for a composer or lyricist to assign his copyright to a producer, subject to a royalty sharing arrangement. For instance, the Oscar winning A.R. Rahman, who composed the music for *Slumdog Millionaire*, is one such author who has the market power to claim a share of royalties, but even Rahman was unable to take on the biggest labels in the music industry such as T-Series.<sup>22</sup> It was reported that Rahman was the original choice for composing the music used

<sup>19</sup> See Musicconnect, *Om Shanti Om*, available at [http://www.musicconnect.com/mreview/om\\_shanti\\_om\\_music.php](http://www.musicconnect.com/mreview/om_shanti_om_music.php) (Last visited on December 28, 2012).

<sup>20</sup> One India Entertainment, *T-Series owns Om Shanti Om Music Rights*, July 27, 2007, available at <http://entertainment.oneindia.in/music/indian/2007/om-shanti-om-t-series-270707.html> (Last visited on December 18, 2012).

<sup>21</sup> See *A Different Tune*, FRONTLINE June 30- July 13, 2012, available at <http://www.frontline.in/static/html/fl2913/stories/20120713291310000.htm> (Last visited on May, 25 2013).

<sup>22</sup> Reuters, *A.R. Rahman Wins Oscar for “Slumdog”*, February 23, 2009, available at <http://in.reuters.com/article/2009/02/23/idINIndia-38155020090223> (Last visited on December 18, 2012).

in *Om Shanti Om* but that he had to drop out because T-Series refused to enter into a royalty sharing agreement with him.<sup>23</sup>

One possible reason why Indian composers and lyricists have weaker bargaining power compared to their counterparts in developed countries, such as the U.S. and U.K., is the absence of the institution of ‘music publishers’. The term broadly refers to agents specializing in representing composers and lyricists in marketing and valuing their music, in negotiating licensing deals with third parties and ensuring royalty collections from copyright societies.<sup>24</sup> The western model of ‘music publishers’ works to the relative advantage of the lyricists and composers as the revenue of publishers bears a strong nexus with those earned by composers and lyricists, thereby giving the former an incentive to aggressively protect the interests of the latter and act as a shield against predatory music labels.<sup>25</sup> The lack of such an institution in India may have contributed to the weak bargaining powers of Indian composers and authors. With this basic understanding of the Indian music industry, the paper shall move to the history of the amendments in the next part, starting with Mr. Akhtar’s role in the same.

### III. THE ROLE OF AKHTAR IN LOBBYING FOR THE COPYRIGHT (AMENDMENT) ACT, 2012

It is impossible to narrate the history of the Copyright (Amendment) Act, 2012 without referring to the key role played by Javed Akhtar, one of India’s most noted, award winning lyricist/poet and public intellectuals.<sup>26</sup> As mentioned earlier, Mr. Akhtar was for all purposes, the face and the voice of the lobbying effort for greater protection of the rights of composers and lyricists.<sup>27</sup> His efforts caused much turmoil in the music industry and at one point, several powerful lobbies in the movie industry, especially

<sup>23</sup> Subhash K Jha, *Rahman, Fights for Copyright of his Music*, THE TIMES OF INDIA (Lucknow) October 12, 2006, available at <http://timesofindia.indiatimes.com/articleshow/2161297.cms> (Last visited on December 18, 2012).

<sup>24</sup> See Music Publishers Association, *Frequently Asked Questions*, available at <http://www.mpaonline.org.uk/FAQ> (Last visited on December 18, 2012) (The term is wrongly associated with music labels in India. Please note that later in the paper, the term ‘music publisher’ when used in the context of the governing rules of IPRS, has a different meaning which will be explained later in the paper).

<sup>25</sup> See generally TIM BASKERVILLE & DAVID BASKERVILLE, *MUSIC BUSINESS HANDBOOK AND CAREER GUIDE* (2009).

<sup>26</sup> See IMDb, *Javed Akhtar*, available at <http://www.imdb.com/name/nm0015287/> (Last Visited on December 30, 2012) (Provides for more information about Javed Akhtar’s works).

<sup>27</sup> See *Good that Copyright Bill Being Taken Up in Parliament: Akhtar*, THE INDIAN EXPRESS May 14, 2012, available at <http://www.indianexpress.com/news/good-that-copyright-bill-being-taken-up-in-parliament-akhtar/949268/> (Last visited on December 18, 2012) (“I am very happy that the copyright bill has been presented in the Parliament and I just hope that it passes. I have been fighting for it for two years. People in Parliament recognise the bill as Javed Akhtar’s bill now”).

production houses, threatened to stop working with him and several of them eventually did.<sup>28</sup> This was a real threat because the production houses were wary of Mr. Akhtar's amendments. Further, there was also the issue of the music labels, some of which were so big that they were also doubling up as producers of Bollywood movies.<sup>29</sup>

It helped Mr. Akhtar, that at some point of time during his efforts, he was nominated by the President of India, under Article 80 of the Constitution, to be a member of the Rajya Sabha, the Upper House of Parliament.<sup>30</sup> This gave Mr. Akhtar unrestricted access to politicians across the political spectrum and more importantly, access to key bureaucrats in the Central Government.

For most part, Mr. Akhtar had his task cut out since Kapil Sibal, the Minister for Human Resources & Development, who was responsible for piloting the Bill through both Houses of Parliament, was not the most popular minister with the opposition or for that matter with his own party. This is because he was trying to push through some very unpopular reforms to the Indian education system.<sup>31</sup> During an earlier, aborted attempt to pass the Copyright Bill, Mr. Sibal was attacked by the opposition for an alleged 'conflict of interest' in the content of the bill, since his son, a leading lawyer, represented one of the music labels which was allegedly going to benefit from one of the amendments regarding version recordings.<sup>32</sup> However, when the Bill was finally taken up

<sup>28</sup> Subhash K Jha, *The Film Industry has Boycotted Me*, MID DAY (Mumbai) May 2, 2012, available at <http://www.mid-day.com/entertainment/2012/may/270512-The-film-industry-has-boycotted-me.htm> (Last visited on December 18, 2012).

<sup>29</sup> Bollywood Hungama News Network, *T-Series All Set to Get into Film Production in Big Way with Patala House*, available at <http://www.bollywood.com/node/17606> (Last visited on December 18, 2012).

<sup>30</sup> The Constitution of India, 1950, Art. 80(3): The members to be nominated by the President under sub clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely: literature, science, art and social service (This provision requires the President of India to nominate to the Rajya Sabha, the Upper house of Parliament, twelve Indian citizens who have 'special knowledge' or 'practical experience' in the fields 'literature, science, art and social service'. The President's nominations are usually based on the recommendation of the Council of Ministers. To be nominated to the Rajya Sabha was an enormous recognition of Javed Akhtar's contribution to the arts in India and as such was an indicator of the enormous respect that he enjoyed in the eyes of the Central Government); See ET Bureau, *Mani Shankar, Javed Akhtar Nominated to Rajya Sabha*, THE ECONOMIC TIMES March 20, 2010, available at [http://articles.economicstimes.indiatimes.com/2010-03-20/news/27627121\\_1\\_theatre-personality-rajya-sabha-javed-akhtar](http://articles.economicstimes.indiatimes.com/2010-03-20/news/27627121_1_theatre-personality-rajya-sabha-javed-akhtar) (Last visited on December 18, 2012).

<sup>31</sup> *Kapil Sibal Blames Opposition for Lack of Progress in Reforms in Education*, THE ECONOMIC TIMES September 25, 2012, available at [http://articles.economicstimes.indiatimes.com/2012-09-25/news/34082826\\_1\\_accreditation-bill-education-bills-education-sector](http://articles.economicstimes.indiatimes.com/2012-09-25/news/34082826_1_accreditation-bill-education-bills-education-sector) (Last visited on December 18, 2012); See also ET Bureau, *Education Tribunal Bill: Sibal Shoots Himself in the Foot*, THE ECONOMIC TIMES September 2, 2010, available at [http://articles.economicstimes.indiatimes.com/2010-09-02/news/27598552\\_1\\_education-tribunal-bill-minister-congress](http://articles.economicstimes.indiatimes.com/2010-09-02/news/27598552_1_education-tribunal-bill-minister-congress) (Last visited on December 18, 2012).

<sup>32</sup> Sumathi Chandrashekar, *Copyright Bill Interrupted by "Conflict of Interest"*, December 13, 2011, available at <http://spicyipindia.blogspot.in/2011/12/>



for debate in May, 2012, even members of the opposition participating in the debate commended the minister for moving the amendments and commented on how they rarely got a chance to support a Bill moved by him.<sup>33</sup>

As evidenced by the parliamentary debates, Mr. Akhtar had quite obviously managed to ‘sell’ to the political class a very convincing story of struggling composers and lyricists who were being ruthlessly exploited by the faceless music labels, since almost every Member of Parliament who spoke during the debate, referred to the starving authors and composers.<sup>34</sup>

One of the key elements of Mr. Akhtar’s story, and this paper, was the takeover of the Indian Performing Right Society. In several interviews prior to, and post the enactment of the amendments, Mr. Akhtar repeatedly narrated the story of how music labels had covertly taken over IPRS and that the IPRS had subsequently stopped paying royalties to lyricists and composers.<sup>35</sup> The roots of Mr. Akhtar’s views of the takeover can be traced to the time when his election to the Board of IPRS, in 2004, was challenged by Saregama, one of the biggest Indian music labels, in a lawsuit which continues till date.<sup>36</sup>

In addition to this event, there appears to be another event which must have impacted Mr. Akhtar, but one which he never really refers to in his interviews. The event in question was his rather embarrassing loss in a copyright infringement suit that he had filed against a Bollywood producer

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copyright-bill-interrupted-by-conflict.html (Last visited on December 18, 2012).

<sup>33</sup> See Lok Sabha, *Debate on Copyright Amendment Bill 2010*, May 17, 2012, available at <http://164.100.47.5/newdebate/225/17052012/20.00pmTo21.00pm.pdf> (Last visited on December 19, 2012) (During the debates, M.P. Achutan, Member of Parliament (CPI)(M), in the Rajya Sabha, stated as follows: “I support this Bill. Generally, we do not get an opportunity to support a Bill piloted by Mr. Kapil Sibal. Now, after some changes, he has brought the Bill. Apart from the suggestions given by the Standing Committee, he has made so many amendments, which I support”).

<sup>34</sup> See Lok Sabha, *Debate on the Copyright Amendment Bill*, May 22, 2012, available at <http://164.100.47.132/newdebate/15/10/22052012/Fullday.pdf> (Last visited on May 1, 2013) (Kapil Sibal made the following comments: “The result was that under the Copyright Act, instead of the artist, the producer became the sole author of the copyright. [...] The result was that the poor author and the poor creator of the copyright did not get any share of the profit. According to me, this is a historic injustice to the creators”. Also, Shashi Tharoor made the following comments: “But for all, one knows the composer of yesteryear, the singer of yesteryear, the person who wrote the lyrics, the composer who created the tune, they may be dying in penury because they are excluded from any of the benefits, any share of such income by the companies. [...] This is a very positive development in the Bill and I would particularly like to draw attention to it because the works are ultimately the intellectual property of the creators and they should have a say in what is done with their music, how it can be altered, remixed or changed”).

<sup>35</sup> See Aparna Joshi, *Interview with Javed Akhtar, Lyricist*, SOUND BOX, Vol. 1, Issue 7, February 2011, 20; See also Rahul Bhatia, *The Quiet Royalties Heist*, OPEN March 29, 2011, available at <http://www.openthemagazine.com/article/art-culture/the-quiet-royalties-heist> (Last visited on December 18, 2012).

<sup>36</sup> *Id.*, Aparna Joshi.

before the High Court of Delhi. The case in question was that of *Javed Akhtar v. Magic Mantra Vision*,<sup>37</sup> where Mr. Akhtar unsuccessfully sued a production house which had used his lyrics in the music of a cinematographic film called *Pyar Ki Dhun* (which it had produced) for copyright infringement. Mr. Akhtar did not dispute the fact that he had written and assigned to the defendants, only the synchronization rights to the lyrics for seven of the songs in the movie.<sup>38</sup> However, he claimed that he had retained copyright over all the remaining rights apart from the synchronization rights i.e., the rights to make and sell the music in the form of cassettes or tapes.<sup>39</sup> According to Mr. Akhtar, the reason that he was suing the production house was because they had, without his authorization, assigned to Saregama (a music label), even those rights which Mr. Akhtar had allegedly not licensed to the production house. The defendants, however, produced a 'letter' to the Court which was from Mr. Akhtar, wherein he had assigned to them all the rights in the lyrics, including the publishing rights and not just the synchronization rights as alleged by Mr. Akhtar in his initial plaint.<sup>40</sup> When confronted with what appeared to be irrefutable evidence, Mr. Akhtar reportedly responded stating that while it was his signature that was affixed on the 'letter', he "had no idea that he was being made to sign an agreement, giving away or assigning or transferring his rights".<sup>41</sup> Ultimately, Mr. Akhtar withdrew the lawsuit and the Court imposed a fine of Rs. 1 lakh (Rs. 1,00,000) on him for causing 'hardship' to the defendant.<sup>42</sup>

This particular case is a typical example of a transaction between a 'legally illiterate' composer or lyricist and the 'legally savvy' production house. Most artists, including the popular ones like Mr. Akhtar, had no idea about the copyright contracts they were entering into with producers, and unfortunately they never seemed to have employed anybody to advise them on the same. While Mr. Akhtar almost never references this case in his interviews, it appears to have substantially impacted the design of the copyright amendments passed in 2012 and in a way, goes way beyond the issue of the composer and lyricists losing control of IPRS.

#### IV. AKHTAR'S MAIN DILEMMA WITH THE PRE-2012 COPYRIGHT LAW

Briefly put, Akhtar had four main problems with the copyright law as practiced and interpreted in India. *Firstly*, there was the problem of ownership of copyrights in film music, especially the concept of first ownership which was also known as the work-hire doctrine. *Secondly*, the weak

<sup>37</sup> CS (OS) NO. 1743/2005 (Delhi H.C.), August 21, 2006, (Unreported).

<sup>38</sup> *Id.*, ¶ 6.

<sup>39</sup> *Id.*, ¶ 3.

<sup>40</sup> *Id.*, ¶ 4.

<sup>41</sup> *Id.*, ¶ 5.

<sup>42</sup> *Id.*, ¶ 7.

negotiating power of composers and lyricists was also problematic. *Thirdly*, the emergence of mobile ringtones as a new market for composers also raised certain issues. *Lastly*, there was also the problem of music labels taking over the IPRS and expelling composers & lyricists from these societies. These issues will be discussed below in their historical context.

#### A. THE PROBLEM OF OWNERSHIP OF COPYRIGHTS IN FILM MUSIC: WHO OWNS THE 'MUSIC & LYRICS' OF A SOUNDTRACK USED IN A MOVIE?

One of the most confusing issues in Indian copyright law has been the question of ownership of copyright in music and lyrics of a soundtrack used in a movie. A large part of this confusion stems from a Supreme Court judgment, rendered in 1977, in *Indian Performing Right Society v. Eastern India Motion Pictures Association* ('IPRS case').<sup>43</sup> This was a case which was initially decided by the Copyright Board before it was overturned by the High Court of Calcutta, whose judgment was then upheld by the Supreme Court of India.<sup>44</sup>

The origins of the dispute can be traced to when IPRS published in the *Gazette of India* and the *Statesman*, a tariff scheme laying down certain licence fees.<sup>45</sup> These licence fees were going to be charged for the public performance of musical works and lyrics that were a part of the IPRS's *repertoire*. Apart from the foreign music and lyrics which were owned by foreigners, the remaining music and lyrics were owned by Indian composers & lyricists who used to compose most of their music for various Indian movies, be it Bollywood or other regional cinema.

Once the tariff scheme was published by the IPRS, the producers of various cinematograph films raised an objection before the Copyright Board, a judicial tribunal, on the grounds that the lyricists and composers did not own any copyright and the associated public performance right, in the music and lyrics which had been incorporated into cinematographic films.<sup>46</sup> Instead, the producers argued that they owned the copyright and all related rights in the music and lyrics of the works that IPRS claimed as part of its *repertoire*.<sup>47</sup>

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<sup>43</sup> 1977 SCR (3) 206.

<sup>44</sup> *Eastern India Motion Pictures Association v. Indian Performing Right Society*, AIR 1974 Cal 257 (It was upheld by the Supreme Court in *Indian Performing Right Society v. Eastern India Motion Pictures Association*).

<sup>45</sup> *Indian Performing Right Society v. Eastern India Motion Pictures Association*, 1977 SCR (3) 206, 211.

<sup>46</sup> *Id.*, 211, 212.

<sup>47</sup> *Id.*

This argument was premised on the simple claim that since producers commissioned authors to create the music and lyrics for the movies, the resulting works would necessarily be owned by the producer who has commissioned the creation of the work. On the other hand, the authors argued that while the producers would own the synchronization rights of the music with the movie, the remaining rights, including the public performance rights, independent of its performance with the movie, would remain with the authors.<sup>48</sup>

The above argument made by the producers and the subsequent reply by the authors, which will be discussed below, captures one of the classic debates of copyright law- whether the author who has created the work or the publisher/producer who has commissioned the author to create the work in question, should be entitled to own the copyright in that work.<sup>49</sup> Typically, in the context of copyright law, one would expect the author of the work to naturally have ownership of the work. This is usually the case, except when there is a contract stating something to the contrary or the law deems a certain person, other than the author, to be the first owner of a copyright.

This issue of first ownership seems less obvious when the author's risk of failure is covered by a producer who purchases the copyright from the author even before the market judges the success or failure of the work. In such a case, where the author receives a one-time payment, all of the risk related to the success or failure of the particular work is borne by the producer and only he will be liable for the losses.<sup>50</sup>

The issue gets confusing when seen in the context of Bollywood or other Indian cinema. A lot of times the popularity and success of a soundtrack depends not only on the melody of the music and the lyrics but also the star cast appearing in the movie, since the songs are often picturized to the star cast dancing or emoting to the music. A top star appearing in the video accompanying a particular soundtrack is likely to receive a lot more publicity since the song sequences are the main tools of pre-release publicity for the movie itself.<sup>51</sup> The success or failure thereof of a song depends on several factors, although it would be reasonable to assume that the genius of the author is the most important factor.

Historically, economic policies favour rewarding the risk-taker so as to incentivize capital into making risky investments for the creation of goods or ideas, which can then be used for the greater public good. The text of Indian

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<sup>48</sup> *Id.*, 213, 214.

<sup>49</sup> See generally Kling, *The Work Made for Hire Doctrine Under the Copyright Act of 1976: Employees, Independent Contractors and the Actual Control Test*, 22 IND. L. REV. 619, 622 (1988).

<sup>50</sup> See generally *A Different Tune*, *supra* note 21.

<sup>51</sup> Jha, *supra* note 2 (Aamir Khan suggested that lyricists don't really contribute much to the impact of a song).

copyright law on the law of first ownership, especially § 17, which deals with ownership of copyrights, reflects this underlying policy goal.

In the present case, the Supreme Court rendered its final judgment in favour of the producers, on the basis of § 17 of the Copyright Act. This provision deals with the principles of ownership and deemed ownership of copyright in a work. As per the main clause of § 17, the author of a work is deemed to be the owner of a work except in those circumstances outlined in the provisos to the provision. Most of the provisos deal with copyrights created during the course of employment or for instance, when the work is created through commission. In foreign jurisdictions like the U.S., this doctrine is called the ‘work-for-hire’ doctrine.<sup>52</sup> The text of the provisos is broadly based on the above explained policy of rewarding the risk taker who is investing capital. It is of course possible to contract out of these provisions, but the author would be required to have some negotiating power for the same. Illustratively, proviso (a) to § 17 states that a newspaper employing journalists will own the copyright in all the articles/news-reports authored by them. This is of course, subject to the right of the author to contract out of such an arrangement.

In its judgment in the IPRS case, the Supreme Court based its analysis on provisos (b) & (c) to § 17, to come to the conclusion that producers of cinematograph films owned the rights in all the works that they commissioned authors to create, and this included music and lyrics.<sup>53</sup>

According to proviso (b), a person who commissions the creation of any of the following works - a photograph, a painting, a portrait, an engraving or a cinematographic film, owns the copyright in the resulting work. Similarly, according to proviso (c), any work created during the course of employment will be owned by the employer, unless otherwise provided for in the contract. In both instances the aim of the law is to protect the risk taker who has invested in the creation of the work.

The Supreme Court concluded that both provisos would be applicable to the dispute between the authors and producers subject to the existence of a contract to the contrary and held:

<sup>52</sup> 17 U.S.C.1976, § 101 : A “work made for hire” is:

1. a work prepared by an employee within the scope of his or her employment; or
2. a work specially ordered or commissioned for use as (1) a contribution to a collective work, as part of (2) a motion picture or other audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional text, (7) a test, (8) answer material for a test (9) or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

<sup>53</sup> Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Association, 1977 SCR (3) 206, 222.

“According to the first of these provisos viz. proviso (b) when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric there-fore i.e. the sounds for incorporation or absorption in the sound track associated with the film, which as already indicated, are included in a cinematograph film, he becomes the first owner of the copyright therein ‘and no copyright subsists in the composer of the lyric or music so composed unless there is a contract to the contrary between the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other. The same result follows according to aforesaid proviso (c) if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work. It is, therefore, crystal clear that the rights of a music composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in provisos (b) and (c) of section 17 of the Act.”<sup>54</sup>

There has been considerable debate on this judgment and at least the community of authors have been very critical of the judgment, which has come back to haunt them on more than one occasion.<sup>55</sup> The most frequent criticism of the judgment is the Court’s expansive interpretation of proviso (b) which is reproduced as follows:

subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

If one were to go by a strictly literal interpretation of this proviso, it could be argued that the provision speaks of ownership rights for only

<sup>54</sup> *Id.*

<sup>55</sup> See *Saregama India Limited v. Puneet Prakash Mehra*, CS NO.101 of 2010 (Calcutta H.C.); *Anandji Virji Shah v. Nadiadwala Grandson*, C.S.NO.109 of 2010 (Calcutta H.C.); *Puneet Prakash Mehra v. Nadiadwala Grandson*, CS NO.112 of 2010 (Calcutta H.C.); See also Sumathi Chandrashekar, *The Story of the Laawaris Song, as told by the Calcutta HC*, May 5, 2010, available at <http://spicyipindia.blogspot.com/2010/05/story-of-laawaris-song-as-told-by.html> (Last visited on December 20, 2012); See also Nikhil Krishnamurthy, *IPRS v. Eimpa, Performing Right or Wrong?*, 1 MIPR 169 (2007) (It provides an excellent critique of the Supreme Court judgment); See also Nandita Saika, *The Bollywood Amendments: Film, Music and Indian Copyright Law (2010-2012)*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1566350](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566350) (Last visited on December 30, 2012).

a certain specified category of works and not literary, musical works or sound recordings that were incorporated into the cinematograph film. The criticism therefore is that the Supreme Court travelled beyond the plain words of the statute by including even music and lyrics composed for a cinematograph film, within the bounds of proviso (b). The golden rule of statutory interpretation requires a court to give the black letter of the law its most literal interpretation.<sup>56</sup> A court can digress from such a rule only if the literal interpretation results in an absurd result.<sup>57</sup> A simple reading of the provision in question demonstrates that the provision extends only to cinematograph films and not the music and lyrics created separately from the film, which are subsequently incorporated into the film.

One of the reasons for the above conclusion was the fact that the definition of ‘cinematograph work’ in the Copyright Act, as it existed in 1957, included the phrase ‘soundtrack if any’.<sup>58</sup> Although the term ‘sound track’, was undefined in the legislation, the Supreme Court presumed that the phrase includes both, music and lyrics.<sup>59</sup> While this interpretation may have been correct, the Supreme Court could have also confined the scope of the producer’s rights to only the synchronisation rights of the soundtrack with the movie. This would have meant that the authors of the music and lyrics would still own all the remaining rights to the music, when used independently of the cinematograph film. This would include the lucrative public performance rights of the music. The exact scope of these rights would have depended on an examination of all independent contracts. The law, especially § 13(4) of the Copyright Act as it existed then, clearly provided for works incorporated into a film or a sound-recording to have their own independent copyright, even after they had been incorporated into the former class of works. The Supreme Court however fails to make this distinction between synchronisation rights and other rights such as public performance rights.

The second limb of the Supreme Court’s conclusion was on the basis of proviso (c) which is as follows:

in the case of a work made in the course of the author’s employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall , in the absence of any agreement to the contrary, be the first owner of the copyright therein.

<sup>56</sup> *Illachi Devi v. Jain Society*, Protection of Orphans India, AIR 2003 SC 3397, ¶ 35.

<sup>57</sup> *Id.*

<sup>58</sup> The Copyright Act, 1957, § 2(f): “cinematograph film” includes the sound track, if any, and “cinematograph” shall be construed as including any work produced by any process analogous to cinematography” (un-amended 1957 Act).

<sup>59</sup> See generally Nandita Saikia, *The Bollywood Amendments: Film, Music and Indian Copyright Law (2010 to 2012)*, February 21, 2010, 18, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1566350](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566350) (Last visited on May 26, 2013).

In its analysis, the Supreme Court appears to have accepted the producers' contention that all the musical and literary works, involved in the case, had been made during the course of employment under contracts of service.<sup>60</sup> This was most likely untrue, since most authors in the film industry compose music and lyrics for a number of producers and are not 'employed' by any single producer in the legal sense of the term. At the very least, the Supreme Court should have laid down appropriate criteria to determine which categories of contracts would qualify as 'employment contracts' as opposed to 'independent contracts'. Unfortunately, the Supreme Court's judgment came to this conclusion without any such analysis.

The U.S. courts faced with a similar situation, while determining whether a work fell within the purview of the 'work-for-hire' doctrine, laid down certain criteria, such as mode of payment, tax treatment and other factual grounds, to determine whether the person in question was an employee or an independent contractor.<sup>61</sup>

Regardless of the criticism, the Supreme Court's judgment was the law of the land by virtue of the Constitution of India and the immediate ramification of the judgment was that all of the producers who had commissioned authors to create musical or literary works for their movies would be deemed to be the first owners of copyrights in those works, unless the authors could demonstrate that they had entered into a contract to the contrary.

## *B. THE PROBLEM OF WEAK NEGOTIATING POWER OF AUTHORS*

On the basis of the above mentioned discussion, one may question that if the authors were not satisfied with their contracts, why didn't they simply remedy the situation by incorporating stronger ownership rights in their future contracts with producers? The Supreme Court judgment clearly gave them a right to opt out of such contracts.<sup>62</sup>

However, there is no clear answer to this question and there are probably multiple reasons for the same, the main being the lack of collective bargaining by the authors. Prior to Mr. Akhtar's lobbying efforts, the authors of Bollywood were exceptionally unorganized and they have constantly lacked the political muscle to negotiate on a level playing field with the music labels. This is in complete contrast to the situation in Europe or the U.S., where authors

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<sup>60</sup> Indian Performing Right Society v. Eastern India Motion Pictures Association, 1977 SCR (3) 206, 222.

<sup>61</sup> Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

<sup>62</sup> Indian Performing Right Society v. Eastern India Motion Pictures Association, 1977 SCR (3) 206, 222, 223.



are politically organized, with strong collective bargaining skills.<sup>63</sup> It is well known that Hollywood is no stranger to strikes by script-writers and their colleagues.<sup>64</sup> On the other hand, authors in Bollywood have not even been able to form strong collectives, let alone call strikes.

This is not to say that all Indian authors lack the negotiating power to enter into equitable and 'fair' contracts. As explained earlier, a few composers like A.R. Rahaman, who won an Oscar for his music in *Slumdog Millionaire*, did have the market power to negotiate royalty sharing arrangements with the producers and music labels, instead of acceding to the standard one-time payment formula which is accepted by other composers and lyricists of Bollywood. However, even Rahaman's negotiating power has had limits, which is evident when he had to drop out of big banner films like *Om Shanti Om* because T-Series, the music label responsible for marketing and distributing the music, refused to enter into a royalty sharing arrangement with him.<sup>65</sup> T-Series is currently under investigation for alleged anti-competitive activities by the Competition Commission of India.<sup>66</sup>

### C. UNFAIR CONTRACTS AND MOBILE RINGTONES

As is always the case with copyright law, technology was to play the role of a game changer. In the late nineties and the following decade, Indians awoke to the miracle of mobile phones. The telecom industry was soon to be the poster child of a newly liberalized Indian economy and tele-density in India zoomed to incredibly high levels, mainly due to the deep penetration of cellular services in all classes and regions of India.<sup>67</sup>

<sup>63</sup> See *ASCAP, We Create Music*, available at <http://www.ascap.com/legislation/> (Last visited on June 20, 2013); See *The Authors Guild*, available at <http://www.authorsguild.org/advocacy/> (Last visited on June 20, 2013) (Examples of associations that been successful in lobbying and protecting the interests of authors, composers and lyricists include-The American Society of Composers, Authors and Publishers (ASCAP), which is an association of more than 450,000 U.S. composers, songwriters, lyricists, and music publishers. ASCAP is the only U.S. performing rights organization created and controlled by composers, songwriters and music publishers, with a Board of Directors elected by and from the membership. The main objective of ASCAP is to protect the rights of its members by licensing and distributing royalties for the non-dramatic public performances of their copyrighted works. Another such association is the Author's Guild. The Author's Guild, founded as the Authors League of America in 1912, works for the protection of writers' interests in effective copyright protection, fair contracts and free expression).

<sup>64</sup> BBC News, *Hollywood Writers' Strike*, February 13, 2008, available at <http://news.bbc.co.uk/2/hi/entertainment/7092571.stm> (Last visited on December 20, 2012).

<sup>65</sup> Jha, *supra* note 23.

<sup>66</sup> Sangeeta Singh, *T-Series Faces Probe on Royalty Payments*, MINT Oct 31 2011, available at <http://www.livemint.com/Politics/bKHiyXl4YsRn8fG6xsQYhL/TSeries-faces-probe-on-royalty-payments.html> (Last visited on December 20, 2012).

<sup>67</sup> Business Maps of India, *Liberalization of Indian Telecom Sector*, June 27, 2011, available at <http://business.mapsofindia.com/communications-industry/liberalization-india.html> (Last visited on December 20, 2012).

One of the surprising offshoots of the success story in telecom was the increased demand for music, especially in the category of ringtones and caller-ringtones. For some reason, which is beyond the scope of this article, Indians were ready to pay for not only the music that they were going to hear when they received a call from somebody but also for the music that the person calling them would hear.<sup>68</sup> Given that there were almost 700 million subscribers in India for cellular phones, even a small percentage of users downloading ringtones would mean an entirely new revenue stream for copyright owners, with little or no added investment.<sup>69</sup> For one copyright society, revenues from this category zoomed by almost 2239% in a span of 7 years.<sup>70</sup>

With all the money that was flowing around, authors were obviously wondering why they were not getting any, especially since they were the creators of the music and lyrics that were being sold to mobile subscribers. As it would turn out later, several of these authors had in fact contracted away all their rights in their works including, most importantly, the rights that may accrue through exploitation in future technological mediums.<sup>71</sup> That is to say, most of the authors had assigned away their rights in new mediums of exploitation such as ringtones to the producers of films and could no longer stake a claim to the fortunes that were being raked in by music labels.

On this issue of mobile ringtones, especially those related to works composed before the invention of ring-tones, there was a significant conflict between producers and music labels, with the producers of the super-hit film *Sholay* suing both, the assignee-music label and a telecom company, on the grounds that the original licensing agreement transferring music rights to the music label in the late seventies did not extend to ringtones, since the technology was not even invented in the seventies.<sup>72</sup>

<sup>68</sup> Arindam Mukherjee, *Music, Games to Drive Mobile VAS Growth*, THE ECONOMIC TIMES Feb 2, 2007, available at [http://articles.economicstimes.indiatimes.com/2007-02-02/news/28415854\\_1\\_mobile-music-mobile-subscribers-vas](http://articles.economicstimes.indiatimes.com/2007-02-02/news/28415854_1_mobile-music-mobile-subscribers-vas) (Last visited on December, 20, 2012).

<sup>69</sup> See *The Story of India's Telecom Revolution*, MINT January 8, 2013, available at <http://www.livemint.com/Opinion/biNfQImaobXxOPV6pFqxI/The-story-of-Indias-telecom-revolution.html?facet=print> (Last visited on May 28, 2013).

<sup>70</sup> *Infra* note 175; See also Prashant Reddy, *The 'Numbers' continue to talk – PPL's Revenues from Mobile Ringtones has Zoomed up by 1857% in 6 years from Rs. 7 Crores to Rs. 137 Crores*, February 12, 2011, available at <http://spicyipindia.blogspot.com/2011/02/numbers-continue-to-talk-ppls-revenues.html> (Last visited on December, 20, 2012) (The Annual Reports of PPL show us how revenue from mobile ringtones increased rapidly year after year. Revenue from this source from 2004 to 2010 are as follows – i) 2004- 2005 - Rs. 7.06 crores, ii) 2005-06: Rs. 13.97 crores, iii) 2006-07: Rs. 33.26 crores, iv) 2007-08: Rs. 69.4 crores, v) 2008-09: Rs. 99.13 crores, vi) 2009-10: Rs. 137.8 crores and vii) 2010-2011: Rs. 165.18 crores).

<sup>71</sup> Bhatia, *supra* note 35.

<sup>72</sup> *Sholay Media & Entertainment Pvt. Ltd. v. Vodafone Essar Mobile Services Ltd.*, CS(OS) No. 490/2011, (Delhi H.C.) (The suit is pending resolution).

## D. THE MISDEEDS AT IPRS – THE FINAL CATALYST

While inequitable contracts were certainly at the core of dissatisfaction amongst authors, the main event which sparked off the lobbying efforts of Akhtar & Co., was the non-payment of annual royalties by the IPRS, a copyright society originally founded by composers, lyricists and film-producers before it was covertly taken over by a cartel of music labels, starting in 2004. The manner in which music labels took over IPRS and its subsequent consequences will be described in vivid detail in the following portion of the article. Here, it is sufficient to state that the true target of the takeover was the millions of rupees that IPRS had started to earn from licensing its *repertoire*, a substantial portion of which constituted ringtone royalties.

### 1. The origins and role of IPRS

In 1969, a small group of film producers, authors and composers incorporated a company by the name Indian Performing Right Society.<sup>73</sup> Unlike most companies, IPRS was not a conventional company with shareholders etc. Instead it was a company limited by guarantee i.e., all its members were liable for only a sum of Rs. 100.<sup>74</sup> Instead of shareholders, IPRS had members, whose membership depended on the number of works they had *created* and *not as per* the number of works they *owned*.<sup>75</sup> Once an author was admitted as a full member or honorary member, he or she would have equal voting rights, without any relation to the number of works owned or created by him/her.<sup>76</sup> As per its incorporation documents, IPRS was formed with the intent of performing the role of a copyright society for mainly music, lyrics and any other underlying work in a soundtrack.<sup>77</sup>

A copyright society basically functions as a large ‘exchange’ for music.<sup>78</sup> Most owners of copyright are members of a copyright society and they collectively licence and enforce their music royalties in order to reduce transaction costs and make the music more affordable to content users.<sup>79</sup> Similarly, such copyright societies are an advantage for the end-users like radio stations or restaurants since they have to negotiate with only one society for a licence instead of contacting each copyright owner individually, a task which is both arduous and expensive.<sup>80</sup>

<sup>73</sup> Articles of Association, Indian Performing Right Society (IPRS).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> IPRS (AoA), *supra* note 73, Art. 28.

<sup>77</sup> Memorandum of Association, Indian Performing Right Society.

<sup>78</sup> See generally Dr. Ulrich Uchtenhagen, *The Setting-up of new Copyright Societies*, May, 2005, available at [http://www.wipo.int/export/sites/www/freepublications/en/copyright/926/wipo\\_pub\\_926.pdf](http://www.wipo.int/export/sites/www/freepublications/en/copyright/926/wipo_pub_926.pdf) (Last visited on May 26, 2013).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

## 2. The MoU with Public Performance Ltd (PPL) & Indian Music Industry (IMI)

The story of misfortune at IPRS began with a tripartite Memorandum of Understanding (MoU) entered into between IPRS (headed by Naushad Ali and Sanjay Tandon), Public Performance Ltd. ('PPL') & the Indian Music Industry ('IMI'), which at the time was called the Indian Phonographic Industry ('IPI').<sup>81</sup>

The membership of PPL and IMI, which were sister concerns, consisted of only music labels. PPL which was a copyright society, was tasked with collectively licensing the rights in 'sound-recordings', unlike IPRS, which was responsible for the underlying works of a 'sound-recording' i.e., the music and lyrics.<sup>82</sup>

This MoU of 1993 laid down three main objectives:<sup>83</sup>

- (i) IPRS would derecognize and terminate all film producers from its membership and bring in the music labels from PPL & IMI to replace these film producers;
- (ii) After extending membership to the music labels from PPL & IMI, IPRS would ensure that its future earnings would be distributed in the following ratio: 50% of all revenue would go to the 'music publisher' members of IPRS (in this case the music labels from PPL) while 30% of all revenue would go to composers and the remaining 20% would go to author members of IPRS, who are mainly lyricists and composers.
- (iii) It would be ensured that the 'Governing Council' of IPRS had equal representation from composers, lyricists and music labels since at the time of signing the MoU, the Governing Council had 6 composers, 6 lyricists and only 2 music label members.

In addition to the above terms, IPRS was also required to make a suicidal admission stating that it acknowledged that music labels owned the performing and mechanical rights in all the musical and literary works

<sup>81</sup> The Indian Performing Rights Society, *Memorandum of Understanding between IPRS, PPL and IMI*, November 12, 1993, available at <http://spicyip.com/docs/IPRS%20MoU.pdf> (Last visited on December 20, 2012).

<sup>82</sup> The Indian Music Industry (IMI) was established in 1936 as the Indian Phonographic Industry (IPI). Subsequently, IPI members decided to form a specialised body to administer their public performance and broadcasting rights, as a result Public Performance Ltd. (PPL) came into being in 1941. PPL has been functioning as the Copyright Society for Sound Recordings of its member music labels. See <http://www.pplindia.org/pplweb/aboutus.aspx> and <http://www.indianmi.org/> (For more information about IMI and PPL)(Last visited on December 20, 2012).

<sup>83</sup> MoU, *supra* note 81, ¶ 2, ¶3, and ¶5.

incorporated in sound recordings and owned by the music labels, and that “the appropriation of 50% of the revenue for composers/authors (would be) in the interests of giving encouragement to the composers/authors”.<sup>84</sup> With such an admission, the IPRS would have denuded its membership of their main rights.

For its part, the MoU does not quite specify as to why IPRS would readily and willingly welcome outsiders into its fold. A calculated guess in this regard would be that the IPRS wanted to begin functioning on a larger scale and lacked the resources to do so, which led them to invite the music labels to invest in it for a share in future profits. This is a plausible explanation, since the Indian economy had just opened up to foreign investment in 1991 and the economy was generally on an upward trend. There was every indication that with a booming economy, the market for music would grow.<sup>85</sup> However, given that administration of a copyright society is an expensive business, especially since it requires enforcement against infringers through the judicial system, it is possible that IPRS desperately needed capital to take its business plan ahead. Another factor which adds credence to this theory is the fact that amendments were afoot, and were in fact passed in 1994, to require all copyright societies to be registered in order to carry out the business of licensing copyrights, and the language of the amendments suggested that the government would not be open to more than one society per class of works.<sup>86</sup> Therefore, if recognised by the Government, IPRS would have a monopoly in its class of works which included music and lyrics. In such a case, it would have been important for IPRS to have the means to assert its rights.

However, the MoU could not be implemented until it was approved by the members since some of the requirements of the MoU, such as a change in the governing structure of IPRS, to increase representation of music companies on the Governing Council, required an amendment to the Articles of Association (‘Articles’) of the IPRS.

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<sup>84</sup> *Id.*, ¶ 1.

<sup>85</sup> See ASHA KASBEKAR, POP CULTURE INDIA! : MEDIA, ARTS AND LIFESTYLE 7, 8 (2006); Arvind Panagariya, *India’s Economic Reforms What Has Been Accomplished? What Remains to Be Done?*, (Edrc Policy Brief No. 2, November 2011).

<sup>86</sup> Copyright (Amendment) Act, 1994, proviso to § 33 (3): The Central Government may, having regard to the interests of the authors and other owners or rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licenses in respect of the relevant rights and the ability and professional competence of the applicants, register such association of persons as a copyright society subject to such conditions as may be prescribed:

Provided that the Central Government shall not ordinarily register more than one copyright society to do business in respect of the same class of works.

### 3. The registration process with the Copyright Office

Prior to the 1994 amendments, copyright societies in India were referred to as ‘performing rights societies’. The pre-1994 law defined these societies as follows:

“A society, association or other body, whether incorporated or not, which carries on business in India of issuing or granting licences for the performance in India of any works in which copyright subsists.”<sup>87</sup>

Although pre-1994, these performing rights societies were not required to register themselves with the Copyright Office, they were required to file with the Registrar of Copyrights, a statement of all fees or royalties proposed to be charged for different licences, failing which they could not avail of any of the civil or criminal remedies under the law.<sup>88</sup> This information was then published in the official gazette and any person could object to the fees or royalties being charged by the performing society.<sup>89</sup> Objections to the rate of royalty being charged by the performing society were required to be heard by the Copyright Board.<sup>90</sup> The Board would then give both parties a hearing after which it could fix the rate of royalties.<sup>91</sup> The pre-1994 law therefore allowed the Copyright Board to fix the royalty rate.

The Copyright (Amendment), Act 1994, which was passed just three years after the Indian government enacted free-market reforms in the Indian economy, did away with the mechanism of price-fixation by the Copyright Board.<sup>92</sup> This amendment, however, brought in a tougher regulatory regime for the administration of ‘performing societies’ which were now referred to as ‘copyright societies’. As per the 1994 amendments, copyright societies would have to be registered with the Registrar of Copyrights and in ordinary circumstances, the Registrar of Copyrights would register only copyright society in each class of works.<sup>93</sup> In order to be registered, a copyright society would have to comply with the various requirements introduced by the amendments, such as the mandatory requirement that copyright societies be managed by the owners of copyrights and that such societies must not spend more than 15% of their revenues on administration.<sup>94</sup> In case a copyright society

<sup>87</sup> The Copyright Act, 1957, § 2(r) (as originally passed).

<sup>88</sup> *Id.*, § 33.

<sup>89</sup> *Id.*, § 34; Copyright Rules, 1958, Rule 12 (as originally passed).

<sup>90</sup> The Copyright Act, 1957, § 35 (as originally passed).

<sup>91</sup> *Id.*, § 35(4).

<sup>92</sup> §35 of the original Copyright Act was deleted and replaced with a new version in 1994. This new version only requires copyright societies to be under the control of owners of copyright.

<sup>93</sup> The Copyright Act, 1957, § 33 (after the 1994 amendment).

<sup>94</sup> The Copyright Act, 1957, § 34, § 35 (after the 1994 amendment); Copyright Rules, 1958, Rule 14H (after the 1994 amendment but prior to the 2012 amendment).

was found to be violating the terms of its registration, the Central Government could cancel its registration after an inquiry and even appoint an administrator to take-over the functioning of the society until the completion of the inquiry.<sup>95</sup>

Several of the subsequent problems at IPRS can be traced to the tardy registration process before the Registrar of Copyright after IPRS filed its application for registration on February 1, 1996.<sup>96</sup> Not only were senior bureaucrats negligent while registering IPRS as a copyright society, but they also ignored red-flags raised by junior bureaucrats regarding its registration. For instance, one of the most important requirements of the new amendments was to ensure that IPRS was in control of the owners of the copyright in works administered by the society and not necessarily the authors of the works.<sup>97</sup> However, during the registration process, the Registrar of Copyrights completely failed to recognize that the governing laws of IPRS were drafted in a manner wherein membership of IPRS was not linked to *ownership* of copyright in music or lyrics, but depended instead on *authorship* of a particular copyrighted work.<sup>98</sup> This was a significant oversight by the Registrar of Copyrights and contrary to the terms of § 35 of Copyright Act. Ideally, the Registrar should have denied IPRS registration as a copyright society until it had amended its Articles to ensure that only owners could be members and in control of IPRS.

The second gaffe by the Copyright Office was to ignore the advice of one of its officers, Mr. M.C. Swaroop, a junior bureaucrat who had very specifically red-flagged an issue with the registration application filed by the IPRS. The issue was that IPRS had not submitted a list of owners, also known as the 'Register of Owners', along with a list of all the works owned by them.<sup>99</sup> The pertinent 'file noting', which recorded the defect in IPRS's application, was made by the officer and communicated to his seniors, and it reads as follows:<sup>100</sup>

“(i). As required vide column 3 of the form II-C, no details of works in which copyright or other rights of the applicant subsist have been given in the instant case. Against the said column, it is simply stated by the applicant that ‘copyright in musical works as envisaged in section 14(a) of the Copyright Act, 1957’. This statement is not relevant. What is required here, is a list of works in which copyright actually subsist.”

<sup>95</sup> The Copyright Act, 1957, § 34, § 35 (after the 1994 amendment).

<sup>96</sup> Government of India Ministry of HRD, *Application under Section 33(2) of the Copyright Act, 1957 by IPRS for Registration as a Copyright Society*, February 1, 1996, available at <http://www.spicyip.com/docs/partb1.pdf> (Last visited on May 28, 2013).

<sup>97</sup> The Copyright Act, 1957, § 35 (after the 1994 amendment).

<sup>98</sup> IPRS (AoA), *supra* note 73.

<sup>99</sup> Copyright Rules, 1958, Rule 14(I) (after the 1994 amendment).

<sup>100</sup> Ministry of Human Resource Development, *Application by IPRS for Registration as a Copyright Society in Musical Works*, F. No. 4-1/ 96 – I. C., ¶ 2 (i), available at <http://www.spicyip.com/docs/partb1.pdf> (Last visited on December 20, 2012).

The ‘Under-Secretary’, responsible for the entire registration process however, over-ruled his subordinate’s sharp observation after a meeting with the General Manager of IPRS. In a pertinent part, the Under-Secretary made the following ‘file-noting’, stating that:<sup>101</sup>

“6. During the hearing, Shri Tandon explained that the composer-members have copyright over all their compositions and the songwriters have copyright over all their songs. These members include leading lights in Indian film music like Naushad Ali (who incidentally, is the current Chairman of the IPRS), Bappi Lahiri, Anup Jalota, Hemant Kumar, Ilaiya Raja, and M.B. Srinivasan. Shri Tandon said that the list of their works would be voluminous. Since it is well known that these reputed composers and songwriters have a large number of compositions and songs to their credit, it may not be necessary to have on file a list of their works, and we may not insist on that.”

The above conclusion of the Copyright Office that authors were also owners of copyrights in their works was clearly flawed as the latter does not automatically flow from the former. The Copyright Office failed to notice that authorship is distinct from ownership under copyright law. If the Copyright Office had followed the law and insisted on the submission of the ‘Register of Owners’ and a corresponding amendment to the Articles of IPRS in the year 1996 itself, it would have helped in clarifying the issue of ‘ownership of copyright’ in various works.

Unfortunately, since ownership issues were not clarified in 1996 during the registration of IPRS as a copyright society, the music labels used this flaw during the registration process to sue IPRS in different forums, as explained below. In each of these legal actions, the music labels claimed that they were the sole owners of all copyrighted works in IPRS despite the fact that they had not sought to restrain IPRS from collecting the royalties for any of these works. It is very likely that the music labels did indeed own most of the rights, especially after the 1977 judgment of the Supreme Court in the IPRS case. As a result, these music labels would have a legitimate right to collect royalties, although they would have had to do so under a new company since the governing laws of IPRS at the time did not allow for owners to be in control of the company. However, as described in greater detail below, instead of forming a new company and registering it as a copyright society, the music labels attempted a takeover of IPRS.

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<sup>101</sup> *Id.*, ¶ 6.



#### 4. The efforts at IPRS to accommodate PPL's members as per the terms of the MoU

After being registered as a 'copyright society' by the Registrar of Copyrights, on March 27, 1996, IPRS carried out a few amendments to its Articles in order to incorporate the concerns of the member companies of IPI and PPL with whom it had signed an MoU.<sup>102</sup> The first set of amendments to its Articles was carried out on September 2, 1996.<sup>103</sup> They amended the definition of 'full-members' to include 'publishers' of musical works.<sup>104</sup>

With the above amendment to the Articles, music labels could finally vote in IPRS, since the governing law of IPRS allowed only 'full-members' to vote at 'Annual General Meetings' ('AGMs') and to also be elected to the Governing Council of IPRS, provided they were the owners of the copyright.<sup>105</sup> This, however, did not make much of a difference to the larger quest for control by the music labels, since the voting rights were not linked to the number of works owned by each member. Therefore, even if a music label claimed ownership of around 1000 works, it would still have the same vote as an author who had only authored 100 works. Further, to the frustration of the music labels, the existing cap of only two music labels being elected to the Governing Council, was undisturbed by this amendment. As a result, IPRS continued to be controlled, at the executive level, by persons who were not necessarily the owners of the copyright in the works that they had authored.

On September 21, 2000, the AGM of IPRS passed a special resolution amending the governing law once again.<sup>106</sup> Amongst other amendments, this resolution amended the structure of the 24 member Governing Council to ensure equal representation among the four categories of full members, namely, composers, lyricists, publishers and audio-visual publishers. This fulfilled one of the important preconditions of the MoU by giving music labels

<sup>102</sup> Government of India-Copyright Office (Department of Education), *Certificate of Registration under Section 33(3) of The Copyright Act, 1957*, March 27, 1996, available at [http://iprs.org/copyright\\_cert.pdf](http://iprs.org/copyright_cert.pdf) (Last visited on May 1, 2013).

<sup>103</sup> The Indian Performing Right Society, *Special Resolution passed at the Annual General Meeting*, September 2, 1996, available at <http://spicyip.com/docs/Board%20Resolution2.pdf> (Last visited on December 20, 2012).

<sup>104</sup> IPRS (AoA), *supra* note 73, Article 1(r): "publisher" is defined as a publisher of any music or works and or of any words which or may be associated with any music or works; *See* The Indian Performing Right Society, *Special Resolution passed at the Annual General Meeting*, September 2, 1996, available at <http://spicyip.com/docs/Board%20Resolution2.pdf> (Last visited on December 20, 2012) (For the Amendment, the reader may look at §5(e) of the document).

<sup>105</sup> *See* IPRS (AoA), *supra* note 73, Arts. 28, 38, 35.

<sup>106</sup> The Indian Performing Right Society, *Special Resolution passed at the Annual General Meeting*, September 21, 2000, available at <http://spicyip.com/docs/Board%20Resolution3.pdf> (Last visited on December 20, 2012).

greater representation on the Governing Council of IPRS.<sup>107</sup> However, the core problem of voting rights being independent of the ownership of the works persisted even after this resolution.<sup>108</sup> Therefore, even if the music labels did claim ownership of a majority of the works, they still couldn't gather the required number of votes since the number of authors who had voting rights, irrespective of the works that they owned, far outstripped the number of music labels.

Going by the subsequent actions of the music labels, it appears that they were frustrated by the fact that they were unable to take control of IPRS despite the two special resolutions of 1996 and 2000. Obviously the composers and lyricists who had founded IPRS were not going to hand over IPRS to the music labels without a fight, especially when the revenues of IPRS were providing them with a steady source of income. The stage was thus set for a clash. In October, 2004, the music labels launched the first salvo in a 5 year long battle to gain control of IPRS.

## 5. The final battle before the Civil Court, Barasat District

The first shot in the battle to takeover IPRS was fired soon after its 34<sup>th</sup> AGM, which was held on September 29, 2004.<sup>109</sup> In this AGM, Javed Akhtar, amongst others, had been elected to the 'Governing Council'. As Akhtar recounted in a later interview, he had been asked to stand for the elections to the 'Governing Council' by a group of composers and lyricists who were completely dissatisfied with the manner in which IPRS was being administered.<sup>110</sup> At the same AGM, two music publishers, perceived by the music labels to be very closely allied with the authors' lobby, were elected to 2 of the 6 positions normally kept for publishers.<sup>111</sup>

The term 'publisher' was defined in a circular manner in Article 1(r), of the pre-2008 Articles of Association of IPRS. The definition stated that, "Publisher means a publisher of any music or works and or of any words which are or may be associated with any music or works". Given the usage of the term

<sup>107</sup> *Id.*, Art.30(a) (This Article was amended by the Resolution of 2000 to ensure equal representation of composers, lyricists, publishers & audio-visual publishers); This ensured compliance with ¶ 5 of the MoU, *supra* note 81.

<sup>108</sup> The Copyright Act, 1957, § 35 (after the 1994 amendment); IPRS, AoA, *supra* note 73, Art.28.

<sup>109</sup> The Indian Performing Right Society Limited, *Annual Report 2008-09*, available at <http://www.iprs.org/agm0809.asp> (Last visited on May 30, 2013).

<sup>110</sup> Joshi, *supra* note 35 (As Akhtar recounts – "I was quite ignorant about copyright issues, and had never in my life contested an election. A group of composers and lyricists came to me saying that I should be their representative on the Indian Performing Right Society (known as IPRS) that supposedly collects performance rights royalty for them. They seemed to be very unhappy with the work done by the society and wanted me on the governing board. I resisted as much as I could, but they were really persuasive. So I contested and won that election!").

<sup>111</sup> *Saregama India Ltd. v. Indian Performing Right Society*, Plaintiff (filed by Saregama India Ltd.), T.S. 114 of 2004, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat, ¶18.

‘publisher’ in the rest of the Articles,<sup>112</sup> it can be safely assumed that it was meant to cover the music label or the record company.

The elections at the 34<sup>th</sup> AGM appeared to have un-nerved the music label cartel, which had by then, managed to increase its influence over the Governing Council of IPRS. According to confidential interviews conducted by the author, the music labels managed to increase their influence by having their ‘friends’ voted into a majority of the 6 positions on the Governing Council reserved for publishers and also in the other categories of composers and lyricists. An influential, not to mention outspoken, person like Mr. Akhtar had the potential to disrupt the cosy arrangement at the Governing Council of the IPRS especially since publishers allied with Mr. Akhtar, had defeated two of the big music labels like Sony and Universal in their bid to get re-elected in the publisher’s quota.<sup>113</sup>

The preferred mode of attack was an injunction from the High Court of Calcutta on a writ petition made by Asha Studios, soon after the 34<sup>th</sup> AGM.<sup>114</sup> This injunction, which stayed all decisions taken at the 34<sup>th</sup> AGM, including Mr. Akhtar’s election, was soon vacated and the petition was dismissed by the High Court on procedural grounds on April 13, 2005.<sup>115</sup>

However, before the first injunction was vacated by the High Court, IPRS had been sued once again on November 24, 2004, by Saregama, a leading music label (formerly known as HMV) which was already on the Governing Council of IPRS.<sup>116</sup> This time, Saregama had sued IPRS by filing a shareholder’s derivative action before the Civil Court at Barasat, located on the outskirts of Kolkata. It had named 13 defendants in this lawsuit, including Mr. Akhtar and music publishers such as Deep Emotion and Ultra Movies, both of which had defeated Universal and Sony.

The decision to sue before the 2<sup>nd</sup> Civil Judge (Senior Division) at Barasat was a strategic choice by Saregama, since this Court was at least 1,662 kilometres from the city of Mumbai, where Akhtar and his allies were residing. Also, the registered office of IPRS is located in Mumbai and ideally the shareholder’s derivative lawsuit should have been filed in Mumbai itself. Saregama,

<sup>112</sup> See e.g. IPRS (AoA), *supra* note 73, Article 4 (a) : “Each and every member shall, on election, and/or at any time thereafter on request by the society, assign or cause to be assigned to the Society (i) the Performing Right and the Mechanical Right in all or any works or parts of works, present and future of which he is the composer, author, publisher and/or owner and/or (ii) the whole or any part of the Performing Right and Mechanical Right in any work or part of a work to the extent that any such right or part of right is or shall during his membership be or become vested in him [...]”.

<sup>113</sup> *Plaint of 2004, supra* note 111, ¶18.

<sup>114</sup> *Saregama India Ltd. v. Indian Performing Right Society*, *Plaint* (filed by Saregama India Ltd.), T.S. 101 of 2005, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat, ¶ 21.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, ¶ 22.

however, claimed that since it had received the notice of AGM at its registered office located at Barasat, it could invoke the jurisdiction of the Barasat Court.<sup>117</sup> A large part of the reason for the choice of Barasat as the forum was the fact that Saregama and its parent organization, the industrial conglomerate RPG Group valued at around \$2.84 billion, had their origins in neighbouring Kolkata and were extremely influential in the entire region.<sup>118</sup> Just the sheer logistics involved in fighting such a legal battle on the home turf of Saregama was likely to have posed enough of a challenge for Akhtar & Co.

This lawsuit had sought to render the decisions at the 34<sup>th</sup> AGM void on grounds that the notice was not properly served and also that several of the persons who won the elections such as Mr. Akhtar and his allies, were in fact not eligible to stand for elections due to some procedural formalities.<sup>119</sup> There was however little explanation as to why Saregama was raising the issue of the notices not being in the prescribed format despite having attended the meeting itself without any objections.

The crux of the lawsuit however went beyond the legality of the 34<sup>th</sup> AGM and pertained to the alleged mismanagement of IPRS by its governing officers. Specifically, Saregama made an issue out of the fact that the 'Register of Owners' had never been created by the IPRS despite the fact that the terms of its registration as a copyright society required it to be governed only by owners.<sup>120</sup> As recounted earlier, this was not done, since the Office of the Registrar of Copyrights had negligently waived the requirement.<sup>121</sup> Saregama pointed out that since only owners of copyrights were supposed to be voting at AGMs, no elections should be held until such a 'Register of Owners' was created by the management of IPRS.<sup>122</sup> Towards this end, Saregama requested the Court to appoint a receiver for the purposes of creating the Register of Owners.<sup>123</sup>

#### *a. The first ex-parte interim injunction by the Barasat Court*

As per the law, a shareholder derivative's lawsuit, such as the one filed by Saregama, is instituted by a minority shareholder to protect the

<sup>117</sup> Plaintiff of 2004, *supra* note 111, ¶ 36.

<sup>118</sup> See Sanjiv Goenka, *A Powerful Heritage*, ENTREPRENEUR October 24, 2010, available at <http://entrepreneurindia.in/people/coverstory/a-powerful-heritage/5568/> (Last visited on December 23, 2012).

<sup>119</sup> Plaintiff of 2004, *supra* note 111, ¶ 41 (Prayer).

<sup>120</sup> *Id.*, ¶ 15 (sub- paras iv and v) & Prayer.

<sup>121</sup> See *supra* Section IV (D)(3) (The Misdeeds at IPRS: the Final Catalyst : 3) The registration process with the Copyright Office); See also Government of India Ministry of HRD, *Application under Section 33(2) of the Copyright Act, 1957 by IPRS for Registration as a Copyright Society*, February 1, 1996, available at <http://www.spicyip.com/docs/partb1.pdf> (Last visited on May 28, 2013).

<sup>122</sup> Plaintiff of 2004, *supra* note 111, ¶ 15 (sub- paragraph (iv) and (v)) & Prayer.

<sup>123</sup> *Id.*, Prayer ¶ (p).

company from the decisions of the management.<sup>124</sup> Normally, it is impossible to get a court to grant an ex-parte injunction in ‘shareholder’ derivative lawsuits on the very first day of hearing, where the defendant is not present, since courts tend to follow the thumb rule of corporate governance, i.e., the rule of majority of shareholders.<sup>125</sup> For some unexplained reason, the Barasat Court thought it necessary to shift away from this core principle of corporate governance when it granted a ‘status-quo’ order to Saregama on the very first date of hearing, even before notice was issued to Akhtar & the other defendants who were elected at the 34<sup>th</sup> AGM.<sup>126</sup> The order restrained IPRS from enforcing any of the decisions at the 34<sup>th</sup> AGM and instead, maintained the ‘status-quo’ that had prevailed before the elections at the 34<sup>th</sup> AGM. This order was an interim order until such time that the Court heard both parties.

The defendants, especially Mr. Akhtar, appealed against the order to the District Judge at Barasat. It took them 3 years to win before the District Judge, who set aside the order of the 2<sup>nd</sup> Civil Judge at Barasat on the ground that the “impugned order dated November 25, 2004 suffers from illegality and sound principles of law for granting and refusing an order of ex-parte ad-interim injunction”.<sup>127</sup>

After the judgment of the District Judge, Saregama had filed a revision petition before the High Court, even before Akhtar & Co. could file a caveat with the High Court. Saregama secured a stay of the District Judge’s order.<sup>128</sup> At this point, it appears that Akhtar & Co. gave up trying to fight the matter and instead moved towards lobbying for a change in the law. The High Court eventually remanded the matter back to the Civil Judge and without Akhtar & Co. pressing the issue any further, the management of the IPRS, probably acting on the instructions of the music labels such as Saregama, put up almost no fight before the Civil Judge at Barasat who went ahead to make his interim order passed on November, 2004, absolute, pending trial.<sup>129</sup>

<sup>124</sup> See *Bsn (Uk) Ltd. v. Janardan Mohandas Rajan Pillai*, 1993 (3) Bom CR 228, ¶ 15, 16; *Hrushikesh Panda v. Indramani Swain*, AIR 1987 Ori 79.

<sup>125</sup> See generally A. RAMAIIYA, *GUIDE TO THE COMPANIES ACT* (2011).

<sup>126</sup> *Saregama India Ltd. v. Indian Performing Right Society*, (Ex Parte Interim Order), T.S. 114 of 2004, 2, 3, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat, November 25, 2004.

<sup>127</sup> *Javed Akhtar v. Saregama India Ltd.*, Judgment, Misc. Appeal No. 15 of 2005, Before the Additional District Judge, Barasat, ¶ 15.

<sup>128</sup> Refer to the letter sent on behalf of Saregama India Ltd. to Mr. R.N. Jayagopal and Others, in the matter concerning *Saregama India Ltd. v. R.N. Jayagopal*, (C.O. No. 2633 of 2007), dated July 25, 2007.

<sup>129</sup> *Saregama India Ltd. v. Indian Performing Right Society*, (Interim Order), T.S. 114 of 2004, 2, 3, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat, November 25, 2004.

*b. The subsequent lawsuits filed in 2005 & 2006*

The lawsuit filed in 2004 was only the first of the three lawsuits against IPRS. Saregama filed two more law suits, one in the 2005 and the other subsequently, in 2006.<sup>130</sup> In both these lawsuits, Saregama named only IPRS, its Chairperson Hasan Kamaal and another executive director of IPRS as defendants. These suits sought a stay on the holding of the AGM in both those years, in order to prevent Akhtar & Co. from being re-elected and consequently retaking control of IPRS. The Barasat Court granted Saregama an ex-parte interim injunction against the holding of the AGM in both lawsuits, in successive years.<sup>131</sup> As evident from these orders, it appears that IPRS, which was Defendant No. 1 and its Chairperson Kamaal who was Defendant No. 2, did not contest both the suits filed by Saregama, most probably because the music labels, which were on the Governing Council, were quite satisfied with not holding an AGM that could threaten their position in IPRS. The manner in which all three suits proceeded before the Civil Court at Barasat speaks poorly of the Indian judicial system.

In the first lawsuit filed in 2004, the first interim injunction was extended *31 times* before it was made absolute on October 4, 2007.<sup>132</sup> In the second lawsuit, filed in 2005, the first interim injunction was extended at least *67 times* between November 22, 2005 and January 4, 2011.<sup>133</sup> In the third lawsuit, filed in 2006, the first interim injunction was extended at least *71 times* between August 25, 2005 and May 30, 2012.<sup>134</sup> Cumulatively, in all three lawsuits, the Civil Judge at Barasat has granted, so far, a total of *169 extensions/adjournments* to either Saregama or IPRS. It is important to note that the suits are still pending in this court and more adjournments have been granted.

As per Order XVII of the Civil Procedure Code, 1908, a civil court can grant a maximum of *3 adjournments in a single lawsuit*.<sup>135</sup> While a few of the adjournments were unavoidable due to 'bandhs' or strikes in Bengal, most of the adjournments were granted on the request of either Saregama or IPRS.<sup>136</sup> The sheer number of adjournments raises eyebrows about the entire

<sup>130</sup> Saregama India Ltd. v. Indian Performing Right Society, Plaintiff (filed by Saregama India Ltd.), T.S. 101 of 2005, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat; Saregama India Ltd. v. Indian Performing Right Society, Plaintiff (filed by Saregama India Ltd.), T.S. 124 of 2006, Before the Second Civil Judge (Sr.-Div.).

<sup>131</sup> Saregama India Ltd. v. Indian Performing Right Society, (Interim Order), T.S. 101 of 2005, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat, September 22, 2005; Saregama India Ltd. v. Indian Performing Right Society, (Interim Order), T.S. 124 of 2006, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat, September 25, 2006.

<sup>132</sup> Order Sheets of Saregama v. IPRS T.S. 114 of 2004.

<sup>133</sup> Order Sheets of Saregama v. IPRS T.S. 101 of 2005.

<sup>134</sup> Order Sheets of Saregama v. IPRS T.S. 124 of 2006.

<sup>135</sup> Civil Procedure Code, 1908, Order XVII Rule 1.

<sup>136</sup> Refer to the case dockets of Saregama v. IPRS in T.S. 114 of 2004, T.S. 101 of 2005 and T.S. 124 of 2006.

process because it is almost impossible for a Court to have granted so many adjournments if IPRS had vigorously contested the matter. Given that AGMs are critical events for any company, IPRS should have at least tried to argue the matter on merits.

Before explaining the manner in which the Barasat Court passed orders allowing the music labels to takeover IPRS and the manner in which the music labels executed those orders, it is necessary to make a small but necessary deviation to a proceeding started by Universal India before the Company Law Board.

## 6. The proceedings by Universal before the Company Law Board

In 2005, one of the music labels – Universal India ('Universal'), which at that time, was under the management of one Mr. Rajat Kakkar, had filed a petition against IPRS before the Company Law Board ('CLB') alleging amongst other issues, mismanagement of IPRS.<sup>137</sup> This was one of the three petitions filed before different CLBs by the other music labels, including Sony and Tips.<sup>138</sup> Unlike the shareholder derivative lawsuit filed by Saregama at Barasat, a petition alleging mismanagement of a company before the CLB required the assent of at least 20% of the membership of the company, to be admitted.<sup>139</sup> Universal apparently did not have the support of 1/5<sup>th</sup> of all IPRS members to get the petition heard before the CLB and had sought a waiver of this minimum requirement.<sup>140</sup>

In this context, IPRS's reply to Universal's petition before the CLB was simply astounding.<sup>141</sup> As a copyright society with a majority of its membership consisting of composers and lyricists, the management at IPRS had a fiduciary duty to its majority membership to strongly contest the petition filed by Universal. However, the reply filed by IPRS, instead of aggressively seeking for a summary dismissal of Universal's petition, made several statements which caused grave and extreme prejudice to a majority of the IPRS members. This shouldn't be surprising considering IPRS had adopted a similar stance before the Barasat Court, where instead of defending the interests of its majority members, who were composers and lyricists, it sought to defend the interests of music labels who were minorities in the overall scheme of IPRS.

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<sup>137</sup> See *Universal Music India Ltd. v. Indian Performing Right Society (IPRS)*, Reply filed by IPRS, CP No. 124 of 2005, Before the Company Law Board, New Delhi.

<sup>138</sup> See Hasan Kamaal, *Annual Report 2008-09*, August 31, 2009, available at <http://www.iprs.org/aggm0809.asp> (Last visited on May 30, 2013).

<sup>139</sup> The Companies Act, 1956, § 399.

<sup>140</sup> As obvious from the order in *Universal Music India Ltd. v. Union of India*, 2006 (9) TMI 293.

<sup>141</sup> *Universal Music India Ltd. v. Indian Performing Right Society (IPRS)*, Reply filed by IPRS, CP No. 124 of 2005, Before the Company Law Board, New Delhi.

One such incriminating statement before the CLB was to the effect that, “It can thus be said that the said lyricists and/or composers do not hold any copyright or cannot be termed as the owners of copyright unless of course they have a contract to the contrary.”<sup>142</sup>

This was a damaging statement for a majority of the IPRS membership since its consequence would be the disqualification of almost 99% of its members who were composers and lyricists. In this context, one would also question the veracity of the statement. It is possible that after the 1977 judgment of the Supreme Court in the IPRS case, the music labels did own most of the rights in music and lyrics. However if that was the case, the music labels could have simply got the registration of IPRS as a copyright society cancelled, and they could have registered their own copyright society for the purposes of collecting royalties for underlying works. The fact that music labels didn’t pursue such an obvious remedy indicates that they most probably did not own a majority of the rights in the music of the time.

As if the above statement were not enough, IPRS also made the following damaging statement in its reply, while explaining the terms of the 1993 MoU:

“It was agreed that 50% of the income therefrom would go to the music publishers, 30% to the composer members and 20% to the author members (lyricists in this case) of the Respondent No. 1. The composers and authors were given the aforesaid share in the income not because they had a right to it but just to encourage them.”<sup>143</sup>

In other words, the then management of IPRS was informing the tribunal that any payments being made to composers and authors was in the nature of *gratis* and that they could not claim such royalties as a matter of right. This statement by the IPRS management, in reply before the CLB, makes no sense because if the music labels did in fact own all the rights they would have simply setup their own copyright society. It is difficult to understand why would any right thinking company part with 50% of its revenue as a matter of *gratis*?

IPRS then concluded its reply by requesting the CLB to pass directions against its own members, ordering them to prepare a list of musical works in which they had the copyright.<sup>144</sup> IPRS further informed the CLB that

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<sup>142</sup> *Id.*, ¶ 4.

<sup>143</sup> *Id.*, ¶ 5.

<sup>144</sup> *Id.*, ¶ 11.



the same had not been done till date due to the mismanagement by Mr. Sanjay Tandon who was the previous General Manager of IPRS.<sup>145</sup>

In response to IPRS's reply to Universal's petition, the CLB ordered its Mumbai branch to 'authenticate' the 'Register of Members/Owners' of IPRS.<sup>146</sup> In its report, the Mumbai branch informed the CLB that IPRS had not been maintaining a 'Register of Owners' as required by the Copyright Act.<sup>147</sup> On the basis of this report, the IPRS management, reportedly wrote a letter, dated August, 29, 2006 to all its members informing them that they were now taking steps to create a 'Register of Owners'.<sup>148</sup>

Apart from the CLB order, it should also be mentioned that IPRS sought and received an opinion from Justice Chandrachud (retired) on the point of the 'Register of Owners' and control of IPRS by the owners.<sup>149</sup> Going by the opinion penned by Justice Chandrachud, it is possible that he was misinformed about certain crucial facts. For instance in paragraph 6 of his opinion, he states:

“The case for the opinion states that MoU/Agreement was unanimously accepted by the Governing Council of IPRS and also by the members of the IPRS in their Extra-ordinary General Meeting.”<sup>150</sup>

As per the information available on record, the 1993 MoU was never accepted by a majority of members in any EGM, which is why the governing laws of IPRS specifically had to be amended to incorporate the terms of the MoU. Only portions of the MoU were accepted as evidenced by the 'special resolutions' in the AGM of 1996 and 2000.

When the final 'Register of Owners' was prepared by IPRS after the CLB order, it predictably enough recorded only music companies as owners of copyright in all musical and literary works controlled by IPRS. The incomplete 'Register of Owners' as prepared after the CLB order was filed with the Barasat Court in 2007 and it records only 23 music labels as owners.<sup>151</sup> Not a single composer or author was recorded as an owner of any music. To put the

<sup>145</sup> *Id.*, ¶ 8.

<sup>146</sup> Order Sheet (of the hearing on March 15, 2005), CP No. 21 of 2005, Principle Bench of the Company Law Board, New Delhi.

<sup>147</sup> Office of the Company Law Board (Mumbai), Report on the Authentication of Register of Members and Register of Owners of the Indian Performing Right Society, April 4, 2005.

<sup>148</sup> Reference of such a letter was made in the letter addressed to The Director and Registrar of Copyrights, signed by The Indian Performing Right Society February 11, 2011.

<sup>149</sup> In re Indian Performing Right Society (ex parte querist), Legal Opinion by Justice Chandrachud (Former Chief Justice of India), October 12, 2005.

<sup>150</sup> *Id.*, ¶ 6.

<sup>151</sup> As evidenced by Saregama India Ltd. v. Indian Performing Right Society, Filing made by IPRS, T.S. 124 of 2006 under Civil Procedure Code, 1908, Order XXXIX Rule 1 & 2, November, 2009.

numbers in perspective, IPRS had over 1,500 members as per its filing with the Registrar of Companies in the year 2008.

Further, the ‘Register of Owners’ was not prepared in the format required by the Copyright Rules, 1958. The pertinent rule is Rule 14I which defines the ‘Register of Owners’ in the following terms:

“A register of owners of copyright and other rights to be called the “Register of Owners” in respect of which the copyright society has been authorised by the owners to issue or grant licences. The register shall contain the names of the owners, their addresses, the nature of rights authorised to be administered by the copyright society, date of publication of the work, the date on which the copyright society becomes entitled to and the duration of such right.”

The ‘Register of Owners’ submitted by IPRS contained only the number of works owned by each music company without any of the accompanying details.

## 7. The coup de’ grace at the 37<sup>th</sup> AGM of IPRS

Armed with the ‘Register of Owners’ prepared under the auspices of the CLB, the IPRS sought permission from the Civil Court at Barasat to conduct an AGM, which suggests that it was the first time that the IPRS made such an effort since 2004.<sup>152</sup> As noted in the order of the Court, Saregama did not object to this application, presumably because the ‘Register of Owners’ now named only music labels as owners of copyrights.<sup>153</sup> As a result the Civil Court at Barasat appointed a ‘receiver’ (Mr. Tarun Kumar Banerjee) to conduct the 37<sup>th</sup> AGM of IPRS.<sup>154</sup>

At this meeting, the music labels completely replaced the governing laws of IPRS i.e., the ‘Memorandum of Association’ and ‘Articles of Association’, which is a rare event for any company.<sup>155</sup> The new governing laws ensured that membership was only according to the ownership of copyrights and weighted voting rights were linked to the number of copyrighted works owned.<sup>156</sup> While there was nothing wrong *per se* with the new governing laws,

<sup>152</sup> Saregama India Ltd. v. Indian Performing Right Society, Order, T.S. 124 of 2006, Court of the Second Civil Judge (Sr.- Div.), Barasat, December 7-10, 2006, 1, ¶ 3.

<sup>153</sup> *Id.*, 2 ¶4.

<sup>154</sup> *Id.*, 3.

<sup>155</sup> Minutes of the 37<sup>th</sup> Annual General Meeting of the Owner Members of The Indian Performing Right Society, recorded by Tarun Jyoti Banerjee (Receiver cum Chairman), February 4, 2008, ¶ 5.

<sup>156</sup> The Indian Performing rights Society, The New Articles of Association (adopted on January 5, 2008 by Special Resolution), Art. 24.

the manner in which this AGM was convened and amendments were voted on, was illegal since it was not in keeping with the old governing laws of IPRS under which this AGM was conducted.

As per the 'minutes' of this AGM, as recorded by the court appointed 'receiver', only representatives of the following seven music labels were present at this 37<sup>th</sup> AGM, which was conducted on January 5, 2008 at Mumbai: (i) Saregama India Ltd. (ii) Tips Industries Ltd. (iii) Universal Music India Ltd. (iv) Venus Records and Tapes Ltd. (v) Sony Music Entertainment Ltd. (vi) Virgin India Ltd. (vii) Krunal Music Ltd.<sup>157</sup>

In other words, only the music labels were present at this AGM and not a single composer or author was present at the meeting despite the fact that IPRS had more than 1500 composers/lyricists as members of IPRS. Even the composers and lyricists on the Governing Council did not turn up for the meeting.

Obviously this raises serious questions as to the manner in which the court appointed 'receiver' conducted this 37<sup>th</sup> AGM. One may question whether the 'notice' of the impending AGM was properly served on all IPRS members as claimed by the receiver or to only those members in the recently created 'Register of Owners', which as already described, was not prepared in accordance with the law.<sup>158</sup> If so, then how is it possible that only seven music labels, four of whom were suing IPRS, turned up for the meeting?<sup>159</sup>

An even more troubling question was whether the 'receiver' even conducted the AGM under the appropriate governing laws of IPRS. As per the minutes, the court appointed 'receiver' notes that only 'owner-members' were present at that meeting.<sup>160</sup> The use of the phrase 'owner-members' was surprising because this class of membership was introduced only by the new amendments which were put to vote at the 37<sup>th</sup> AGM. The AGM, however, had to be conducted under the existing governing law and the existing governing laws of IPRS, especially the Articles, did not make use of the term 'owner-member'.

<sup>157</sup> Minutes of the 37<sup>th</sup> Annual General Meeting of the Owner Members of The Indian Performing Right Society, recorded by Tarun Jyoti Banerjee (Receiver cum Chairman), February 4, 2008.

<sup>158</sup> See Tarun Banerjee (Receiver), *Final Report regarding the 37<sup>th</sup> Annual General Meeting of IPRS*, T.S. No. 124 of 2006, February 4, 2008.

<sup>159</sup> See The Indian Performing Right Society, *Annual Report 2009-10*, available at <http://iprs.org/agm0910.asp> (Last visited on December 22, 2012) (Under the sub-head 'Copyright and Legal Matters' points A, B and E, show that IPRS has cases filed against it by Saregama, Universal Music India Ltd, Sony BMG Music Entertainment (India) Ltd and Tips Industries Limited).

<sup>160</sup> See Tarun Banerjee, *Final Report regarding the 37<sup>th</sup> Annual General Meeting of IPRS*, T.S. No. 124 of 2006, February 4, 2008, ¶ 1.2.

In fact the existing governing laws did not even require ownership as a pre-requisite to membership of IPRS.<sup>161</sup> One would then question the usage of the term ‘owner-member’ by the court appointed ‘receiver’ in his report. Regardless of this and other unanswered questions, the new governing law of IPRS ensured that the music labels were now firmly in control of IPRS. This was the turning point and the financial woes of the composers and lyricists at IPRS would begin henceforth.

## 8. The end of royalty payments to Akhtar & Co.

Shortly after the 37<sup>th</sup> AGM, the management at IPRS, controlled by music labels, required all composers and lyricists to sign a standard-format letter.<sup>162</sup> This letter not only required the lyricist and composers to acknowledge that the music labels owned the copyright in all their works but also wanted them to accept the terms of the 1993 MoU.<sup>163</sup> The letter also required them to accept the new governing laws of IPRS despite the fact that not a single author was present at the 37<sup>th</sup> AGM.<sup>164</sup>

The authors, who did not sign the letter, not agreeing to the contents therein, were not paid any of the annual royalties that they had been receiving from IPRS every year.<sup>165</sup> Given that the royalties from IPRS counted towards a substantial portion of income for most of the smaller composers and authors, it came as no surprise that most of them signed the letter under duress. As per IPRS, at least 1473 composers/authors had signed the letter in order to receive royalties from IPRS.<sup>166</sup>

<sup>161</sup> See *supra*, Section IV (D)(1) (The misdeeds at IPRS: The Final Catalyst – 1) The origins and role of IPRS).

<sup>162</sup> Letter addressed to The Indian Performing Rights Society and all its publisher members, signed by the Authors/Composers/Legal Heirs, September 23, 2009.

<sup>163</sup> *Id.*, ¶ 2.

<sup>164</sup> *Id.*, ¶ 3. (The relevant extract from this standard form letter is as follows:

I would like to place on record that we the creative fraternity of Authors and Composers have shared a very healthy and cordial relation with the Publishers (Music Companies). It has come to our notice that some of the authors/composers have raised unnecessary disputes with regards the rights of the Publishers. I the undersigned, hereby affirm that I am in total agreement with the MOU reached between the Indian Performing Rights Society (IPRS) and Indian Music Industry (Formerly Indian Phonographic Industry-IPI) on 12<sup>th</sup> November, 1993, which confirmed that the ownership in the literary and musical works rested with the publishers, unless their (sic.) was contract to the contrary. We also acknowledge and accept the present (new) Memorandum and Articles of Association which is in line with the Copyright Act, 1957 and gives the correct recognition and governance to the owners of the rights. We are pleased to understand and accept the distribution of the performing royalty as per the MOU stated above).

<sup>165</sup> See Three letters addressed to The Director and Registrar of Copyrights, signed by The Indian Performing Right Society, February 18, 2011, February 11, 2011 and February 3, 2011.

<sup>166</sup> *Id.*

This letter and the scheme contained in the letter, was justified by IPRS on the basis of a positive legal opinion that it had sought from Justice Phukan, a retired Supreme Court Judge, on the issue of payment of royalties as per the formula prescribed by the 1993 MoU.<sup>167</sup> Even a simple perusal of the opinion rendered by Justice Phukan indicates that he was either misinformed or he misunderstood certain crucial facts. For instance, Justice Phukan's opinion repeats the assertion that the 1993 MoU agreed to share 50% of the royalties with the composers and authors solely to encourage them.<sup>168</sup> This was not true. The MoU had agreed to share royalties with the authors and composers without any caveat and in such a circumstance it is presumed that the MoU agreed to share royalties with composers and lyricists in consideration of the final object of the MoU. Authors and composers would never have agreed to the MoU without such a royalty sharing agreement. The composers and authors were entitled to the money as a matter of right and not a matter of *gratis*. It also appears that Justice Phukan was not made aware of the fact that the 50:30:20 revenue sharing formula for certain royalties in the MoU had been incorporated into Rule 4(e) of the 'Rules of the Society' *via* a special resolution passed by the AGM in 2001.<sup>169</sup> Once the terms of the MoU were incorporated into the Rules, it would be binding on IPRS and all of its members.

For authors like Akhtar & Co. who refused to sign the letter, the non-payment of royalties proved to be the 'last straw'. Shortly thereafter, Akhtar & Co. filed complaints with the Central Government regarding the non-payment of royalties and when even those efforts did not yield any results, they began lobbying with the establishment for an amendment to the statute itself.

## 9. The quiet royalty heist between 2004 and 2009

As mentioned earlier, the IPRS was proving to be a goldmine in terms of royalties that could be earned through ringtones and public performance licences. However, starting in 2004, the then IPRS management began to inform its licensees *via* letters, that it was no longer going to administer ringtone royalties and further instructed such licensees to contact IMI for licensing of such rights.<sup>170</sup> This decision by IPRS made no financial sense since ringtone royalties, which totalled to Rs. 3,65,514,007.94 (3.65 crores) constituted 30%

<sup>167</sup> See *In re Indian Performing Right Society (ex parte querist)*, Legal Opinion by Justice S.N. Phukan (Former Judge, Supreme Court of India), July 31, 2008.

<sup>168</sup> *Id.*, ¶ 2(iv).

<sup>169</sup> The Indian Performing Right Society, *Special Resolution passed at the Annual General Meeting*, September 21, 2000, 7.

<sup>170</sup> See the two letters addressed to Mr.Taron Mohan (Country Head, M/s. Phoneytunes.com) and Mr.Mandar Thakur (General Manager, Sound Buzz India Pvt. Ltd.), signed by The Indian Performing Right Society, February 24, 2004.

of IPRS's earnings in the financial year 2003-04, with all indications pointing towards an exponential rise in the next few years.<sup>171</sup>

In this context, one if forced to question the reasons which would make IPRS surrender such a lucrative source of income. In the subsequent year, after IPRS conveyed its decision to not collect ringtone royalties, its earnings from these royalties fell drastically to a mere Rs. 38,70,098 (Rs. 38 lakhs) in 2004-05 and then, even lower to just Rs. 10,00,000 in the financial year 2005-06.<sup>172</sup> Pursuant to this the category of 'ringtone royalties' disappeared completely from the balance sheets of IPRS in the financial year 2006-07.<sup>173</sup> This had happened not because the market for ringtones had vanished but because the music labels which had taken over IPRS had transferred these rights to collect royalties to another copyright society namely, the Phonographic Performance Ltd ('PPL'). The primary membership of PPL consisted of music labels and had been registered as a copyright society in the class of 'sound recordings', along with the fact that it was firmly under the control of the top music labels in India.<sup>174</sup>

During the period in which IPRS's ringtone royalties dwindled, PPL's ringtone royalties rose enormously from Rs. 7.06 crores (Rs.7,06,00,000) in 2004-05 to Rs. 165.18 crores (Rs. 165,18,00,000) in 2010-2011 i.e., an increase of 2239% .<sup>175</sup> Cumulatively, PPL had earned around Rs. 525.80 crores from 2004 to 2011 just through ringtone royalties.<sup>176</sup>

This spurt in PPL's ringtone royalties should have resulted in a proportional increase, and not decrease in the ringtone royalties collected by IPRS. The reason for the same is that a standard ringtone contains both,

<sup>171</sup> See The Indian Performing Right Society, *Director's Report for the Year Ended March 31, 2004*, available at <http://spicyip.com/docs/Annual%20Report%202003.pdf> (Last visited on December 24, 2012).

<sup>172</sup> See The Indian Performing Right Society, *Income and Expenditure Account for the Year Ended March 31, 2006*, available at <http://spicyip.com/docs/Ringtones%20Profit%20&%20Loss%20IPRS%2006.pdf> (Last visited on December 24, 2012).

<sup>173</sup> See The Indian Performing Right Society, *Income and Expenditure Account for the Year Ended March 31, 2009*, available at <http://spicyip.com/docs/Ringtones%20Profit%20&%20Loss%20IPRS%2009.pdf> (Last visited on December 24, 2012).

<sup>174</sup> See Copyright Office, Certificate of Registration, Phonographic Performance Ltd., May 7, 1996; See also Phonographic Performance Ltd., *Annual Report 2005-06*, available at <http://spicyip.com/docs/pp11.pdf> (Last visited on December 22, 2012); The Indian Performing Right Society, *Income and Expenditure Account, for the Year Ended March 31, 2009*, 3, available at <http://spicyip.com/docs/Ringtones%20Profit%20&%20Loss%20IPRS%2009.pdf> (Last visited on December 24, 2012).

<sup>175</sup> See Phonographic Performance Ltd., *Auditor's Report*, August 30, 2011, available at <http://www.spicyip.com/docs/pp18.pdf> (Last visited on December 22, 2012); See also Prashant, *supra* note 70 (For a detailed analysis of the Annual Reports of PPL, showing a massive increase in revenues from ringtone royalties).

<sup>176</sup> See, e.g., Government of India Ministry of HRD, *Annual Returns 2008-09 PPL*, February 7, 2011, available at <http://spicyip.com/docs/pp13.pdf> (Last visited on May 30, 2013).

‘music & lyrics’ and a ‘sound recording’ which incorporates the ‘music & lyrics’. Thus, a telecom company wanting to sell ringtones would have to obtain licences from both PPL & IPRS, since the former had the right to administer only ‘sound recordings’ while the latter had the same rights only over ‘music & lyrics’.

What makes the entire scenario more intriguing is the fact that PPL’s annual report for the year 2008-09 revealed that it was actually collecting ringtone royalties on behalf of IPRS. In pertinent part, the report states, “Tariff same as last year – 25% of end-user-price, subject to a minimum of Rs.2.50 per tone (inclusive of performance royalty to IPRS Society, as this licenced as single window).”<sup>177</sup> However as explained above, IPRS’s balance sheets for the same period do not show any income by way of mobile ringtone royalties from PPL. A pertinent question that may be raised in this regard is that why was PPL not repatriating ringtone royalties to IPRS and more importantly, why did IPRS not sue PPL for collecting royalties on its behalf and then failing to repatriate these royalties?

The simple answer to this issue was the fact that the ‘Governing Council’ (the Board of Directors) of IPRS was being controlled by music labels which also controlled PPL. This is evidenced by the fact that the 39<sup>th</sup> AGM of IPRS and the 68<sup>th</sup> AGM of PPL which were both held on September 30, 2009 in the same hotel in Mumbai, merely two hours apart, consisted of almost the same quorum.<sup>178</sup> The Board of Directors of both PPL and IPRS were populated with representatives from the very same music labels, namely, Saregama, Tips, Universal Music, Venus Records, Sony Music & Virgin India.<sup>179</sup> In fact even the representatives were the same for most of the music labels.

By taking control of IPRS, the music labels appear to have succeeded in quietly transferring millions of rupees to PPL, where they had to share the royalties with only a handful of other music labels, instead of the large number of composers and lyricists at IPRS.

## 10. The inquiries by the Registrar of Copyright

The royalty heist and the takeover of IPRS by the music labels did not go un-noticed. The authors and composers made at least three complaints to the Central Government requesting an inquiry into the affairs of IPRS. The first complaint on March 26, 2008 by a group of composers and lyricists, headed by

<sup>177</sup> Phonographic Performance Ltd., *Annual Return 2008-09*, 18, available at <http://spicyip.com/docs/ppl3.pdf> (Last visited on December 24, 2012).

<sup>178</sup> *Id.*, 3; Hasan Kamal (Chairman), Minutes of the 39<sup>th</sup> Annual General Meeting of Owner Members, September 30, 2009, 4, available at <http://spicyip.com/docs/iprs1.pdf> (Last visited on December 24, 2012).

<sup>179</sup> See PPL, Annual Report, *supra* note 174; IPRS, Annual Report, *supra* note 159.

Mr. Akhtar, was to the Minister for Human Resources & Development, the late Mr. Arjun Singh.<sup>180</sup> The complaint requested the Central Government to take over the administration of IPRS and ensure that royalty payments, which had been stopped by the new management of IPRS, were made to all the composers and lyricists.<sup>181</sup> While the main complaints related to the issues already discussed in this paper, this complaint flagged some new issues such as the sub-licensing of television rights to PPL through a MoU, which rights were then sub-licensed to another company by the name of Select Media Ltd.<sup>182</sup> Although this arrangement did make commercial sense, since the broadcast industry wanted a single window licence instead of negotiating with two different copyright societies, it was technically in violation of the law because copyright societies were supposed to be operating within the terms of their registration for a particular class of works. On the basis of this complaint, the Registrar of Copyrights initiated the first round of inquiry on June 24, 2008.<sup>183</sup>

While this inquiry was on-going, another complaint was filed by Ravi Shankar Sharma a.k.a. 'Bombay Ravi', the famous composer who composed brilliant music like – *Pyar Kiya To Darna Kya* (1963), *Neel Kamal* (1968), *Ek Alag Mausam* (2003) and many more foot tapping numbers that are prized jewels of Indian music and culture. 'Bombay Ravi' had filed his complaint with the Joint Secretary of the Ministry, on January 24, 2009, who in turn forwarded the complaint to the Registrar of Copyrights.<sup>184</sup> Ravi's complaint focussed on the fact that composers and lyricists of IPRS were being 'harassed and tortured' by the music labels of IPRS.<sup>185</sup> His main allegation was with respect to the fact that the music labels were withholding from the composers and lyricists, the royalties that were rightly due to them.<sup>186</sup> 'Bombay Ravi' would pass away three years later without receiving any royalties from IPRS.<sup>187</sup>

The inquiries initiated by the Registrar of Copyright, on the basis of the above complaints, were largely ineffective, and for reasons which are not clear, the Registrar of Copyrights did not cancel IPRS's registration as a copyright society nor did he appoint an administrator to takeover IPRS, despite the fact that there was a good case for doing so.

<sup>180</sup> See Letter addressed to Minister of Human Resource and Development (Mr. Arjun Singh), in the matter of illegalities in administration of IPRS, March 26, 2008.

<sup>181</sup> *Id.*, ¶ 1.

<sup>182</sup> *Id.*, ¶ 9, ¶ 10.

<sup>183</sup> Complaint addressed to the Registrar of Copyrights, signed by The Indian Performing Right Society, in the matter regarding illegalities in administrating of IPRS, July 15, 2008.

<sup>184</sup> Letter addressed to Amit Khare Joint Secretary, Ministry of Human Resource Development, signed by Ravi Shankar Sharma (Music Director), in the matter regarding harassment of composers and authors by publishers, January 24, 2009.

<sup>185</sup> *Id.*, ¶ 1, ¶ 3.

<sup>186</sup> *Id.*, ¶ 3.

<sup>187</sup> See Ajith Kumar, *Bombay Ravi Dead*, THE HINDU (Kozikhode) March 8, 2012, available at <http://www.thehindu.com/arts/music/article2971806.ece> (Last visited on December 24, 2012).



For its part, IPRS, under the control of music labels, did everything in its power to stall the inquiry by the Registrar of Copyrights. Its final attempt to derail the inquiry was the most audacious but it resulted in success. As a part of this strategy, Saregama (a member of the IPRS) impleaded the Registrar of Copyrights, who sits at New Delhi, in one of the existing lawsuits before the Civil Court at Barasat and sought an interim injunction against the Registrar from carrying out further inquiry and imposing any order on IPRS to repatriate money to the complainant authors and composers.<sup>188</sup> Saregama had alleged that the inquiry and the order by the Registrar of Copyright to repatriate royalties to the composers and authors were in violation of the earlier injunctions passed by the Civil Judge at Barasat.<sup>189</sup> Ordinarily, civil courts are prohibited by law from passing any orders against the Central Government without giving the government a chance to be heard, unless the plaintiff can demonstrate urgency for doing away with the requirement.<sup>190</sup> The Civil Judge at Barasat waived this statutory requirement and issued a 'status-quo' order against the Registrar, part of the reason being that the counsel of IPRS who was the defendant in the suit, informed the Court that it had no objection to Saregama's request.<sup>191</sup> By joining the cause of action before the Barasat Court, both IPRS & Saregama managed to nix the Registrar's attempt to inquire into the happenings at IPRS.

The third complaint was filed on December 20, 2011 before the Minister for Human Resources, Mr. Kapil Sibal, by a group of four leading musicians – Jagjit Singh, Shanker Mahadevan, Vishal Bhardwaj and Javed Akhtar.<sup>192</sup> This complaint was filed during the height of the lobbying efforts by composers and authors for amendments to India's copyright law and when the Copyright (Amendment) Bill, 2012 had already been introduced into the Parliament. This complaint, specifically requested the Central Government once again to take-over IPRS by appointing an administrator to look into the affairs of IPRS.<sup>193</sup>

This time round, the management of IPRS, which was under the spotlight, thanks to a scathing Parliamentary Report, co-operated with the Registrar and answered questions during the course of the inquiry.<sup>194</sup> The re-

<sup>188</sup> *Saregama India Ltd. v. Indian Performing Right Society*, (Application for Interim Injunction), T.S. 124 of 2006, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat, ¶ 49.

<sup>189</sup> *Id.*, ¶ 41.

<sup>190</sup> Civil Procedure Code, 1908, § 80.

<sup>191</sup> *See Saregama India Ltd. v. Indian Performing Right Society*, Order, T.S. 124 of 2006, Before the Court of the Second Civil Judge (Sr.- Div.), Barasat, 45-48, November 6, 2011, available at <http://spicyip.com/docs/iprs4.pdf> (Last visited on December 24, 2012).

<sup>192</sup> *See* Letter addressed to the Minister for Human Resource Development, signed by Jagjit Singh, Shankar Mahadevan, Vishal Bhardwaj and Javed Akhtar, in the matter regarding illegalities with respect to administration of IPRS (2), December 20, 2011.

<sup>193</sup> *Id.*, ¶ 5.

<sup>194</sup> Standing Committee Report, Copyright Amendment Bill 2010, *supra* note 8, ¶ 21.4 to ¶ 21.6; *See* letters addressed to Mr. Raghavender (Director and Registrar of Copyrights), signed by

plies by IPRS revealed several *prima facie* contradictions along with violations of the law. For example, the Chairperson of IPRS claimed in a pertinent part that IPRS was not collecting any ringtone related royalties and that it had not assigned the right to collect these royalties to anyone else.<sup>195</sup> However, as highlighted above, this was clearly contradicted by PPL's claim in its annual report that it was collecting ringtone royalties on behalf of IPRS.<sup>196</sup>

Similarly, other admissions by IPRS revealed serious infractions of the law. For example, the admission by IPRS that it had licensed all of its television rights to PPL which had in turn sub-licensed these rights to Select Media Ltd.,<sup>197</sup> for licensing to the television industry was in violation of the Copyright Act as well as the terms of registration of IPRS as a copyright society because each copyright society was supposed to administer its own works. Sub-licensing the works defeated the entire purpose of registration and regulation of a copyright society.

These replies filed by IPRS provided the Registrar of Copyrights with ample grounds to cancel the registration of IPRS or at the very least takeover the administration of the IPRS. For reasons best known to the Registrar of Copyrights, no such action was taken against either IPRS or PPL. In a RTI reply, the Copyright Office informed the author that the official inquiry into the allegations of mismanagement of IPRS had not been continued due to the pending Copyright (Amendment) Bill 2010 in the Indian Parliament.<sup>198</sup> As of March, 2013 the Registrar has been sued once again by music labels before the Barasat Court.<sup>199</sup> The outcome of these proceedings is still awaited.

## V. THE COPYRIGHT (AMENDMENT) ACT, 2012

### A. AN INTRODUCTION

On March 30, 2010, the Minister for Human Resources and Development, Mr. Kapil Sibal, introduced the Copyright (Amendment) Bill, 2010 in the Rajya Sabha, the Upper House of Parliament.<sup>200</sup> The legislation was

Hasan Kamal (Chairman, IPRS), February 3<sup>rd</sup> and 11<sup>th</sup>, 2011.

<sup>195</sup> *Id.*, Standing Committee Report, Copyright Amendment Bill 2010, *supra* note 8, ¶ 21.4 to ¶ 21.6.

<sup>196</sup> Prashant, *supra* note 70.

<sup>197</sup> See Letters addressed to Mr. Raghavender (Director and Registrar of Copyrights), signed by Hasan Kamal (Chairman, IPRS), February 3 and February 11, 2011.

<sup>198</sup> See Prashant Reddy, *Official Inquiry into Mismanagement of IPRS Given a Quiet Burial*, February 12, 2012, available at <http://spicyipindia.blogspot.com/2012/02/official-inquiry-into-mismanagement-of.html> (Last visited on December 30, 2012).

<sup>199</sup> Prashant Reddy, *Déjà vu for Akhtar – Nightmare Before Barasat Courts Plays Out Once Again – With a Different Ending?*, February 4, 2013, available at <http://spicyipindia.blogspot.com/2013/02/deja-vu-for-akhtar-nightmare-before.html> (Last visited on June 13, 2013).

<sup>200</sup> *HR Min Introduces Copyright Amendment in Rajya Sabha*, April 20, 2010, available at <http://www.radioandmusic.com/content/editorial/news/>

in the making for several months before it was introduced in the Parliament. While most of the legislation was based on an earlier draft of amendments which was made public in 2007, the amendments regarding the rights of composers and lyricists were drafted much later through an opaque and non-participatory process.<sup>201</sup> In fact, unlike most other legislations drafted by the Government in the same period, the contents of the Bill were kept a closely guarded secret until the Bill was introduced in the Parliament.

A point to be noted at this juncture is that the composers and lyricists were only one of the many stakeholders with an interest in changing copyright laws for the music industry. There were other lobbies, such as the broadcast industry, which were lobbying for a statutory licensing regime for the public performance of music licensed by copyright societies.<sup>202</sup> There was some intersection of interests between the authors lobby and the broadcast lobby, in that they both wanted more transparency in copyright societies but for most part, authors like the music labels, were likely to be disadvantaged by a statutory licensing regime.

After its introduction in Parliament on April 19, 2010, the Bill was referred to the Parliamentary Standing Committee on April 23, 2010 for examination and public consultation.<sup>203</sup> The Committee, in its final report, recommended several amendments to the Bill. Despite these amendments, the final version of the Bill which was voted on by Parliament and which subsequently translated into law in the form of the Copyright (Amendment) Act, 2012, was substantially similar in spirit to the earliest version of the Bill.

The lobby of composers and lyricists, headed by Mr. Akhtar had sought three main amendments to protect their rights. The first was to over-rule the 1977 judgment of the Supreme Court in the IPRS case.<sup>204</sup> The second was to change the nature of rights given to authors and protect them from unfair contracts by giving them a statutory right to remuneration and protection from assigning away their copyrights in future technologies. This was necessary to prevent a recurrence of the loss of ringtone royalties. The third and final demand was to change the manner in which copyright societies were administered. As mentioned above, apart from the authors, there was a call from even the broadcast and hospitality industry for more transparency and regulatory

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hr-min-introduces-copyright-amendment-rajya-sabha (Last visited May 20, 2013).

<sup>201</sup> Bhatia, *supra* note 35.

<sup>202</sup> See generally Ashish Sinha, *Anger in the Air as Copyright Bill Favours Radio*, THE FINANCIAL EXPRESS September 1, 2011, available at <http://www.financialexpress.com/news/anger-in-air-as-copyright-bill-favours-radio-lets-music-cos-charge-more-royalty-from-tv-channels/839986/0> (Last visited on May 30, 2013).

<sup>203</sup> Standing Committee Report, Copyright Amend Bill 2010, *supra* note 8, 7.

<sup>204</sup> Indian Performing Right Society v. Eastern India Motion Pictures Association, 1977 SCR (3) 206.

oversight of copyright societies. The main amendments, proposed as a result of the above demands, are discussed below.

## B. *OVERRULING THE SUPREME COURT'S JUDGEMENT*

As discussed earlier in this paper, the judgment of the Supreme Court in the IPRS case<sup>205</sup> in 1977 had concluded, on the basis of proviso (b) & (c) in § 17 of the Copyright Act that all music or lyrics created for the purpose of a cinematograph film would be deemed to be owned by the producer of the film unless the contract had a written stipulation to the contrary.<sup>206</sup>

On paper, it was possible for all composers and lyricists to retain their copyrights by entering into contracts stating the same. As explained earlier, some composers like Rahaman appear to have entered into such contracts to retain a share in the royalties earned by the producers.<sup>207</sup> However, as also explained previously, a vast majority of Indian authors and composers do not enjoy the same bargaining power as Rahaman. Given the lack of any individual or collective bargaining power, the only other option to over-rule the Supreme Court's judgment was to bring in a legislative amendment.

Towards this end, the Copyright (Amendment) Bill, 2010 as introduced in Parliament sought to insert the following proviso to § 17:

“Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13.”

The works referenced in § 13(1)(a) are ‘original literary, dramatic, musical and artistic works’. When the Bill was referred to the Parliamentary Standing Committee, this particular amendment was endorsed by the Committee which in a pertinent part stated the following:

“The Committee also takes note of the fact that independent rights of authors of literary and musical works in cinematograph films are being wrongfully exploited by the producers and music companies by virtue of Supreme Court judgment in *Indian Performing Rights Society v. Eastern India Motion Pictures Association* which held that film producer is the first

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<sup>205</sup> *Id.*

<sup>206</sup> *See supra* Section IV (Akhtar's Main Dilemma with the Pre-2012 Copyright Laws).

<sup>207</sup> *See supra* Section IV (B) (The problem of the weak negotiating power of authors).

owner of the copyright and authors and music composers do not have separate rights.<sup>208</sup>

This amendment was retained in its original form in the final version of the law which was passed by the Parliament. As a result of this amendment, the authors would now own their rights in the music and lyrics even if they were created for the purpose of a cinematograph film. Once the synchronisation rights in the music have been licensed to the producers of the cinematograph film, the authors will continue to own the remaining rights such as the public performance rights in the music and lyrics. These remaining rights too could be licensed away by the authors under the new amendments but such contracts would now be subjected to the restrictions discussed below, where the authors would be entitled to certain minimum royalties.

### C. STRENGTHENING THE RIGHTS OF AUTHORS

The amendments sought to remedy the problem of weak negotiating powers of authors by three amendments. *Firstly*, it sought to provide the authors in the music industry, with a right to inalienable, mandatory royalty sharing. *Secondly*, it prohibited contracts which forced authors to licence away their rights for even future technologies. *Thirdly*, the amendments provided authors a right to retain inalienable mandatory royalty sharing even after the copyright is licensed away and *fourthly*, it sought to re-establish control of authors over the copyright societies. Each of these amendments is discussed in detail below.

#### 1. Providing authors in the music industry with a right to inalienable, mandatory royalty sharing

In the quest to strengthen the author's rights, the drafters of the Copyright Amendment moved away from the traditional Anglo-Saxon moorings of Indian copyright law, for the purpose of moving towards the European style of *droit d'auteur*. The Anglo-Saxon model of copyright law, which originated in the U.K. with the Statute of Anne in 1709, and followed by most common law countries like India and the United States, always viewed copyright law as a property right which could be transferred between different parties for a certain consideration.<sup>209</sup> The European system of copyright which is more often referred to as author's right or *droit d'auteur* has the same effect on the market as copyright law in India or the U.K.<sup>210</sup> However, the jurisprudential underpinnings of both these models of copyright law are quite different. In the

<sup>208</sup> Standing Committee Report, Copyright Amend Bill 2010, *supra* note 8, ¶ 9.14.

<sup>209</sup> See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (2003) (For an excellent history of copyright law).

<sup>210</sup> Jean-Luc Piotraut, *An Authors' Rights-Based Copyright Law: The Fairness And Morality of French and American Law Compared*, 24 *CARDOZO ARTS & ENTERTAINMENT* 549, 555 (2006).

*droit d' auteur* system, the creative work is viewed as an extension of an author's personality and is considered inalienable.<sup>211</sup> As such, the *droit d' auteur* model is grounded in human rights, where the author's right to control his work is based upon a natural rights philosophy.<sup>212</sup> Critiquing the European model, described as the 'romantic view' of copyright, an American scholar states the following:

“The Romantic view of copyright is one of the natural rights, a social contract approach to copyright: Authorship is attributable only to individuals because association with the work is believed to be both personal and immutable (hence moral rights too). It is for this reason that the continental referent is *droit d' auteur*, author's right, and not 'copyright'.”<sup>213</sup>

A good illustration of the *droit d' auteur* system is Germany where the author can never waive ownership of the rights in his work, but instead only licence his economic rights. Describing German copyright law, a German scholar states that, “Copyright cannot be transferred (§ 29 (1) UrhG), waived, or renounced, either in whole or in part (such as economic rights or moral rights)”.<sup>214</sup> The author, however, does have the right to licence the right to use the work to other persons in exchange for royalties.<sup>215</sup>

More importantly, countries like Germany have a statutory provision entitling German authors to receive adequate remuneration.<sup>216</sup> As per this provision, if the author is of the view that he or she has not received adequate remuneration, the author can approach a court of law to make any such determination.<sup>217</sup> Normally, the standard of adequate remuneration for an individual author is pegged at the rates negotiated between authors associations and the industry, but courts have a significant role to play in this respect. Of course, these rights of the authors come with a string of conditions, but when compared to the Anglo-Saxon version of copyright law, the statutory protection offered under German law is quite strong with German courts having a substantial say in what constitutes adequate royalties for German authors.<sup>218</sup> In addition to this right of 'adequate remuneration', German copyright law also has several other safeguards such as the 'bestseller provision', which allows authors to claim a share of profits in case the exploitation of a work generates profits completely

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*; See generally Jack Donnelly, *Human Rights as Natural Rights*, 4 HUMAN RIGHTS QUARTERLY 391-405 (1982) (For a comparison between human rights and natural rights).

<sup>213</sup> WILLIAM F. PATRY, *PATRY ON COPYRIGHT*, Chap 3 § 3 :19 (2012).

<sup>214</sup> DOROTHEE THUM, *COPYRIGHT THROUGHOUT THE WORLD* Chap 16 6:29 (a) (Silke von Lewinski ed., 2011).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*, Chap 16 16:32 (a).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

disproportionate to initial expectations.<sup>219</sup> Another safeguard for German authors is the right to claim a share of profits generated from exploiting the work in new forms which were not initially contracted upon.<sup>220</sup>

The specific European law which appears to have influenced the Indian amendments the most is the European Community Rental Rights Directive of 1992.<sup>221</sup> Although the model contained in this law was aimed at rental royalties, its author, Dr. Silke Von Lewinski, acknowledges that this model can be applied to other sectors.<sup>222</sup> The five essential features of this Lewinski model are as follows:<sup>223</sup>

- (1) The statutory basis for the remuneration right;
- (2) The unwaivable nature of the right;
- (3) The fact that it can be transferred only to a Collective Management Organisation (CMO);
- (4) Mandatory collective administration of the remuneration right, and the professional user being the debtor of the remuneration.

The drafters of the Copyright Amendment appear to have been significantly influenced by this alternative narrative of copyright law since the final version of the amendments effectively modelled a section of the Indian copyright law on the Lewinski model described above, which in itself is rooted in the *droit d'auteur* system of law.<sup>224</sup>

The initial version of this Bill, which is the Copyright (Amendment) Bill, 2010, proposed two amendments to § 18 of the Copyright Act to strengthen author's rights. These amendments, contained in Clause 6 of the Bill, prohibited the composer or lyricist of works incorporated in a cinematograph film, from assigning to any person, apart from a legal heir or a copyright society, his or her right to collect equal royalties that are earned by the assignee of the copyright by exploiting the said work outside a cinema hall.

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<sup>219</sup> *Id.*, Chap 16 - 16:32 (b).

<sup>220</sup> *Id.*, Chap 16 - 16:32 (c).

<sup>221</sup> Council Directive 92/100/EEC of 19 November, 1992 on Rental Right and Lending Right and on Certain Rights related to Copyright in the Field of Intellectual Property, O. J. L 346/61 of 27 November, 1992.

<sup>222</sup> Silke Von Lewinski, *Collectivism and Individual Contracts* in INDIVIDUALISM AND COLLECTIVENESS IN INTELLECTUAL PROPERTY LAW 122-123 (Jan Rosen ed., 2012).

<sup>223</sup> *Id.*

<sup>224</sup> This was certainly not the first import from Europe since Indian copyright law had already imported concepts like 'moral rights' and 'resale royalties for art' from Europe. *See* The Indian Copyright Act, 1957, § 57 and § 53A.

The original text of the amendment was as follows:

“Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilisation of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void”.

To briefly illustrate, this provision would now mean that if the final owner of the copyright in the music and lyrics, be it the producer of the film or any other person, earned Rs. 1,00,000 in royalties by licensing the public performance rights in the works to a third party, for example, a radio station or a hotel, the composer and the lyricist would be entitled to share Rs. 1,00,000 equally with the producer. This would mean that each person i.e., the composer, the lyricist and the producer would be entitled to one-third of Rs. 1,00,000. Any contract contrary to this provision would be void in law.

The aim of this provision is to protect the parties with weaker bargaining power i.e., the lyricist and composer, from being forced to contract away all their rights to the stronger party. Such a restriction on the freedom of lyricists and composers to contract their rights away, is reminiscent of the minimum wage legislations which prohibit employers from paying their workers a wage below the minimum statutory amount.<sup>225</sup>

Soon after this Bill was introduced in the Parliament, the Chairperson of the Rajya Sabha referred it to the Parliamentary Standing Committee comprising of around 30 Members of Parliament. Like most other standing committees, this Committee too, invited comments and suggestions from all stake-holders involved.<sup>226</sup>

From the music industry, industry bodies and companies such as the South Indian Music Companies Association (SIMCA) and RPG-Saregama, deposited before the Committee, whereby they objected vociferously to the proposed amendment on the grounds that such restrictions on assignment would severely hamper the fundamental right to contract under Article 19(1)(g) of the Constitution of India.<sup>227</sup>

<sup>225</sup> See Minimum Wage Act, 1948.

<sup>226</sup> Standing Committee Report, Copyright Amend Bill 2010, *supra* note 8, ¶ 1.4.

<sup>227</sup> *Id.*, ¶ 9.6 to 9.10.



The authors and composers were represented by Mr. Javed Akhtar who vigorously defended the provision. Mr. Akhtar's arguments carried the day and the Committee retained the same provision albeit in a redrafted *avatar*.<sup>228</sup> The provision as redrafted by the Committee read as follows:

“Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilisation of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the author's legal heirs or to a copyright society for collection and distribution and any agreement to contrary shall be void.”<sup>229</sup>

In addition, Mr. Akhtar also requested the Committee to ensure that the authors and composers would get a right to equal royalties even when the literary or musical work was utilized as a part of a sound-recording independent of the cinematograph film.<sup>230</sup> This would ensure that the author or composer would receive a share of royalties earned by the music label, selling their works as ringtones, CDs or downloads from the internet. The Committee accepted his recommendation and added the following new provision:<sup>231</sup>

“Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilisation of such work except to the author's legal heirs or to a collecting society for collection and distribution and any assignment to the contrary shall be void”.

Legally speaking, recommendations of the Parliamentary Standing Committee are not binding on either the Parliament or the government.<sup>232</sup> These recommendations are, however, almost always accepted, unless the government of the day raises serious objections to the same.<sup>233</sup> In the present

<sup>228</sup> *Id.*, ¶ 10.20.

<sup>229</sup> *Id.*, ¶ 9.1.

<sup>230</sup> *Id.*, ¶ 9.11.

<sup>231</sup> *Id.*, ¶ 10.20.

<sup>232</sup> *Explained: How Parliament Standing Committees Work*, August 22, 2011, available at <http://www.rediff.com/news/column/explained-how-parliament-standing-committees-work/20110822.htm> (Last visited on May 20, 2013).

<sup>233</sup> See generally Jacob P. Koshy, *GM Panel Recommends Halting All Field Trials*, LIVE MINT (INDIA) September 9, 2012, available at <http://www.livemint.com/Politics/IxOLaoi2FKZJ1yeTME006K/GM-panel-recommends-halting-all-field-trials.html> (Last visited on 30 May, 2012).

case, the above recommendations of the Standing Committee were incorporated in the final version of the Bill that was passed by the Parliament.

The criticism of the above mandatory royalty sharing provisions are two fold, the first being the practical aspect of implementing the provision in contracts between the authors and producers and the second being the issue of legal interpretation of the provision. On the practical side, there have been concerns about the impact that the provisions will have on the authors who have been highly dependent on the one time lump-sum payments that they received earlier when they gave away their entire rights. The amendments will now force them to share the risk with the producer and wait for a period of time before the royalties start flowing in and if the music is not received well, the authors receive close to nothing. For authors used to a culture of receiving risk-free one-time lump-sum payments, it remains to be seen how they will adjust to participate in the risk of success or failure of their works. Not every author may have the financial wherewithal to assume such risk, especially the new entrants.

The second criticism is based upon the interpretation of the provision in question. There has been a particular critique by some scholars, on the wording of the amendments, especially the use of the phrase ‘right to receive royalties’.<sup>234</sup> These commentators point out that the phraseology of the various rights provided for all protectable works under copyright law, under § 14 of the Copyright Act, is essentially a set of positive rights to carry out particular acts regarding the work created by the author. Some of these rights are the right to reproduce, the right to publicly perform and the right to make derivative rights. There is however no positive right under § 14 to ‘receive royalties’. The issue therefore is, how exactly can the amendment impose a bar on assigning away the right to ‘receive royalties’ when no such right is available under the law, especially § 14 of the Copyright Act? This remains unanswered and shall only be addressed through litigation before the courts.

## 2. Bar on contracting away rights in future technologies

This section of the amendments sought to render void any contract for the assignment of copyright from an author in future technology, unless the technology in question was expressly referred to in the initial assignment. In a pertinent part, the provision read as follows:<sup>235</sup>

“Provided further that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work”.

<sup>234</sup> See generally ANANTH PADMANABHAN, INTELLECTUAL PROPERTY RIGHTS 319-322 (2012).

<sup>235</sup> The Copyright (Amendment) Bill, 2010, Clause 6 which sought to amend §18.

This provision was meant to prevent a re-play of those contracts where composers and lyricists in Bollywood had un-wittingly contracted away their rights to the future exploitation of their music, in the form of ringtones for mobile or cellular phones. As explained earlier, these were contracts which had a standard clause forcing authors to assign away their rights in all future technologies.

As per the new proviso proposed in the Bill, the assignee of the copyright would have to renegotiate the contract with the authors every time they wished to exploit the copyright of a work in a new technology which did not exist at the time of the assignment of copyright.

As expected, this new proviso was extremely controversial. The opponents to this provision were not only music labels but also the book publishing industry. The Parliamentary Standing Committee Report recorded the opposition to this particular clause, made by the following parties: South Indian Music Companies Association, RPG-Saregama Enterprises, Film & Television Producers Guild of India, South Indian Film Chamber of Commerce, Indian Broadcasting Foundation, Federation of Indian Publishers, Association of Publishers in India, the Indian Reprographic Reproduction Organization & the Business Software Alliance.<sup>236</sup> All of these organizations objected to this amendment on the grounds that it would cause great uncertainty in the industry since technology was rapidly changing and an assignee who had contracted for only a particular technology could be completely upended by the emergence of a new technology.<sup>237</sup>

Despite the detailed recordings made of these grounds of opposition, the Parliamentary Report is silent on the reasons for retaining this provision. The final version of the law enacted by Parliament did not make any changes to this specific provision and it was retained as drafted.

3. Providing authors a right to retain inalienable mandatory royalty sharing even after the copyright is assigned away

The text of the provision, as originally proposed in Clause 7 of the Bill to amend § 19, read as follows:

“(9) No assignment of the copyright in any work to make a cinematograph film or sound recording shall affect the right of the author of the work to claim royalties or any other consideration payable in case of utilisation of the work in any form other than as part of the cinematograph film or sound recording.”

<sup>236</sup> Standing Committee Report, Copyright Amend Bill 2010, *supra* note 8, 22-25.

<sup>237</sup> *Id.*

The Parliamentary Standing Committee recommended revision of the above provisions in order to ensure that they were in line with the revisions that it had proposed to § 18.<sup>238</sup> The revised sub-clause (9) and the additional sub-clause (10), as proposed by the Committee<sup>239</sup> and as enacted by Parliament in the final version of the legislation, are reproduced as follows:

“(9) No assignment of copyright in any work to make a cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilisation of the work in any form other than for the communication to the public of the work, along with the cinematograph film in a cinema hall.

(10) No assignment of the copyright in any work to make a sound recording which does not form part of any cinematograph film shall affect the right of the author of the work to claim an equal share of royalties and consideration payable for any utilisation of such work in any form.”

The only purpose of the above clauses is to serve as a clarification that the ‘right to receive’ royalties is distinct from the copyright in the work itself and that the authors would retain the ‘right to receive’ royalties even after the copyright has been assigned.

#### 4. Re-establishing control over copyright societies

The last and final limb of Mr. Akhtar’s lobbying efforts was to change the manner in which copyright societies (especially IPRS) were controlled by their members. The undoubted inspiration behind this particular move was the manner in which the music labels had taken over IPRS and the fact that they had subsequently stopped paying royalties to authors who were in control of IPRS.<sup>240</sup> As noted by the Parliamentary Standing Committee Report, “It was further informed [by the Government] that in the background of the amendment was the functioning of the Indian Performing Rights Society, a copyright society founded by authors and music composers including music publishers.”<sup>241</sup>

Working towards the above mentioned goal, the amendments originally proposed that all future copyright societies be administered only by ‘authors’ and not ‘owners of copyrights’.<sup>242</sup> As noted by the Parliamentary

<sup>238</sup> *Id.*, ¶ 10.20.

<sup>239</sup> *Id.*

<sup>240</sup> See generally *supra* Section IV(c) (The misdeeds at IPRS – the final catalyst).

<sup>241</sup> Standing Committee Report, Copyright Amendment Bill 2010, *supra* note 8, ¶ 16.3.

<sup>242</sup> The Copyright (Amendment) Bill, 2010, Clause 22.

Standing Committee report, "Against this backdrop, the amendment has been proposed to make clear that the societies can only be formed by the authors and not by the owners."<sup>243</sup>

The move to switch control of copyright societies to authors instead of owners was strongly resisted by almost all other stakeholders, save for Javed Akhtar and the Authors Guild of India. As noted by the Parliamentary Standing Committee report, the following stakeholders opposed the amendment: South India Music Companies Association, Indian Music Industry, Phonographic Performance Ltd., Indian Broadcasting Foundation, Motion Pictures Association, Indian Motion Pictures Producers' Association, Association of Publishers in India, Federation of Indian Publishers, Indian Reprographic Rights Organization, Onmobile Global Ltd., Google India.<sup>244</sup> The main ground for their opposition was that persons apart from the author may own the copyright in a work and hence it would be absolutely unreasonable to disallow such persons from controlling the copyright societies.<sup>245</sup>

The grounds for opposition were duly taken note of and this was probably the only amendment which Javed Akhtar was unable to defend. In a pertinent part, the Committee notes that:<sup>246</sup>

"The Committee, after analyzing the pros and cons of the proposed amendments feels that obliging only authors to form and register a copyright society may not prove to be a right decision as it may lead to serious practical consequences. Firstly, it will keep the owners of rights viz recording companies, music publishers, book publishers etc. out of the ambit of these societies leading to a vacuum. It would not be wrong to say that it would be a remedy worse than a malaise. Secondly, the complete handover of the copyright society to the authors alone would not be fair and balanced. Legally and practically, the owners of rights have been the owners of copyright and there would be no harm if they also remain members of the copyright societies. The Committee takes note of the fact that this was a suggestion made by some of the stakeholders. Composition of the copyright society should be such that both authors and owners get their rightful share. The Committee further feels that there is no denying in the fact that authors need protection of their rights. However, the way to achieve this protection is not by excluding the other stakeholder i.e. owners of rights. A mechanism has to

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<sup>243</sup> Standing Committee Report, Copyright Amendment Bill 2010, *supra* note 8, ¶ 16.3.

<sup>244</sup> *Id.*, ¶ 16.4 to 16. 10.

<sup>245</sup> *Id.*, ¶ 16.11 to 16. 13.

<sup>246</sup> *Id.*, ¶ 16.12.

be evolved whereunder both authors and owners are allowed to form and administer the copyright societies with all the members having equal rights and powers”.

The recommendation of the Committee was accepted in the final version of the Bill. The Government dropped the proposed amendment and introduced a new amendment which required copyright societies to be managed jointly by authors and owners of copyright. The amendment to § 35 states:<sup>247</sup>

“(3) Every copyright society shall have a governing body with such number of persons elected from among the members of the society consisting of equal number of authors and owners of work for the purpose of the administration of the society as may be specified.”

It is submitted that the solution for shared control of copyright societies, by authors and owners, is a poor solution to the problem at hand. What happened with IPRS, especially the manner in which the music labels took over the society, was an extraordinary failure of the judicial system, which can be remedied only through the judicial system. The solution of shared control between authors and owners is going to pose major problems in running a copyright society because both these groups are likely to have diametrically opposing interests when it comes to deciding distribution of royalties between different groups. With shared control of the governing council, it is possible that a lot of these decisions will be evenly split. In such a case how will the governing body resolve the ‘tie’? Given the degree of differences between the authors and owners, it is possible that such a provision will paralyze the functioning of future copyright societies.

#### *D. STRICTER REGULATORY AND TRANSPARENCY REQUIREMENTS FOR NEW COPYRIGHT SOCIETIES*

Ever since the first copyright society was created in France in 1792 by the French playwright Pierre-Augustin Caron de Beaumarchais, the concept of collective management of copyright have revolutionized the manner in which copyrights have been licensed and enforced.<sup>248</sup> As described by one scholar, collective management organizations “can solve the copyright paradox, by proving that the role of copyright (for published works, performance and recordings) is not to deny access and use but rather to organize it by making it reasonably simple, if not always inexpensive, for users to secure the rights

<sup>247</sup> The Copyright (Amendment) Act, 2012, Clause 23 (Final version).

<sup>248</sup> See Nathalie Piaskowski, *Collective Management in France* in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 169 (Prof. Gervais ed., 2010)(For history of copyright societies in France).

they need”.<sup>249</sup> The danger of such collective licensing is that it gives rise to monopolies, therefore making regulation of such collective licensing one of the key challenges of copyright law in the 21<sup>st</sup> century.

Globally there have been two models of regulation. Countries like U.K., for instance, need copyright societies to register with the government, which usually allows for only one copyright society in a class of works, followed by an oversight of the society’s licensing schemes. In case of a dispute with regard to the tariffs, a Copyright Tribunal exists to resolve all disputes regarding the same.<sup>250</sup> The other model of regulation is the one followed by the United States, where there is no requirement for registration of copyright societies. There are multiple copyright societies in the U.S. in the same class of works and rights, for example, the American Society of Composers, Authors and Publishers (‘ASCAP’), Broadcast Music, Inc. (‘BMI’) and SESAC.<sup>251</sup> The first two, which are the biggest societies, have been functioning under anti-trust decrees enforced by the Department of Justice for the last 7 decades, after the copyright societies were found to be in violation of the competition laws.<sup>252</sup> Additionally, there is a Copyright Royalty Board which fixes royalties for statutory licences.<sup>253</sup>

Over the last 5 decades, India has oscillated between both the modes of regulation. Under the original Copyright Act, copyright societies, which were then known as performing rights societies, were not required to register themselves with the government and there were no restrictions on the number of copyright societies in each class of works.<sup>254</sup> However, if a copyright society wanted to carry out the business of collective licensing, it was required to “publish and file with the Registrar of Copyrights, statements of all fees, charges or royalties which it proposes to collect for the grant of licences for performance in public of works”.<sup>255</sup> The statement of fees and royalties was also required to be published in both, newspapers and the gazette.<sup>256</sup> The right to sue for infringement of such rights was subject to the copyright society submitting

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<sup>249</sup> See generally Prof. Gervais, *Collective Management of Copyright: Theory and Practise in the Digital Age* in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 15 (Prof. Gervais ed., 2010).

<sup>250</sup> See generally Prof. Dr. Paul L.C. Torremans, *Collective Management in the United Kingdom* in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 251 (Prof. Gervais ed., 2010).

<sup>251</sup> See generally Glynn Lunney, *Copyright Collectives and Collecting Societies: The United States Experience* in MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 339 (Prof. Gervais ed., 2010).

<sup>252</sup> See *United States v. American Society of Composers Authors and Publishers*, Equity No. 78-388 (S.D.N.Y., filed 30 Aug, 1934); *Broadcast Music Inc. v. Columbia Broadcasting System Inc.*, 441 U.S. 1.

<sup>253</sup> 17 U.S.C., § 801-805 (2009).

<sup>254</sup> The Copyright Act, 1957, § 33 (as originally passed).

<sup>255</sup> *Id.*, § 33(1).

<sup>256</sup> The Copyright Rules, 1958, Rule 12(1) (as originally passed).

such statement of fees and royalties to the Copyright Office.<sup>257</sup> The published rate of royalties could be challenged by any person before the Copyright Board, a tribunal, whose decision on the rates would be considered final for all purposes.<sup>258</sup>

The cumulative effect of these provisions was the creation of a rather stringent scheme to ensure transparency for copyright societies apart from ensuring price regulation. Such regulation was not surprising given that the Indian economy in the fifties was primarily a socialist economy where the Central Government kept a tight rein on every aspect of the economy. This, however, changed in the nineties (1990-91) when India went through a severe financial crisis. As a consequence of the crisis, India was forced to open its markets to foreign capital and lift a number of controls on the operation of free enterprise.

The effects of a newly liberalized economy changed the mind-set of the government. This change was reflected in the Copyright (Amendment) Act, 1994. With this legislation, the Parliament renamed 'performing societies' as 'copyright societies' and relieved them of several of the onerous obligations discussed above. According to the new law, copyright societies only had to ensure that they were registered with the Copyright Office, that they were functioning under the control of the owners of copyright and complying with the statutory caps on administrative overheads.<sup>259</sup> The law required the government to ordinarily register only one copyright society for each class of work.<sup>260</sup> The provisions regarding the right to challenge the royalty structure before the Copyright Board were deleted, which meant that copyright societies now had a stronger hand in negotiations with content users.<sup>261</sup> There was of course, the possibility that a potential user could seek compulsory licences but such licences were granted in only limited circumstances where the work was not being made available to the general public.<sup>262</sup>

From 1994 onwards, copyright societies in India grew at a phenomenal pace. However, as it is always the case with monopoly rights in a free market, there were several allegations of abuse of monopoly powers bestowed on these copyright societies under the Copyright Act. The range of complainants varied from hotels, restaurants, radio broadcasters to event management companies. In the years leading up to the Copyright Amendment, IPRS & PPL were sued by the Event and Entertainment Management Association,<sup>263</sup> the

<sup>257</sup> The Copyright Act, 1957, § 33(2) (as originally passed).

<sup>258</sup> *Id.*, § 34.

<sup>259</sup> The Copyright Act, 1957, § 33 (after the 1994 amendment).

<sup>260</sup> *Id.*

<sup>261</sup> The Copyright (Amendment) Act, 1994.

<sup>262</sup> The Copyright Act, 1957, §31 (after the 1994 amendment).

<sup>263</sup> Event and Entertainment Management Association v. Union of India, W. P. (C) 5422/2008 & CM APPL 10648/2010, May 25, 2011 (Del. H.C); See Prashant Reddy, *Delhi High Court*



Federation of Hotels & Restaurants Association of India<sup>264</sup> and several radio broadcasters for unreasonable tariff rates. Petitions by the first two associations were on a slippery legal footing and hence were subsequently dismissed by the Delhi High Court.<sup>265</sup> IPRS & PPL have also been sued in various states by regional associations of hotels and restaurants.<sup>266</sup> The radio broadcasters on the other hand, managed to successfully secure compulsory licenses by suing the copyright societies before the Copyright Board.<sup>267</sup>

While the high rate of tariffs was the primary complaint, there were also several complaints regarding the lack of transparency in the operation of these copyright societies especially with respect to tariffs that were being charged. For example, PPL would not even publish its tariffs on its website despite being required to file the same with the Registrar of Copyrights as a public document under the Copyright Rules, 1958.<sup>268</sup> Against this backdrop, it was not surprising that the government sought to amend the legislation in order to put the copyright societies back under intensive regulation. Therefore, as per the Copyright Amendment, all existing copyright societies would have to register once again with the Copyright Office and thereafter, they would have to renew their registrations every 5 years after demonstrating compliance with the terms of the legislation.<sup>269</sup>

In a move to further increase transparency, the copyright society would be required to publish its tariff scheme, instead of merely submitting it to the Registrar of Copyright.<sup>270</sup> Most importantly, however, the amendments aimed to curb the bargaining powers of the copyright societies by allowing any person to challenge the tariff scheme of the copyright societies before the Copyright Board.<sup>271</sup> Further, it was provided that, “the Board may, if satisfied

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*Dismisses yet Another Petition against IPRS & PPL*, June 2, 2011, available at <http://spicyipindia.blogspot.com/2011/06/delhi-high-court-dismisses-yet-another.html> (Last visited on December 26, 2012).

<sup>264</sup> Federation of Hotels & Restaurants Association of India v. Union of India, WP(C) No.452/1999, WP(C) No.914-1040/2009 & CM No.17009/2008, April 7, 2011 (Del. H.C.); See Prashant Reddy, *Delhi HC Ejects Petitions against Copyright Societies & Copyright Act*, April 8, 2011, available at <http://spicyipindia.blogspot.com/2011/04/delhi-hc-ejects-petitions-against.html> (Last visited on December 26, 2012).

<sup>265</sup> See *Id.*; *supra* note 263.

<sup>266</sup> See Phonographic Performance Ltd., *Report of the Directors on the Working of the Company for the Year Ended March 31, 2007*, 3, available at <http://www.spicyip.com/docs/ppl5.pdf> (Last visited on December 26, 2012).

<sup>267</sup> Music Broadcast Pvt. Ltd. v. Phonographic Performance Ltd., Case No. 1, 2 and 6 of 2002 and Case No. 3/1 to 3/6 of 2008, Order passed on August 25, 2010, Before the Copyright Board, available at <http://www.spicyip.com/docs/Copyrightboardorder.pdf> (Last visited on December 26, 2012).

<sup>268</sup> The Copyright Rules, 1958, Rule 14J - Tariff Scheme (after the 1994 amendment).

<sup>269</sup> The Copyright (Amendment) Act, 2012, Clause 19 (this clause amended §33 of the Act).

<sup>270</sup> The Copyright (Amendment) Act, 2012, Clause 20 (this clause inserted a new § 33A to the Act).

<sup>271</sup> *Id.*

after holding such inquiry as it may consider necessary, make such orders as may be required to remove any unreasonable element, anomaly or inconsistency therein”.<sup>272</sup> The penalties for non-compliance with some of the above requirements, such as non-publication of the tariff scheme, could be the suspension of the registration of the copyright society itself.<sup>273</sup>

### *E. THE REQUIREMENT FOR MANDATORILY FUNCTIONING THROUGH A COPYRIGHT SOCIETY*

As explained above, copyright societies are going to be regulated extensively under the new amendments. Theoretically, there are several music companies which can remove themselves from the purview of such regulation by not joining any copyright society.

This may change with the Copyright Amendment for the simple reason that the Government appears to be determined to regulate the entire business of copyright licensing in the music industry, and the only way to do so is to ensure that every music label is a part of a copyright society. For example, Clause 19 of the Amendment Bill, states the following:

“Provided further that the business of issuing or granting license in respect of literary, dramatic, musical and artistic works incorporated in a cinematograph films or sound recordings shall be carried out only through a copyright society duly registered under this Act”.

This clause requires the entire business of copyright licensing in the music industry to be conducted only through a registered copyright society. As explained earlier, the reason for including this provision in the Bill was to ensure that all music labels transacted their business only through a registered copyright society which was subjected to government supervision.

Strangely enough, the Bill, even in its final version, does not provide for any penalty or any other remedial measure in case an entity transacts the business of issuing copyright licences for music, independent of a copyright society. Thus, for all practical purposes this provision is toothless and can be ignored.

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<sup>272</sup> *Id.*

<sup>273</sup> The Copyright (Amendment) Act, 2012, Clause 19 (this clause amended §33 of the Act).

## VI. CONCLUSION – WILL THE COPYRIGHT (AMENDMENT) ACT, 2012 SUCCEED IN ITS GOAL?

The success or failure of the Copyright (Amendment) Act, 2012 will ultimately be contingent on the degree to which the composers and lyricist are able to enforce their hard won rights before the judiciary especially the Copyright Board, which has been reformed under the same amendments. The history of India is replete with well-meaning legislations that are not effectively enforced for a variety of socio-economic and political reasons. Illustratively, despite legislations banning child labour and prescribing minimum wage legislation in India, both legislations have failed in fulfilling their aims. Child labour continues to exist in India and minimum wages are rarely paid in the unorganized sector. The reason for this sorry state of affairs is the fact that the key beneficiaries of these laws have never been organized enough to enforce their rights before the judiciary. The community of composers and lyricists will thus have to constantly be on their toes to ensure that music labels and producers of films share royalties with them as required under the amendments. They will have to engage in collective bargaining with copyright societies and music labels. This is easier said than done because authors, especially composers and lyricists, tend to be independent minded persons.

It is unlikely that the music labels and the producers of films will concede their grip over these royalties without putting up a fight over the interpretation of the language of the amendments since they have vociferously opposed the amendments from the beginning. It is likely that these players will use the judicial process to cushion the impact of the amendments and achieve success to a certain degree. For example, the amendments do not define the word 'royalties'. Then, how will the courts interpret this term as used in the amendments? Will it mean the net revenues or gross profits? Who is going to collect these 'royalties'? How are they going to distribute these 'royalties'? Will these amendments apply retrospectively?

Apart from the judiciary, the Registrar of Copyrights too will play a key role in registering and ensuring compliance by the new copyright societies. As has been demonstrated in this paper, it is the failure and poor administration by consecutive Registrars which has contributed in large measure to the brazen manner in which music labels and copyright societies flouted the law. If this lack of political will to enforce the law continues, the authors and composers will find themselves in considerable trouble. The Registrar of Copyrights will thus have to demonstrate considerable skill in administering the copyright societies under the new law. Revolutionary amendments such as the Copyright Amendment Act, 2012 are never easy to enforce, more so in a country as complicated as India. Hopefully, the composers and lyricists of India will have a happy ending.

