SKEWING THE PITCH?

IMPLICATIONS OF EXPANDING SECTION 31 D OF THE COPYRIGHT ACT TO INTERNET BROADCASTERS AND ONLINE STREAMING SERVICES

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EXECUTIVE SUMMARY

In its recent review of the Indian intellectual property regime, a parliamentary standing committee recommends extending statutory licensing to internet platforms. Statutory licensing is a form of non-voluntary licensing of copyrighted works that permits prospective licensees to exploit certain creative works without prior permission from the copyright owner. It is an extraordinary provision, meant as a way forward when negotiations between creators and aspiring licensees are at an impasse. In India, under Section 31D of the Copyright Act of 1957, it was specifically brought in to give succour to an ailing traditional broadcast industry.

The standing committee report suggests amending Section 31D of the Copyright Act to bring internet streaming services within its purview. The committee justifies its recommendation by citing the success of digital content service providers in the country, arguing that the economic potential of digital streaming services warrants granting them the same benefits as traditional broadcasters. The recommendation is questionable. Most music is now consumed in digital form. Copyright industries are burdened by the unprecedented erosion of value through piracy. Extending the purview of statutory licensing to the internet could drive down the value of musical works and eviscerate the negotiating power of creators with large streaming companies.

This article discusses the feasibility of including internet broadcasters within the scope of statutory licensing. It is divided into three sections. The first section provides an overview of the concept of statutory licensing under the Copyright Act 1957. The second section analyses the implications of extending Section 31D to internet broadcasters. It traces the history of statutory licensing under the Act and highlights the possible ramifications of extending it on the negotiating power and earnings of creators whose works are primarily consumed online. It also discusses how extending Section 31D would contradict the objectives of the National Intellectual Property Policy, 2016. The third section outlines licensing reforms in other nations to identify alternatives to statutory licensing which have served the public interest without compromising on the value artists and creators derive from their work.

INTRODUCTION

The 161st Parliamentary Standing Committee Report on a Review of the Intellectual Property Regime in India recommends amending Section 31D of the Copyright Act, 1957 to broaden the scope of statutory licensing to include internet broadcasters in its purview.[1] At present, Section 31D grants traditional broadcasters the right to air sound recordings or literary or musical works that have already been published without the prior permission of the owners of these works. It was introduced to help an ailing radio broadcast industry find a way forward when negotiations with copyright owners were at an impasse. The intent behind the Committee's suggestion to include internet streaming companies is, however, quite different. It contends that statutory licensing is necessary to enhance the success of a burgeoning digital streaming sector, and to create a level playing field between traditional and digital distribution media.

This paper analyses the ramifications of extending Section 31D to internet broadcasters and streaming companies. It argues the move would threaten to undermine the negotiating power of content creators to the detriment of India's creative economy. It identifies global best practices alternative to statutory licensing which have served the public interest by improving the efficiency of the licensing process without compromising the value artists and creators derive from their work.

BACKGROUND

A licence is the transfer of interest in copyright. It is the vehicle by which creators exploit their rights to their works. Through a licence, a creator gives another party the right to use their copyright subject to restrictions. Broadly, a licence agreement provides details of the copyrighted work, the rights licensed, the royalty payable and conditions of the duration, extension and/or termination of the licence.

There are two kinds of licence under the Copyright Act: voluntary and compulsory/non-voluntary.

1. **Voluntary licences**, covered by Section 30 of the Act, are used by copyright owners to grant certain rights to licensees, subject to terms and conditions mutually agreed.

2. **Non-voluntary licences** on the other hand, permit the use of a copyright holder's work without their prior permission. These licences are of two kinds: compulsory and statutory. The primary aim of non-voluntary licensing is to make copyrighted works available to the general public when it would be otherwise difficult to do so.

Statutory licences under the Copyright Act enable radio or television broadcasters to transmit previously published literary and sound recordings after giving unilateral notice to the copyright

holders and paying a fee determined by Commercial Courts.[2]

In 2016, the Department of Industrial Policy and Promotion (now the Department for Promotion of Industry and Internal Trade) issued an Office Memorandum (OM) dated 5 September expanding the scope of Section 31D to include "broadcasting" on the internet.[3] The OM was, however, set aside as non-binding and lacking legal sanctity by the Bombay High Court in the case of *Tips Industries v Wynk Music*.[4] The Court held that the provisions on statutory licensing were limited to television and radio broadcasters and did not include online streaming services.[5]

Despite the decision in *Tips v Wynk*, the 2019 draft amendments to the Copyright Rules 2013 sought to bring internet broadcasting within the domain of statutory licensing, by expanding the scope of Section 31D from "radio broadcast or television broadcast" to "each mode of broadcast". This revision is omitted from the latest amendments to the Copyright Rules notified by the Central Government on 30 March 2021.[6] The omission of this term marks an acknowledgement of the pitfalls associated with extending Section 31D to internet broadcasters.[7] The 2019 amendments have also been criticised for overstepping the mandate of the Copyright Act.

EXTENDING SECTION 31D TO INTERNET BROADCASTERS IS LEGALLY INFEASIBLE

1. Extending 31D to the internet goes beyond its original legislative intent

Section 31D was introduced in 2012 to help a private FM radio industry that was allegedly facing heavy losses. Market players had heavily invested in bids for FM frequencies but were unable to generate revenues to sustain their costs, due largely to their exorbitant licensing fees. Radio licences were auctioned at prices as high as Rs 9.75 crore each with the lowest bidding price set at Rs 1.25 crore. The global economic slowdown prompted by the 2008 financial crisis affected advertising spends as well – the industry's primary source of revenue. Radio was also losing ground to digital – from 2006-08, radio advertising revenues grew at 19.7% CAGR while those for digital grew by 45.2%. Interestingly, during the same period, the music industry witnessed a deceleration of 4.4%.[8]

The costs of operating a radio business allegedly increased further after the broadcasters' failed negotiations with music publishers over licensing rates.[9] The impasse prompted litigation between music labels and private radio broadcasters. FM operators approached the courts and quasi-judicial forums to obtain compulsory licences for music, contending that the royalties sought by the record labels were excessive as a result of which recordings were being withheld from the public. In *Music Broadcast Pvt Ltd v Phonographic Performance Ltd*,[10] PPL, a copyright society that licensed sound recordings for public performances and broadcasts, demanded a revenue sharing arrangement over and above royalty payment at Rs 1,500 per needle hour to be treated as a minimum guarantee. The radio broadcaster refused the offer, contending that the globally accepted practice was to pay royalty either on a fixed fee model or a revenue sharing arrangement with no minimum guarantee. Having failed to reach an understanding, the radio broadcaster approached the Copyright Board seeking the grant of a compulsory licence against the music held by PPL. The Board held in favour of the broadcaster, fixing the licence rate at an average of Rs 660 per needle hour.[11]

In a similar case of protracted negotiations, in *Entertainment Network (India) Ltd (ENIL) v Super Cassette Industries Ltd*[12] the Supreme Court ruled in favour of granting statutory licences in cases where the record labels had set unreasonable licensing conditions. The matter was then remanded to the (erstwhile) Copyright Board, which ordered that radio broadcasters pay 2% of their net advertising revenue as royalty to music labels. The Supreme Court observed that copyright societies have greater leverage in negotiations with prospective licensees because of their statutorily granted monopolies. The conclusion is debatable, since copyright societies have lower earnings than some of their licensees. Take for instance the two parties to

this case: in FY2019-20 ENIL reported a revenue of Rs 553 Cr[13] while the Indian Performing Rights Society reported a revenue of Rs 172 Cr.[14]

The orders in the ENIL case were an attempt to address what the Court perceived as a market failure caused by the high transaction costs associated with the protracted negotiations between radio broadcasters and copyright owners. These failed negotiations were seen as detrimental to the public interest. The statutory licensing later introduced through a 2010 amendment to the Copyright Act created a mechanism to deal with such situations. The objective of the amendment was to address the inefficiencies of the licence negotiations and correct the perceived imbalance of bargaining power between copyright owners and broadcasters in light of the public interest inherent in accessing these works.[15] Thus, Section 31D was introduced to revive a loss-making industry to further the public interest.

The original objectives of introducing statutory licensing under 31D are largely satisfied today. The latest data from the Telecom Regulatory Authority of India show that there are now 385 private radio broadcasters in the country.[16] The industry's growth indicates that 31D has fulfilled its purpose and the Government may consider excising it from the scheme of the Act.

2. Extending 31D to streaming platforms is unnecessary as they are enjoying unprecedented commercial success

Streaming revenues grew 210% from 2015-18 with streaming accounting for 69% of all recording revenues.[17] It is estimated the Indian streaming market will be worth approximately $15 billion by 2030.[18] Some 86% of Indian consumers now listen to music by streaming on demand, according to a 2018 report released by the International Federation of the Phonographic Industry.[19] And a more recent survey by the Indian Music Industry finds that 94% of respondents listen to music on streaming services.[20]

The rise in digital music consumption is a consequence of the telecommunications revolution and spread of low-cost smartphones in India.[i] Users spent 145 million hours streaming music in 2019, a 22% increase over 2017.[21] Industry players have made the most of this growth – Hungama Music has registered a 37% growth in music streaming sessions since 2017,[22] while Gaana and JioSaavn have amassed a base of 185 million[23] and 100 million users respectively. Digital streaming platforms in India have become behemoths, with easy access to capital and user data (likes/dislikes, streaming preferences, durations etc.), making them necessary trading partners for copyright owners and content creators who wish to access digital consumers.

i Chinese tech giant Xiaomi entered the Indian market in 2015 with low-cost smartphones and Reliance Jio in 2016 introduced the country's first 4G network available across 18,000 cities and 2,00,000 remote areas offering cheap data plans priced at Rs 6.7/GB. This was accompanied by a steep rise in smartphone users, from 7.16% in 2012 to almost 60% in 2021.

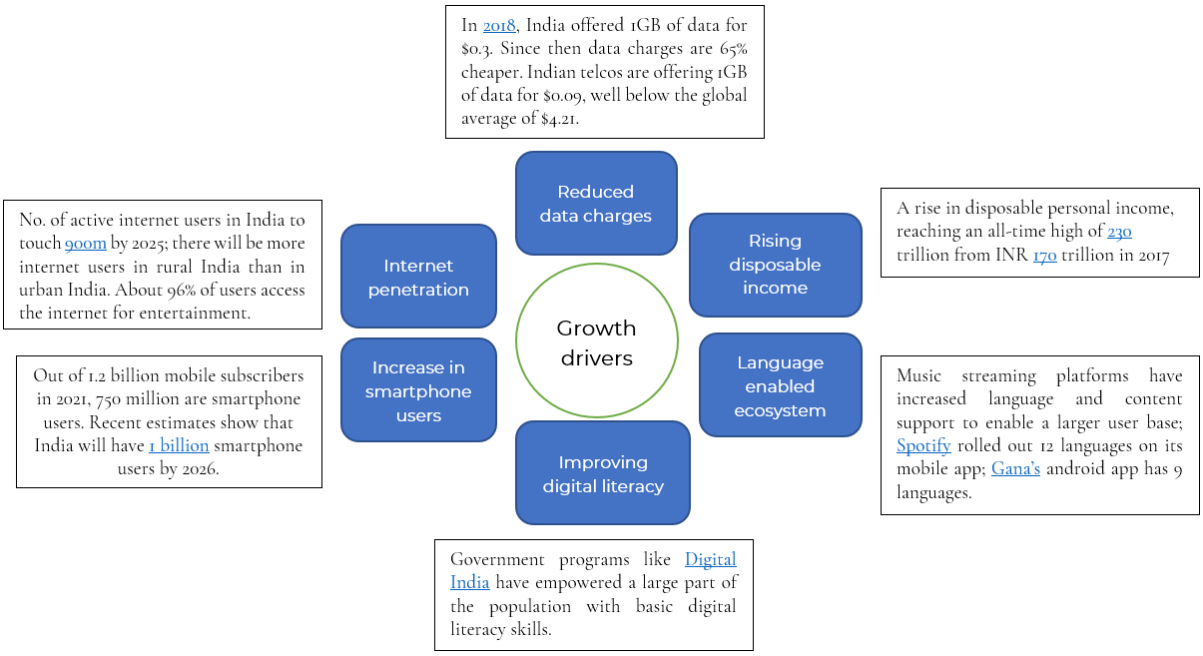

Image 1: Factors contributing to rise in digital music consumption

The dynamics of the Indian music industry have completely changed with the rise of digital streaming in the last decade. In 2011-12 the market cap of the FM radio sector was Rs 12.7 billion[24] (~$167.6 million) or less than one-third the market cap of Gaana, the biggest music streaming service in India. By 2018 Gaana was valued at $570 million[25] (~Rs 43.3 billion) while JioSaavn was valued at $301 million[26] (~Rs 22.8 billion) after Reliance Industries invested $124 million into the service.

The shift in market dynamics shows that internet streaming platforms, unlike the FM radio industry, do not need public assistance. Rather it is the content creators and copyright owners who need an economic impetus to ride out the terms and conditions imposed by streaming platforms.

3. Extending 31D to streaming platforms will give an already powerful set of intermediaries further leverage to exploit artists

Despite voluntary licensing provisions, creators have little leverage over the large streaming companies. The asymmetry of bargaining power in favour of streaming platforms is seen in the low royalty rates paid to artists by digital platforms. Illustratively, Spotify, the largest streaming service in the world, pays artists only around $0.003 per stream.[27] Thus an artist with 1 billion streams would only earn $30,000 from the platform. A survey by Ivor's Academy and the UK Musicians Union found that 82% of musicians earned less than £200 (~Rs 20,000) from streaming in 2019.[ii] This included artists with millions of streams

ii Data showing the state of royalty payments to artists was collected across music streaming services like Spotify, YouTube and Apple Music.

worldwide.[28] Tasmin Little, a celebrated British violinist tweeted[29] that she had been paid a meagre £12.34 for six months' streaming on Spotify, a period in which she garnered over 3.5 million streams.[30]

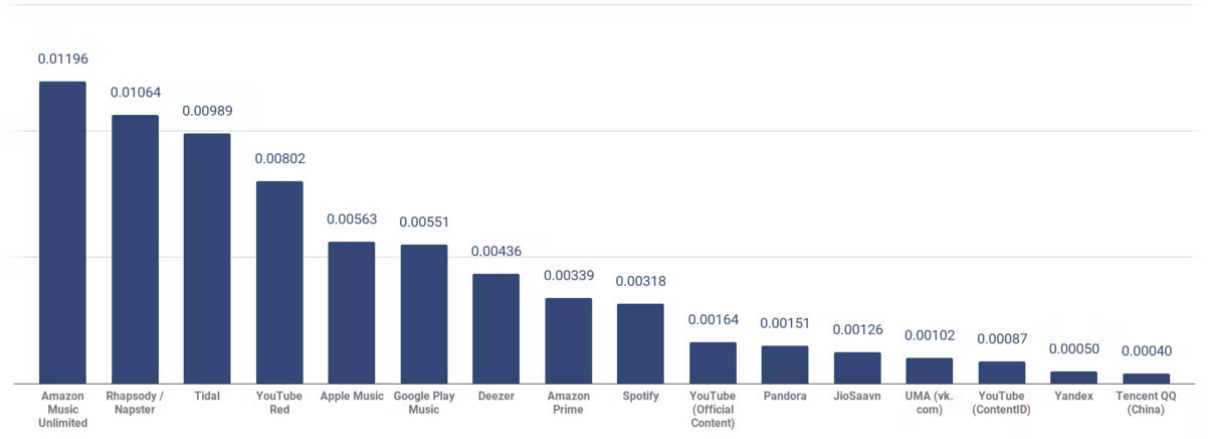

Image 2: Weighted average payout rate per stream (by platform)[31]

A creator needs millions of streams simply to break even. Recording, mixing and mastering a song costs between Rs 25,000 and 40,000 in India, so an artist would need to rake in 5,00,000 to 7,00,000 streams[32] just to recover the cost of producing the song.

Emerging artists are unlikely to achieve these numbers. Global data show that the most popular 1% of artists account for 80-90% of all streams,[33] and that 10% of them account for 98% of all listening by fans.[34] In the UK, only 720 musicians were able to garner a million streams in a month. The IPO (UK) has shown that roughly 12 million streams along with other sources of income would be required each year to make a sustainable income from music.[35]

Image 3: Music streaming trends and music services in India: An overview

The payouts from Indian streaming platforms are even lower. JioSaavn, for instance, pays a meagre $0.0013 (~9.9 paise) per stream. On top of the low payout rates, streaming companies also account for the highest share of music revenues compared to other media. Specifically, they account for 85.1% of the total revenue generated by the music industry in India.

Allowing these platforms to obtain a statutory licence under Section 31D to stream music at rates that are even lower than meagre sums they currently dole out would negatively impact the dwindling revenue streams of musicians and creators.

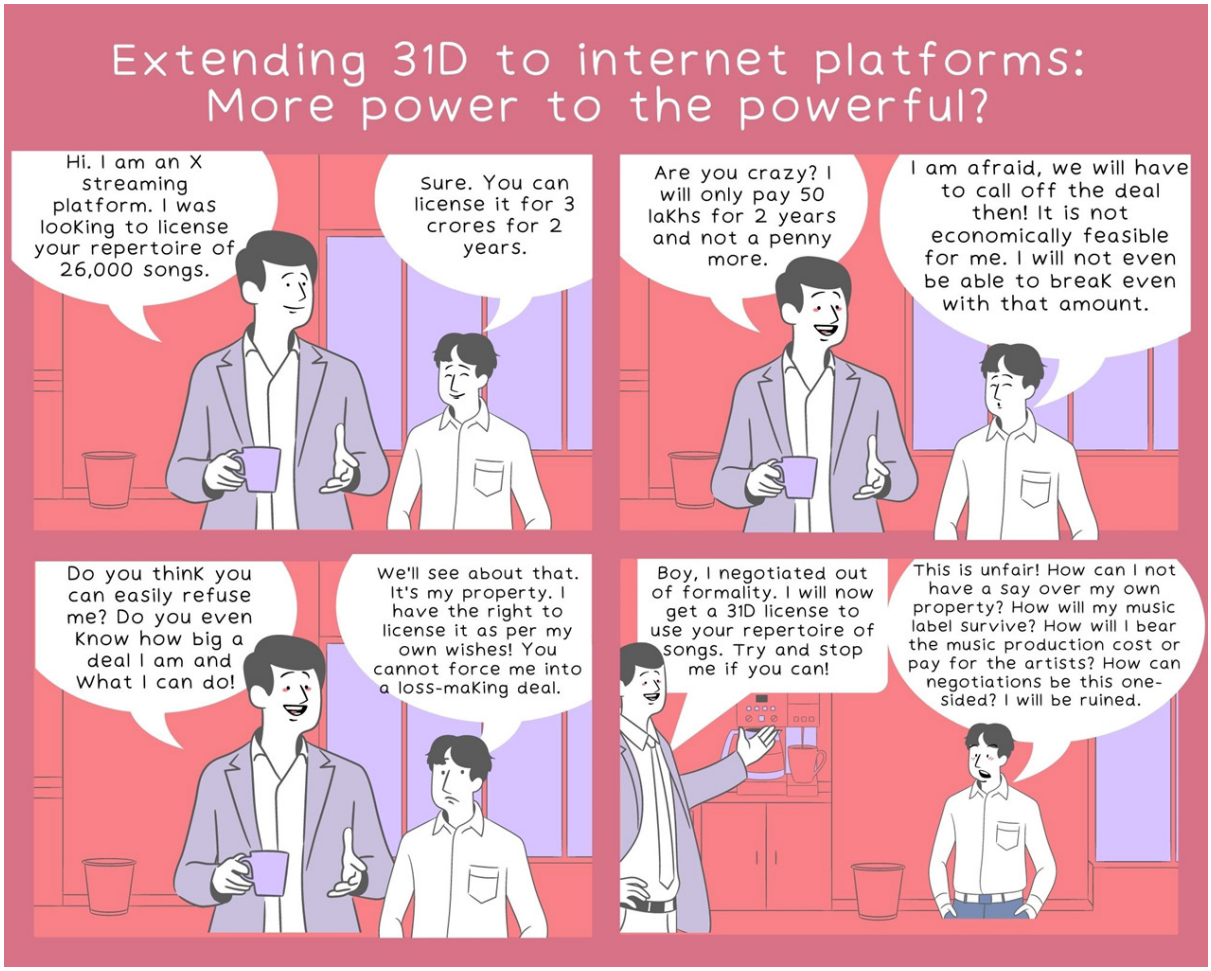

Image 4: The bargaining power imbalance between musicians/ music labels and streaming giants. [Source: Author's own]

4. Extending 31D to internet broadcasters contravenes the objectives of the National IP Policy

The National Intellectual Property Policy, 2016 underlines the importance of enabling creators to commercialise and protect their works for an innovative and creative economy. The thrust of the policy was also recognised by the Bombay High Court in *Tips v Wynk*,[36] in which it emphasised the need to restrict the use of 31D to the specific circumstances intended by the Legislature. It held that 31D is a statutory exception to the rule that a copyrighted work is the exclusive property of its owner, and should therefore be read strictly and in a manner that puts the least burden on the copyright owner.[37]

To include internet broadcasters within the scope of Section 31D would go against the National IP Policy's Vision[38] as illustrated in the table below.

OBJECTIVES LAID DOWN BY THE NATIONAL IP POLICY 2016	REASONS WHY EXPANDING 31D TO INTERNET BROADCASTERS DEFEATS THE PURPOSE OF THESE OBJECTIVES
Balance the rights of the public in a manner conducive to social and economic welfare and to prevent the misuse or abuse of IP rights	Extending 31D to further empower streaming platforms would hamper innovation and creativity in the music industry and tilt the scales in favour of an already powerful set of market players. It would reduce the ability of creators to invest in their compositions, thereby degrading the quality of music creation and hurting the public interest. Extending 31D to streaming platforms would not serve the public interest. Rather, it would only serve private interests, which goes against the objective of non-voluntary licensing.
Stimulate the generation of IPR	Extending 31D would reduce the ability of creators to invest in making music and reduce IPR generation in the industry. Instead of experimenting with new forms and genres, music companies would focus on monetising their existing catalogues.

OBJECTIVES LAID DOWN BY THE NATIONAL IP POLICY 2016	REASONS WHY EXPANDING 31D TO INTERNET BROADCASTERS DEFEATS THE PURPOSE OF THESE OBJECTIVES
Commercialising IPR: The Policy provides that the value and economic reward for the owners of IP rights comes only from their commercialisation. Entrepreneurship should be encouraged so that the financial value of IPRs is captured.	For over the top service providers such as *Wynk* to seek safe harbour under 31D to exploit copyrighted works without obtaining a licence from the copyright owners amounts to usurpation of the owners' exclusive rights. Granting statutory licensing under 31D to internet broadcasters would come at the cost of the economic rights of the creators and defeat the value proposition offered by IP rights. Increased reliance by digital platforms on an exception in the statute negates the effective protection of IP rights.
The Policy aims to improve awareness of the value of copyright for creators and the importance of their economic and moral rights.	In *Tips v Wynk*, the Court observed that copyright in a work is a valuable legal right subsisting with the owner. Such a right has more than one dimension. It may have commercial value depending on the nature of demand for the work. It may also have moral and aesthetic value. Whether such a right should be transferred is a matter for the copyright owner to determine. Sections 14(1)(e) and 30 of the Copyright Act grant exclusive rights to the owner to communicate their sound recording to the public and to license the same to such persons and to such an extent as the owner may deem fit. Section 31D is a statutory exception to this rule, introduced to ensure public access to FM radio networks. Since it is expropriatory in nature, it must be construed strictly in conformity with the specific intention for which it was enacted and not be extended to internet platforms.

OBJECTIVES LAID DOWN BY THE NATIONAL IP POLICY 2016	REASONS WHY EXPANDING 31D TO INTERNET BROADCASTERS DEFEATS THE PURPOSE OF THESE OBJECTIVES
The Policy aims to promote licensing and technology transfer for IPRs and devise suitable contractual and licensing guidelines to enable commercialisation of IPR.	Extending 31D to the internet would result in streaming platforms strong-arming music labels/artists to get their way in licence rate negotiations. This in turn would frustrate contractual and licensing agreements between internet platforms and artists/music labels. To enable negotiation of suitable contractual terms, creators must have the freedom to choose to whom to license the broadcasting rights and to what extent for their works.

Table: How 31D defeats the objectives laid down by the National IP Policy 2016

5. Extending 31D to the internet undermines the negotiating power of copyright owners over large streaming companies

Extending the scope of Section 31D would prevent copyright owners from negotiating revenue rates for online streaming and deprive them of a valuable means to monetise their work.[39] By giving prospective licensees the option to use copyrighted works without the prior permission of the owner, it would create a way for them to bypass negotiations altogether.[40]

The facts of the matter of *Tips Industries v Wynk Music* illustrate how streaming platforms would use Section 31D to strongarm creators into accepting their terms and bypass the negotiation process.

Tips Industries Ltd licensed its repertoire of songs to Wynk (a music streaming service) through a licensing agreement. Negotiations to renew the licence failed as Wynk refused to settle for a price of Rs 4.5 Cr for two years, although it was a deep discount from the initial price of Rs 7 Cr. It was consequently asked to take down the Tips music repertory from its platform via a cease-and-desist letter, which it ignored. Instead, Wynk claimed that it was covered under Section 31D and hence the Tips catalogue could be licensed to it non-voluntarily. The dispute was settled in favour of Tips by the Bombay High Court.

Spotify similarly tried to acquire a statutory licence for using Warner Music Ltd's catalogue. After negotiations over a licensing deal came to a halt, Spotify released its service in India and included songs from Warner Music's catalogue. In the absence of a licence agreement, Spotify invoked 31D to broadcast Warner's content as an internet broadcaster. In retaliation Warner Music filed a copyright infringement lawsuit against Spotify in the Bombay High Court. The

matter was settled between the parties, who signed a new global licensing contract.

These cases show that music streaming platforms have resorted to statutory licensing when negotiations did not go in their favour. Section 31D effectively negates the copyright granted to the creators of published musical and literary works and sound recordings in terms of exploitation through satellite broadcast. Extending its purview to the internet would have a similar effect on the digital exploitation of such works, but the economic impact will be greater, because the majority of music consumption takes place online.

6. Extending 31D to the internet would come in the way of India's free trade agreement negotiations with the United Kingdom

In a document outlining its strategic approach to the free trade agreement with India, the UK Department for International Trade outlines a specific set of principles regarding intellectual property. These include ensuring that rights holders receive fair remuneration and protection for their works, securing copyright provisions that support the UK creative industry, protect its existing IP regime and resist any changes that would undermine its rigorous standards. Expanding the ambit of 31D to the internet would directly contradict these positions as it would erode the exclusivity granted to creators by the Copyright Act. It is likely that such a move would significantly hinder the negotiation process.

7. A lack of institutional expertise will lead to arbitrary and incorrect decisions on licensing matters

The recent disbanding of the Intellectual Property Appellate Board (IPAB) under the Tribunal Reforms Act, 2021 is a sign of the infrastructural inefficiencies at the core of IP adjudication in India. These include vacancies, unqualified members, pending cases, delayed adjudication of cases and more. Jurisdiction over disputes relating to compulsory/statutory licences is now with the Commercial Courts (i.e. a Commercial Court or the Commercial Division of a High Court under the Commercial Courts Act, 2015).[41] It is an open question whether High Courts with their existing backlog of cases and lack of technical expertise in matters of copyright tariff will be able to deal with pending intellectual property cases.[iii]

The recent judgement of the Delhi High Court in *Entertainment Network India Ltd v Phonographic Performance Limited*[42] shows the inability of commercial courts to go into the merits of tariff-related issues in copyright. The case was filed by radio broadcasters seeking the revision of statutory licence rates for sound recordings under Section 31D from 1 October 2021, following the expiry of the rates set by an IPAB order. The Court passed a status quo order maintaining the old rates set by the IPAB for the payment

iii Case pendency before the IPAB was an estimated 2,626 trademark cases, 617 patents cases, 691 copyrights case and 1 geographical indication case.

of royalty for the broadcast of sound recordings over radio. It stated that in the absence of royalty rates the situation would descend into ambiguity as the radio broadcasters would not be able to invoke Section 31D of the Copyright Act at all.

The Court made a flawed appeal to the public interest as a driver of its decision to continue with the year-old rates for the statutory licences in question. It held that unless the power to grant interim orders were read into the provisions of 31D, the public interest contemplated thereunder would be seriously jeopardised, and radio broadcasters constrained to negotiate terms for a voluntary licensing agreement. The decision shows a clear lack of understanding of the licensing regime in the Copyright Act. Voluntary licensing under Section 30 of the Act is the ordinary mode of dealing in copyright, and the statutory licence in Section 31D is an exception to the rule. As it is expropriative in nature, Section 31D must be strictly construed.

Moreover, the Court selectively went into the merits of the dispute and refused to modify or revise the rates. Wrongfully extending the old royalty rates without determining the final rates goes against the commercial practices followed in the industry, where the licensing fee is increased by 6-10% each year. Extending the licence rates without increment, beyond a year, without factoring in inflation or the general growth in the market is highly prejudicial to the interests of artists and creator. It also illustrates the inability of commercial courts to delve into the merits of such matters.

Thus, in the absence of a specialised adjudication mechanism and given the lack of clarity over jurisdictional and procedural issues in the transfer of cases from the IPAB to relevant High Courts, it will be problematic to extend statutory licensing powers to internet broadcasters, especially when any misuse cases are likely to face inordinate delays in litigation.

INTERNATIONAL BEST PRACTICES IN COPYRIGHT LICENSING REFORMS

The key to reform is not to expand 31D but to modernise and upgrade the mechanism of collective licensing. Most countries that introduced revisions with this intent have worked to make the licensing process more efficient and ensure that free-market principles are permitted to play out. Expanding Section 31D to internet broadcasters is a band-aid and would only erode value in the music sector. It would also pit the interests of one set of stakeholders, the creators, directly against the streaming companies, prompting more disputes and discord between the two. As such it is unlikely to bring any efficiency or long term value into the copyright ecosystem.

The reforms discussed below are a mix of holistic and progressive measures to bolster the domestic copyright framework and the creative economy in India.

United States

In 2018, the United States passed the Music Modernisation Act (MMA)[43] to update its music copyright law for the digital era and to fix longstanding issues between streaming services and copyright owners.[44] Prior to the MMA's enactment, digital service providers were required to send a notice of intention (NOI) to copyright holders or to the US Copyright Office if they were unable to identify the author. Pending submission of the NOIs, the service providers could stream/sell the music.[45] The service providers misused this provision by filing large quantities of NOIs with the Copyright Office rather than locating the right owners of the works. This allowed them to continue playing music while avoiding payments due to copyright owners.[46]

In 2015, the US Copyright Office released a report concluding that compulsory licensing should exist only when clearly needed to redress a market failure.[47] It also suggested that a collective be created to handle the blanket licensing of musical works to streaming services.[48]

These suggestions were incorporated into the MMA, and address concerns about inefficiencies in individual licensing procedures by:

> (a) Creating a single Mechanical Licensing Collective (MLC) responsible for collecting royalties for songs played by service providers, in proportion to transaction volumes, and disbursing them to the copyright owners.
>
> (b) Creating a public database of song ownership information to facilitate consistency and transparency in the licensing mechanisms.

Creating a similar public database of musical works ownership information in India will help bring about transparency and efficiency in the disbursement of streaming royalties and also allow copyright holders to see the exact amount of royalties they are owed.

Copyright societies can be held in charge of such a database and be made subject to the accountability mechanisms applicable to the US MLC, such as audits. The

MMA gives the MLC the right to audit digital media platforms, and copyright owners the right to audit the MLC.[49] A similar standard can be extended to copyright societies in India to ensure that both digital streaming platforms and copyright societies operate fairly and transparently when deciding royalties for copyright holders.[50]

United Kingdom

According to the Digital, Culture, Media and Sport Committee (DCMS)[51] of the House of Commons the music streaming industry in the UK brought in more than $1 billion in revenue with 114 billion music streams in 2019, but it paid artists as little as 13% of the income generated. The DCMS published a detailed report of the economics of the music industry in July 2021, in which it calls for a complete reset of the streaming industry. It includes the following recommendations:

(a) There is a need to establish more efficient licensing and royalty chains.

(b) The Competition & Markets Authority must study the economic impact of the dominance of major music companies.

A similar study/inquiry can be commissioned in India to study the music industry landscape, specifically the pricing structures and market dominance of online streaming platforms, and formulate the reforms necessary to ensure that artists and songwriters are fairly rewarded for their skill and work.

Singapore

The Singapore Copyright Review Report proposes changes to the country's Copyright Act.[52] The proposed amendments delve into the concerns of collective management organizations (CMOs), creators and users. As per the amendments, the Intellectual Property Office of Singapore (IPOS) shall regulate CMOs through a class licensing scheme that sets out the broad licensing conditions as well as a mandatory code of conduct. The new licensing scheme is intended to hold CMOs to higher standards of transparency, accountability and efficiency through a light-touch regulatory framework.[53] The proposals in the licensing scheme include the following:[54]

(a) A distribution policy that clearly provides information on the source of revenue and the calculations made to arrive at the amount distributed to members.

(b) An effective and cost-efficient complaint handling and dispute resolution procedure that CMOs must implement.

(c) Code Reviewers appointed by the IPO to audit the CMOs' compliance with licensing conditions.

A similarly interventionist yet unobtrusive approach can be adopted by the Indian Copyright Office to establish well-functioning copyright collectives that will manage rights, including licence administration, royalty collection and enforcement without impinging on the rights of copyright holders. Users and right holders will likely benefit from a light-touch regulatory oversight of collective licensing mechanisms and the conduct of their affairs.

Recommendations based on global best practices

In view of the above, we recommend the following measures to be implemented in India's copyright regime, to make collective licensing more efficient without eroding the value of the music copyright industry.

- Introduce an audit mechanism through which the Copyright Office can audit and oversee the working of registered copyright societies, and copyright owners/societies can audit streaming players to ensure fairness, transparency, and accountability.

- Introduce a public database resembling that provided by the MMA.

- Let the rates for any non-voluntary licensing be calculated under a willing buyer/willing seller standard, like the MMA.

- Introduce alternative dispute resolution mechanisms to resolve disputes between stakeholders, to reduce the burden on commercial courts that the added responsibility of tariff-rate determination will undoubtedly bring.

CONCLUSION

Every country that once provided for a compulsory licence has eliminated it in favour of private negotiations and collective licensing.[55] Thus, granting statutory licences to internet broadcasters would be a retrograde step for the copyright regime in India, with serious repercussions for the future of artists and creators. In light of this consequence and the international best practices discussed above, it is best to explore collective licensing mechanisms as an alternative to statutory licensing, as these are better suited to the changing market dynamics of internet broadcasters.

Rather than create a new body, existing copyright societies can be held responsible for the collection and disbursement of royalty payments to artists in respect of internet broadcasters. They can help tailor royalty rates as per industry needs by including industry experts to determine the rates, unlike statutory licensing where commercial courts set the rates. This would not only create commercial efficiencies for digital music entities wishing to broadcast those works, but help implement fair rates across music distribution models, a win-win situation. Added safeguards such as a mandatory code of conduct and licensing conditions can be introduced for these copyright societies to ensure their proper functioning. A public database disclosing musical work ownership information can also be set up. The database would allow rights-holders to see the exact amount of royalty they are owed.[56] This would help provide transparency to the music industry and enable creators and innovators to connect with potential users, buyers and institutional sources of funding. It is also in line with the National IP Policy, which provides for the creation of a public platform to serve as a central database of IP rights.

ENDNOTES

1 The complete report on review of the IP regime in India dated 23rd July 2021 can be accessed at: https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/141/161_2021_7_15.pdf

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