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## **SPOTIFY, WARNER MUSIC GROUP AND THE INDIAN COPYRIGHT ACT: ENTRY OF WORLD'S BIGGEST MUSIC SERVICE INTO INDIA**

By Mohit Kar<sup>1</sup>

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### **INTRODUCTION:**

The globally acclaimed music streaming firms are poised to stride into India's music firmament despite intriguing and ongoing legal battles. After a prolonged wait, the Swedish music streaming giant Spotify is finally in India to make its presence felt. The music streaming platform may have made its debut in India during the last week of February, 2019, however ironically the music lovers were able to illegally gain access to Spotify's streaming services in a stealthily. With the Swedish firm knocking at the doors of court, the court has accorded seal of approval for its lawful entry into Indian music spheres. Ahead of its launch in India, Spotify which was locked in a legal battle with American Warner Music has finally been given the 'go-ahead' signal by Bombay High Court on 26 February, 2019 with the honorable court directing the Swedish firm to make a deposit of Rs 6.5 crore for its launch in India.<sup>2</sup> Spotify's entry into music world has also brought into sharp focus the legal implications of the much-acclaimed copyright law of the country – The Indian Copyright Act.

### **LOOPHOLES IN THE COPYRIGHT ACT:**

Clause 1 of Section 31D states: "*Any broadcasting organization desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section*".

Broadcasting or performance of such work can be done by issuing a prior notice of the intention to broadcast the work and by paying royalty to the rights holder, as fixed by the Copyright Board. However, the term "*Copyright Board*" in the Act has been substituted with "*Appellate Board*" as per the Finance Act, 2017.<sup>3</sup> Due to widespread growth of internet all over the globe, '*communication to public*' via internet is much more prevalent and thus, on September 05, 2016,

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<sup>2</sup> Bombay HC directs Spotify to deposit 6.5 crore in Warner/Chappell suit, Bar & Bench (2019), <https://barandbench.com/spotify-deposit-6-5-crore-bombay-high-court-warner-copyright-suit/> (last visited Mar 11, 2019).

<sup>3</sup> Prsindia.org(2019), [https://www.prsindia.org/sites/default/files/bill\\_files/Finance%20Bill%202017%20amendments.pdf](https://www.prsindia.org/sites/default/files/bill_files/Finance%20Bill%202017%20amendments.pdf) (last visited Mar 11, 2019).

the Department of Industrial Policy and Promotion (DIPP) issued an Office Memorandum clarifying the scope of section 31 D of Copyright Act, 1957 by construing that "any broadcasting organization desirous of communicating to the public" may not be restrictively interpreted to be covering only radio and television broadcasting, as definition of "broadcast" read with "communication to the public" appears to include all kinds of broadcasts including internet broadcasting.<sup>4</sup> Therefore, bringing 'online broadcasting' under the ambit of section 31 D of Copyright Act, 1957.

The practices as provided under section 31D can be adequately taken care of by Copyright societies as provided in the statutes. The functioning and working of the copyright societies in India has been well explained in the case of *Entertainment Network (India) Ltd vs. Super Cassette Industries Ltd & Ors*<sup>5</sup>. In this case it was stated that the existence of the copyright society is for the benefit of the copyright holder. The Copyright society must help the copyright owner in a way that he/she is able to exploit his/her intellectual property rights in a structured manner. "The Copyright society grants license on behalf of the copyright owner, files for litigation on their behalf not only for the purpose of enforcement but also protection to enforcement of the copyright owner's right. It not only pays royalty to the copyright owner but is authorized to dispense the amount collected by it amongst its members."<sup>6</sup> But the functioning of societies is under the scanner nowadays, as societies are alleged to have been using this law for getting personal gains, thus making the enforcement of this law redundant, leading to various contentious matters.

Since the introduction of section 31D, it has been challenged by various entities alleging it to be ultra-vires the Constitution of India, especially Article 14, 19(1)(g) and 21 of the Constitution as well as the right to property under Article 300A. The functionality and mechanism of this particular section was disputed on the ground that :

a) There is no public interest in making film music available to the broadcasters at subsidized and preferential royalty rates rather than leaving them to negotiate commercial agreements with copyright owners and that the practical effect of Section 31D is to ensure commercial profitability of the broadcasters at the expense of the owners of the copyrighted works.

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<sup>4</sup> Copyright.gov.in (2019), [http://copyright.gov.in/documents/cract\\_amndmnt\\_2012.pdf](http://copyright.gov.in/documents/cract_amndmnt_2012.pdf) (last visited Feb 28, 2019).

<sup>5</sup> *Entertainment Network India Ltd vs Super Cassettes Industries Ltd & ...* on 11 May, 2011, [indiankanoon.org](https://indiankanoon.org/doc/188569518/) (2019), <https://indiankanoon.org/doc/188569518/> (last visited Feb 28, 2019).

<sup>6</sup> *Ibid.*

b) The content of this provision causes inconsistency in the provisions of the Copyright Act, 1957 as it takes away the exclusivity from the exclusive rights granted to the owners of copyrighted works. Thus, being a hindrance to copyright owners in creating original work and to commercially exploit them.

c) Section 31D is violative of Article 19(1)(g), as it provides for the royalties to be fixed for radio broadcasting by the Board directly. Thus, such a power cannot be termed as a reasonable restriction.

The Madras High Court upheld the validity of Section 31 and 31D in the case of *South Indian Music Companies v. Union of India*<sup>7</sup> and observed that Section 31 and 31D provides for a mechanism to deal with public interest vis-a-vis the private interest. Thereby, taking care of interest of public as well as owners. Further, the guidelines as to determination of royalty and provision of providing the owners, a reasonable opportunity to be heard, thereby substantiating section 31D that was also introduced in compliance of Article 11(2)<sup>8</sup> and 13<sup>9</sup> of Berne Convention and Article 15(2)<sup>10</sup> of the Rome Convention (for sound recordings) and Article 9(1) of the TRIPS Agreement.<sup>11</sup>

Thus, the High Court, after analyzing various factors such as principles governing the interpretation of statutes including the doctrine of purposive construction, reading down and contextual interpretation, did not find any reason to hold section 31D of Copyright Act as unconstitutional.

These provisions under the amended Copyright Act have tried to balance the power of music labels by allowing the broadcasters that obtain the said licenses to have continuity of business by making copyrighted works available to the general public at large. These provisions have

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<sup>7</sup> *South Indian Music Companies vs Union Of India* on 30 March, 2016, Indiankanoon.org (2019), <https://indiankanoon.org/doc/65711700/> (last visited Feb 28, 2019).

<sup>8</sup> Article 11 (2) Of Berne Convention: Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

<sup>9</sup> Article 13 Of Berne Convention: Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining to 1. *Compulsory licenses*; 2. *Transitory measures*; 3. *Seizure on importation of copies made without the author's permission*

<sup>10</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Permitted Exceptions: 1. *Specific Limitations*; 2. *Equivalents with copyright*

<sup>11</sup> Article 9(1) of TRIPS Agreement: Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

dealt with the monopoly of the music labels by including the grant of a statutory non-voluntary license in the Act.

Spotify fixed upon this provision of the Copyright Act 1957<sup>12</sup>, which states that broadcasters can acquire a license for copyrighted work even if it's denied for use by the copyright owner. This provision has been challenged to by Warner Music via an injunction arguing that Spotify is exploiting a law designed for traditional broadcasters and not for international streaming services like Spotify.

### **WHAT LIES AHEAD?:**

The prospective for streaming services to make usage of India's copyright law as leverage against labels isn't totally shocking, and is controversial on an international level. If India continues to apply the section 31D interpretation, it would run afoul of obligations under international treaties. The International Federation of the Phonographic Industry offered it's help to work with the Indian Government to iron out this issue and ensure that particular online interactive transmissions are not subject to a compulsory license.

Leaving aside the legal fight, there are significant revenue concerns for Warner if Spotify prevails in the Indian market. The typical voluntary agreements made by broadcasters and labels can include terms that way beyond the scope of the amount being paid out per stream. For example, when Sony made a deal with Spotify it also contained a cut of ad sales income and up to \$9 million in additional ad spots. If Spotify is able to sidestep a direct deal with Warner in India, then Warner potentially loses out not just on streaming payouts, but on a myriad of alternative revenue streams. And those other revenue streams carry heavy weightage in upcoming markets like India.

It's unclear why Warner and Spotify have so far been unable to land on a deal — Warner has deals with other streaming services in India, like freemium music streaming service JioSaavn. It appears Warner has knowledge of the fact that Spotify has a necessity to launch in India for it to grow, and is making use of its power to block it and extract some other concessions. What happens now might change how labels, artists and online streaming services function in India over the upcoming years.

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<sup>12</sup> An insight into the Copyright Act, 1957 and the rules made therein, R & A Associates (2019), <http://www.rna-cs.com/an-insight-into-the-copyright-act-1957-and-the-rules-made-therein/> (last visited Feb 28, 2019).



## **SHOULD DIGITAL PLATFORMS BE GRANTED STATUTORY LICENSE UNDER SECTION 31(D) OF THE COPYRIGHT ACT, 1957?**

By Vasu Manchanda<sup>13</sup> & Aliza Alam<sup>14</sup>

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The music streaming app, Spotify faced multiple controversies, soon after its launch in India. Warner Music Group and Saregama India filed suits for an injunction as a result of which Spotify had to remove Saregama’s catalogue from its offerings<sup>15</sup>. This issue pertains not only to the mentioned parties but also to various interested parties like music labels, publishers, artists, composers, broadcasters, and also consumers.

In the past, Spotify and Warner Music Group were involved in negotiations regarding the terms of licensing agreement. Failing to reach a consensus, Spotify adopted a statutory license under section 31D of the Copyright Act, 1957. This section was introduced by the 2012 Amendment with intent to deal with the dominance of the music publishers and labels by adding the grant of a statutory/compulsory license in the Copyright Act, 1957.

It allowed the broadcasters to communicate with the public already published work after payment of royalty fixed by the Intellectual Property Appellate Board. At the time of the amendment, only the interest of radio broadcasters was taken into consideration by the legislators. However, the Department for Promotion of Industry and Internal trade issued an office memorandum on September 05, 2016, to extend the ambit of Section 31D to include internet broadcasters as well. The department construed that "Any broadcasting organization desirous of communicating to the public" does not only refer to radio and television broadcasting, as the term “broadcast” defined in section 2(ff) of the Copyright Act, 1957, seems to cover all types of broadcasts including internet broadcastings as well. Thus, bringing 'online broadcasting' under the gamut of section 31D of the Copyright Act, 1957.

This created a lot of ambiguities as the term “broadcast” defined in section 2(ff) refers to “communication to the public”, whereas Spotify goes beyond that and also provides an option to reproduce the copyrighted work. If the court decides in favor of Spotify then the internet streaming services like Spotify, Saavn and Youtube won’t only be receiving the broadcasting

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<sup>15</sup> SAREGAMA India Ltd. v. Spotify India Ltd., CS(COMM) 207/2019.

rights but also the reproduction (downloading and sharing) rights, which is quite contrary to the intention of the legislature at the time of amendment.

The music labels and publishers enjoyed a dominant spot by charging extravagant rates for licensing of songs from the Indian FM radio industry which was still at a nascent stage. Thus, the need to institute a compulsory licensing scheme was felt by the legislators in 2012. The motive of the legislation was to balance the interests the copyright owners with the consumers and broadcasters.

However, unlike Music Modernization Act in the United States of America, section 31D of the Copyright Act, 1957 provides the compulsory license as a matter of right. No attempts are to be made to negotiate on mutually beneficial terms or to prove that the copyright owners have acted unreasonably. The basic need of licensees initially approaching the copyright owners and only on refusal or unreasonable demands, being granted a compulsory license, has been overlooked by the legislature.

The provisions of section 31D have to be managed by Copyright societies, according to the statutes. The copyright society's purpose is to help the copyright owners exploit their intellectual property rights in a structured manner<sup>16</sup>. The working of the copyright societies has been elucidated in the case of Entertainment Network (India) Ltd vs. Super Cassette Industries Ltd & Ors<sup>17</sup>, where it was held that "The Copyright society grants license on behalf of the copyright owner, files for litigation on their behalf, not only for enforcement but also protection to the enforcement of the copyright owner's right. It not only pays a royalty to the copyright owner but is authorized to dispense the amount collected by it amongst its members."

With time, there has been an exponential shift from FM broadcasters to internet streaming services. The digital platforms such as Youtube, Saavn, and Spotify provide a major source of revenue to the music industry. This compulsory licensing provisions shall prevent the copyright owners such as music labels, publishers, content creators, artists, and composers from negotiating the rates of licensing, thus hampering their major source of revenue. It also prevents

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<sup>16</sup> MONDAQ, INDIA: ALL ABOUT SECTION 31 D OF COPYRIGHT ACT, 1957

<http://www.mondaq.com/india/x/744338/Copyright/All+About+Section+31+D+of+Copyright+Act+1957>

<sup>17</sup> M/s Entertainment Network (India) Ltd v. Super Cassette Industries, Civil Appeal No. 5114 of 2005.

the copyright owners from choosing their contracting partners which affects the premise of the Copyright Act, 1957.

In *Tips Industries Limited v. Wynk Music Limited & Anr*<sup>18</sup>, it was held that internet broadcasters do not come under the ambit of section 31D of the Indian Copyright Act, 1957. The rationale behind this judgment was that an open interpretation of Section 31D would fetter the capacity of the copyright holders to negotiate the licensing arrangements, thus allowing the broadcasters to profit<sup>19</sup>.

### **CONCLUSION:**

Hence, to reduce ambiguities, the legislature should provide some intelligibility on the issue by stating the conditions for allowance of compulsory licensing to balance the public interest and the rights of the copyright owners, failure of which would lead to abuse of law against the copyright owners. Like in the recently enacted Music Modernization Act in the United States of America, the Copyright Act, 1957 should also provide an opportunity to reach a mutually beneficial agreement and only on refusal or unreasonable demands by the copyright owner, should the licensee be granted a statutory license under the purview of Section 31D of the Copyright Act, 1957.

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<sup>18</sup> *TIPS Industries v. WYNK Music*, IP (L) NO. 113 OF 2018 \_

<sup>19</sup> *SPICY IP, Tips Industries v Wynk Music: A Case of Statutory mis interpretation*, <https://spicyip.com/2019/09/tips-industries-v-wynk-music-a-case-of-statutory-mis-interpretation.html>

## **WELL – KNOWN TRADEMARKS IN INDIA: CURRENT JUDICIAL POSITION**

By Anubhav Das<sup>20</sup>

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A well – known mark as defined under Section 2(zg) of the Trademark Act, 1999 is a ‘mark’<sup>21</sup> which has become majorly known by the public for certain goods and services and any similar mark would suggest a connection, in course of trade (between the former and latter). A well – known trademark has a higher degree of protection when compared to other trademarks.<sup>22</sup> It provides goodwill to the proprietor, regardless of the goods and services offered. As of August 2019, there are ninety well – known trademarks in the trademark registry of India. But time and again, Indian Courts have come across the question of what exactly constitutes a well – known trademark.

The Delhi High Court, recently added two trademarks in the registry of well - know marks of India. It adjudicated upon the trademark infringement of marks ‘Suzuki’ and ‘Vistara’, ultimately declaring them as well – known marks. This blog will discuss both the cases and the requirements for declaring a mark as well – known mark in India.

### **Suzuki Motor V. Suzuki (India) Limited (17<sup>th</sup> July, 2019):**

In this case, the Plaintiff Suzuki Motor (Japanese Automobile Company) entered the Indian market with the help of a joint venture with the Government of India and Maruti Udyog in 1982. By that time, the Defendant Suzuki (India) LTD, had already adopted it. This sparked a long-going trademark battle between them. The Plaintiff filed a suit for permanent injunction in 2005 seeking to restrain the Defendants from using the trademark. The Delhi High Court gave an interim order restraining the Defendants from using the trademark. The Plaintiff then pleaded for a decree under Order XII, Rule 6 of CPC as the defendant had not raised any defence in the written statement except for barring the suit due to territorial jurisdiction limitation.

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<sup>21</sup> The Trademarks Act, 1999, No. 47, Section 2(m), Acts of Parliament, 1999 (India). “Mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

<sup>22</sup> Tata Sons Ltd. vs Manoj Dodia & Ors., 2011 (4) R.A.J. 181 (Del).

The Delhi High Court, passed an order in favour of the plaintiff and also observed that ‘Suzuki’ is a well – known mark. The Delhi High Court placed reliance on essentially two points in order to establish it as a well - known mark:

1. Extensive publicity and its collaboration with Government;<sup>23</sup>
2. Acquired distinctive secondary meaning via long term usage.<sup>24</sup>

**Tata Sia Airlines Limited V. M/S Pilot18 Aviation Book Store & Anr. (5<sup>th</sup> August, 2019):**

A suit for permanent injunction was filed in the Delhi High Court by the Plaintiff, Tata SIA Airlines LTD’s against an aviation bookstore, M/S. Pilot18 for using its registered trademark ‘Vistara’ to sell products such as badges, mugs, uniforms, merchandise etc. The Plaintiff has been using the mark ‘Vistara’ since 2014 for airlines services. The Delhi High Court not only permanently restrained the Defendants from using the mark but also found them liable to pay damages. The Court stressed upon ‘*popularity, acquired unique statues, goodwill and reputation*’<sup>25</sup> to declare the trademark as a well – known mark.

**‘SUZUKI’ AND ‘VISTARA’: ANALYSIS:**

Although, ‘*long term use*’ was considered in the *Suzuki case* but the same was not taken into account while declaring the well – know mark in the *Vistara case*. The use of ‘Vistara’ as a trademark in India is very recent (2014) as compared to the use of trademark ‘Suzuki’ (1982). Thus, it can be concluded that the recognition of a mark as well – known mark majorly depends upon its ‘*popularity*’. The same has been stressed upon in both the cases to declare the marks as well – known mark. Although the criteria used by the Delhi High Court is relevant but the same can be used by financially sound owners to acquire a trademark of their competitors. To make a mark ‘popular’ in public at large, extensive advertisement is required and for that adequate finance is needed. This can be detrimental to small business enterprise as they don’t have sufficient capital to do large scale advertisement. Therefore, the only way out for them is to register their trademark.

**CONCLUSION:**

The exact criteria to declare a mark as well – known mark is still ambiguous. The above two decisions made it clear that ‘*popularity*’ is one of the essential factor for declaring a certain

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<sup>23</sup> Suzuki Motor V. Suzuki (India) Limited, CS(COMM) 235/2018 & I.A.8507/2019 at Para 11.

<sup>24</sup> *Id.* at Para 59.

<sup>25</sup> Tata Sia Airlines Limited V. M/S Pilot18 Aviation Book Store & Anr., CS (COMM) 156/2019 at Para 14.

trademark as well – known mark. Even though ‘*long term use*’ was considered by the Delhi High Court but the same doesn’t seem to be a factor wherein Courts declare a mark as well – known mark, solely based on it. Further, Indian Courts have not properly defined as to what constitutes ‘popularity’. Thus, it can be said that the decision is based on case to case basis.

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## **QUICK REFERENCE - CITATIONS**

1. “Mohit Kar, SPOTIFY, WARNER MUSIC GROUP AND THE INDIAN COPYRIGHT ACT: ENTRY OF WORLD’S BIGGEST MUSIC SERVICE INTO INDIA, Media Law & Intellectual Property Rights – Newsletter, Ed. 1.0 (Oct., 2019)”
2. “Anubhav Das, WELL – KNOWN TRADEMARKS IN INDIA: CURRENT JUDICIAL POSITION, Media Law & Intellectual Property Rights – Newsletter, Ed. 1.0 (Oct., 2019)”
3. “Vasu Manchanda & Aliza Alam, SHOULD DIGITAL PLATFORMS BE GRANTED STATUTORY LICENSE UNDER SECTION 31(D) OF THE COPYRIGHT ACT, 1957, Media Law & Intellectual Property Rights – Newsletter, Ed. 1.0 (Oct., 2019)”

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