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Cross-class protection of reputable trademarks



Mr. Zhenkun Fu, Senior Partner at Corner Stone and Partners, offers first-hand evidence of why a well-known trademark is crucial for protecting your brand against infringers.



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Statutory copyright licensing of music – a purpose analysis

Manisha Singh and Simrat Kaur, of LexOrbis, provide an overview of the protection provided by statutory copyright licensing of music with an evaluation of its benefits and drawbacks.

Legal policy has always been guided by a “no absolutes” approach when it comes to the grant of monopoly rights. But understanding the mathematics of balancing and doing the correct calculations in light of socio-economic realities has never been easy. Provisions pertaining to fair use, limited term of exclusivity and statutory licensing often face criticism for being a little miscalculated. When it comes to the music world, the regime of statutory licensing has faced criticism on the ground that it polarizes income in the value chain for the music market and reduces the incentive to produce music. Section 31D of the Copyright Act has remained at the centre stage of debate for the past few years. It empowers broadcasting organisations to obtain a statutory license for sound recordings against payment of royalty to the concerned copyright owners at the rates fixed by Copyright Board. The only pre-requisite for this is a unilateral notice to the copyright owner from the one who is seeking the license. Unreasonable denial of license by the copyright owner need not be proved. The provision was introduced, vide 2012 Copyright Amendment Act, for radio. Then came a time when internet platforms started invoking it, asserting that it applies to internet broadcasting too. Following a debate with some strong arguments from both sides, Bombay High Court clarified, in a landmark judgment in the case of *Tips v. Wynk*, that the provision does not cover internet platforms. The same year saw the Government coming up with the Draft Copyright Amendment Rules, 2019, which proposed to offer a clarification that a statutory license can be sought “for each mode of broadcast” and not for “radio broadcast or television broadcast” only; thereby expanding the scope of Section



Manisha Singh



Simrat Kaur

31D. There was a lot of discussion around it and the argument of it being *ultra vires* the parent statute seemed to hold water.

The final text of the Copyright Amendment Rules, 2021, which have recently been notified on March 30, 2021, do not carry the aforesaid change which was proposed in the Draft Rules. Though the provision seeking to broaden the scope of Section 31D has been dropped, the question remains if scope of Section 31D should be expanded or not. In this context, a much broader question is – whether statutory licensing is imperative for balancing the interests of rights-holders and licensees, or if it can give way to a free marketplace? We attempt to look at some benefits and drawbacks of the regime.

Solution to transactional bottlenecks

The primary benefit of copyright statutory licensing is the reduction of transaction costs. Music distribution business involves mass content licensing. Statutory licensing simplifies the otherwise long and costly process of tracing multiple copyright owners, negotiating with them and inking deals. By permitting the use of copyrighted works on payment of royalty rates fixed by a rate setting tribunal / board, it does away with the need to negotiate and contract. However, the same job can be done by collective management organizations (CMOs) without Government intervention. Those who endorse CMO mechanism of transaction cost reduction argue that, unlike statutory licensing, it does not take away the rights-holders' right to say 'No' to permit the use of their works. Though the alternative can be explored, but for this, the regulatory framework for CMOs should be such which results in efficiently functioning CMOs.



Antitrust remedy

Competition remains a huge concern in the time market because in a free market big time players may set some very high licensing rates and they can also resort to holdout strategies. Statutory licensing helps to keep this in check. Bar on exclusive deals between copyright owners and distributors of music help in preserving competition in the market. But a counter argument to this says that these deals constitute vertical exclusionary agreements which, unlike horizontal agreements, are not *per se* anti-competitive. They can have pro-competitive effects. As long as players in the market have access to enough essential input for their business (i.e. music), there may not be any barrier to new entry. Even if there is, recourse can always be taken to competition law to attack the agreements resulting in appreciable adverse impact on competition in the relevant market, and there is no need of an IP law oversight.

Bar on exclusivity

One of the major drawbacks of statutory licensing is that, in effect, it mandates non-exclusive deals between rights-holders and music distributors, thereby discouraging an ecosystem where music distribution platforms compete based on content rather than format, number of ads etc. Choice of exclusivity can benefit all. Once a platform gets a valuable popular catalogue, others look for alternative options to survive which, in turn, raises demand for new music. Demand stimulates supply, opening up more opportunities for

Résumés

Manisha Singh, Founder and Managing Partner of LexOrbis

Manisha overviews and supervises all practice groups at the firm. Starting her career at the time when Indian IP laws and practices were undergoing substantial changes pursuant to India's obligations to comply with the TRIPS agreement, Manisha played an important and crucial role in advising and apprising Indian policy and law makers on global standards associated with IP administrative and enforcement systems. Manisha is known and respected for her deep expertise on prosecution and enforcement of all forms of IP rights and for strategizing and managing global patents, trademarks, and designs portfolios of large global and domestic companies. Her keen interest in using and deploying latest technology tools and processes has immensely helped the firm to develop efficient IP service delivery models and to provide best-in-the-class services. She is also known for her sharp litigation and negotiation skills for both IP and non-IP litigations and dispute resolution. She represents the Reserve Bank of India, India's central banking institution before the High Court of Delhi and the Supreme Court of India in cases related to banking and non-banking financial companies in addition to a large number of intellectual property litigations with a focus on patent litigations covering all technical fields – particularly pharmaceuticals, telecommunications and mechanics. She has been involved and successfully resolved various trademarks, copyright and design infringement and passing off cases in shortest possible time and in most cost-efficient manner applying out-of-box strategies and thinking.

Simrat Kaur, Associate Partner at LexOrbis

Simrat is an NUS, Singapore graduate working in IP prosecution and enforcement space for over nine years. Simrat has catered to a wide range of domestic and foreign clients from entertainment, technology, education, pharma, agriculture equipment, automobile industry and more.

artists. Musicians may then get rid of downward spiralling cycle of recycling and repackaging the old popular music.

Public good theory

According to the traditional public good theory, anything which is non-rivalrous and non-excludable is a public good and free markets tend to under-provide public goods. Music has traditionally been viewed as a public good, which justifies compulsory licensing thereof.

Though rivalry does continue to be a characteristic of music because it is not used up once a person listens to it, compared to a chocolate (private good) where nothing remains after a person consumes it. However, music is an excludable good today by virtue of copyright. Because of the lack of non-excludability, it can be argued that it is no more a pure public good.

Conclusion

There are enough justifications for statutory licensing of copyright in music, however, each of them has a counter argument which holds water. Statutory licensing does attempt to strike balance between the competing interests by incentivising the rights-holders and providing easy access of music to the public, but many

“However, music is an excludable good today by virtue of copyright.”

argue that the growth it offers to licensees may be parasitic in nature because it deprives the copyright owners of the consideration that they can receive in a free marketplace. Even though Indian law provides for non-mandatory statutory licensing without curtailing the freedom to contract, private negotiations that take place in the shadow of statutory licensing tend to work in favour of licensees because Government rates work as a ceiling rather than a floor. Though this argument is not enough justification to give way to free marketplace and move away from the tested regime of statutory licensing, however, it does indicate the need to see if the current regime is actually contributing to devaluation and underproduction of music and whether there is a need to explore alternatives.

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