

OF BOLLYWOOD SONGS, FILM PRODUCERS AND COLLECTING SOCIETIES: LOCATING THE RIGHTS OF THE COMPOSERS

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Abstract

Bollywood films are known for their songs, and in many cases Bollywood films are known because of the songs. It is not merely in Bollywood films that songs have a significant role, but also in the lives of myriad composers, lyricists, singers and so on, lending an opportunity for their creative expression in addition to serving as a means of livelihood. Ideally, it should be possible for composers to be able to earn an income by composing music for films, as well as by being a member of a collecting society in such a way as to maximize their returns. From the bundle of rights they have, the composers should be able to transact with both the producers and the collecting societies, but with rights that do not overlap. However, in reality the rights could get tangled in a legal quagmire between the collecting society and film producers, as each demands exclusivity. The article is an attempt to show how the rights of composers is meddled with by both the film producers and the collecting societies, leading to gross unfairness in the distribution of the returns from exploitation of their rights. To this end, the article examines the UK Court of Appeal decision in *B4U Network (Europe) Limited v Performing Rights Society Limited*, which upheld the rights of the collecting society, and compares it with the Indian Supreme Court decision in *Indian Performing Rights Society v Eastern India Motion Pictures*, where the rights of the film producers was upheld. This article then goes on to examine what it means to the composers if the film producers' rights trump those of the collecting societies. The article also explores how the amendments introduced to the Indian Copyright Act in 2012 address the situation.

INTRODUCTION

'Integral to Bollywood films are the songs and dances. The songs comment on the narrative, express a character's sentiments and afford an opportunity for the film to display extravagant choreography, costumes, set design and cinematography.' Moses LJ

So begins the seemingly innocuous judgment of Moses LJ in *B4U Network (Europe) Limited v Performing Rights Society Limited* (B4U case).¹ In these words Moses LJ captures the role and essence of songs in Bollywood films.² As Bollywood celebrates hundred years since the release of the first film,³ it must be admitted that over this long journey, the song (and dance) sequences have become the single most enduring feature of Bollywood films.⁴ It is not merely in Bollywood films that songs have a significant role, but also in the lives of myriad composers, lyricists, singers and so on, lending an opportunity for their creative expression, in addition to serving as a means of livelihood. In other words, Bollywood as a film industry supports within itself a thriving music industry.⁵

Collecting Societies developed as a mechanism to manage the rights of creators in a society with a growing number of content users, matched by the growing number of technological options through which the content is utilised.⁶ Bollywood songs are extensively consumed independently of

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¹ *B4U Network (Europe) Limited v Performing Rights Society Limited* [2013] EWCA Civ 1236 [1].

² "Bollywood" is a name for the Indian popular film industry, based in Mumbai (Bombay), according to Oxford English Dictionary, at <http://www.oxforddictionaries.com/definition/english/Bollywood?q=bollywood>, last visited 10 December 2013. The term Bollywood is used here to represent the Indian film industry in general, which is more often than not rich in music content.

³ "A hundred years ago, on 3rd May 1913, an avid, small-town photographer from Maharashtra, Dhundiraj Govind Phalke (aka Dadasaheb Phalke), who is now known as the father of Indian cinema, produced the first full-length Indian feature film, *Raja Harish Chandra*." Astha Gill, *Bollywood turns 100 – a long journey for Indian cinema*, The Upcoming, 30 May 2013, available at <http://www.theupcoming.co.uk/2013/05/29/bollywood-turns-100-a-long-journey-for-indian-cinema/>, last visited 18 November 2013.

⁴ Sangeeta Gopal and Sujata Moorti, 'Introduction', Sangeeta Gopal and Sujata Moorti (eds), *Global Bollywood: Travels of Hindi Song and Dance* 1 (2008). The author notes that a film by name *Alam Ara* released in 1931, establishing song, dance and music as an intrinsic part of Indian film.

⁵ Gregory D. Booth, *Preliminary thoughts on Hindi popular music and film production: India's "culture industry(ies)"*, 1970–2000 9:02 South Asian Popular Culture 215 (2011), DOI: 10.1080/14746689.2011.569075, available at <http://dx.doi.org/10.1080/14746689.2011.569075>, last visited 18 November 2013.

⁶ Economists typically claim that collecting societies are an effective way of overcoming the problem of high transaction costs for administering copyright in some markets. Christian Handke, *Economics of Copyright Collecting Societies* 38(8) IIC 937 (2007) at 939.

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the films. It makes it all the more essential that the composers⁷ become members of a collecting society, so that the earnings from the consumption of their creation can be maximized.

Ideally, it should be possible for the composers to be able to earn an income by composing music for films, as well as by being a member of a collecting society in such a way as to maximize their returns. From the bundle of rights they have, the composers should be able to transact with both the producers and the collecting societies, but with rights that do not overlap. However, in reality the rights could get tangled in a legal quagmire between the collecting society and the film producers, as both demand an assignment of rights that overlap. For example, the composers should be able to transact with the film producers only for the right to have their work incorporated in a film, leaving all other rights including the right to publicly perform the works in the composers' own control, which they can assign or licence to a collecting society. Instead, the film producers demand assignment of all rights in relation to the work of composers, including the right of public performance, so that if the composers do become members of a collecting society, they end up assigning the right of public performance, resulting in an overlap of rights with the film producers. Besides, these assignments are often in relation to works that will come into existence in the future, adding another layer of complexity as to whose rights take priority when the work comes into existence.

In resolving this legal quagmire, if a court decides that the rights of the producers should take priority, in the absence of a fair arrangement for the payment of royalties, the composers could be left with a lump sum payment, not representing the value of all the rights so assigned. On the other hand, if the collecting society has priority, then there is some hope that the composers will receive some royalties, considering that a collecting society is set up for that very purpose. However, if the collecting society is mired in bad governance, then the composers might lose even the little hope of collecting royalties for the use of their works. This article presents legislative and judicial response to the rights of composers of film music vis-à-vis the film producers and collecting societies.

In Section I, the article will consider the situation where the collecting society's rights gain priority over the rights of the film producers. To demonstrate this, this article draws on the example of the

⁷ Unless specifically stated, the word 'composer' in this article is used in an inclusive sense to denote not only composers who compose music to the songs, but also lyricists who compose words to the song.

B4U case, a recent decision of the UK Court of Appeal,⁸ which is unique in many respects. To begin with, the subject matter of this case was a Bollywood song. The composers as well as the producer of the film were Indian parties. Further, the assignment of the composer's rights in favour of the film producer was signed in India and was subject to Indian laws. Since the alleged act of infringement took place in the UK, the UK courts exercised their jurisdiction over this case. This demonstrates the multijurisdictional manner in which the rights play out.

In Section II, the article goes on to explore the commercial implications of the ruling in the *B4U* case. In this section, the article examines the consequences of the collecting society's rights trumping the producer's rights. It further demonstrates how the sequence of agreements entered subsequent to the assignment to the collecting society could lead to further litigation. Since such litigation could arise in India, the position of Indian law is also examined.

Moving forward, in Section III the article presents the situation where the rights of the producer are upheld over the rights of the collecting society. For this purpose, the article draws on the example of the landmark decision in *Indian Performing Rights Society v Eastern India Motion Pictures* (the *EIMP* case).⁹ In reviewing this case, similarities between the issues presented between the *EIMP* case and the *B4U* case are discussed, highlighting also the differences in the facts and their implications. A review of the old in the light of the new always reveals details that may not have been apparent before.

In the fourth and concluding Section, the article goes on to examine the consequences of the producers' rights trumping the collecting society's rights, and what it means to the rights of the composers. It further examines the amendments introduced to the Indian Copyright Act, 1957 (ICA) in 2012.

SECTION I

FACTS OF THE *B4U* CASE

The case is about a song (the Song) composed by the two composers, Salim and Suleiman Merchant (the Composers), who are, fortunately for them (as will be discussed below), not parties to this suit.

⁸ The Court of Appeal decision was given on 13 October 2013.

⁹ *Indian Performing Rights Society v Eastern India Motion Pictures* AIR 1977 SC 1443, 1977 SCR (3) 206.

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The facts are that the Composers became members of the Performing Rights Society (the PRS) in 2004, by transferring to the PRS ‘absolutely for all parts of the world *the rights* which belong to [them] on the date of the Agreement or which [*they*] *may acquire or own* whilst [they] remain [PRS’s] member.’¹⁰ It is interesting to see here that the Court of Appeal took these ‘*right’s*’ to include the right to perform a work in public and the right to communicate it to the public.¹¹ The High Court on the other hand specifically referred to the provision in the Agreement that spelt out these ‘*rights*’ to be the performing right and the film synchronisation right.¹² The implications of this are discussed presently. A noteworthy point here is that an assignment to the PRS is absolute, which means that the assignor reserves no rights to herself.

Later in 2008, the Composers were commissioned by Dharma Productions Private Limited (the Producer), a certain producer of Bollywood films, who is also, fortunately for its own sake, not party to this suit. The commission was to provide services of directing music for a certain film the Producer was going to produce, and to compose songs for the film, including the Song. The Commissioning Agreement provided for the scope of engagement and the assignment of rights as follows.¹³ The provisions are reproduced verbatim, as it would not be an exaggeration to say that the above assignment clauses typify the broad sweep of assignments extracted by Bollywood producers in general.

"1. ENGAGEMENT

¹⁰ *B4U* [2013] EWCA Civ 1236 at [3], emphasis supplied by Moses LJ in the original transcript. The words correspond to clause 2(a) of the Standard Terms of Assignment provided on the website of the PRS, available at <http://www.prsformusic.com/joinus/writer/Pages/prs-standard-terms.aspx>, last visited 18 November 2013. It would be reasonable to assume that the agreement between the Composers and the PRS was substantially in the form set forth under the Standard Terms of Assignment.

¹¹ *B4U* [2013] EWCA Civ 1236 at [43]. However, under the Articles of Association of the PRS, the right of public performance is defined under Article 1(xix)(b) to include the right of communication to the public. This definition is imported into the PRS Standard Terms of Assignment under clause 1(a).

¹² *Performing Rights Society Limited v. B4U Network (Europe) Limited*, [2012] EWHC 3010 (Ch) [10]. The provision within the Agreement with the PRS referred to are clauses 1(f)(i) and (ii), which match with the PRS Standard Terms of Assignment.

¹³ *B4U* [2013] EWCA Civ 1236 at [4].

(a) The producer engages the Music Directors [the Composers] to inter alia create, recreate, write, arrange, orchestrate, conduct, perform, record and deliver to the Producer [Dharma] music to be included in the Film ... and provide all services usually rendered by a music director to a first class Animated Film ('Services'), on the terms and conditions contained in this Agreement...

2. COPYRIGHT

(a) The Music Directors hereby confirm and agree that the entire copyright (if any) or any performer's rights, if any, or any other rights arising from the Services or the product of the Services of the Music Directors, including without limitation the Music shall vest with the Producer as the first owner of the same pursuant to this contract of service executed. This shall be applicable to all present and future work arising out of the Services. This right shall be exercised for the whole period of the right and in all territories of the world;

(b) The Music Directors hereby expressly consent to the incorporation of the Music and the performance of the Music Directors, if any, arising consequent to the rendering of the Services in the Film. Consequent to the same the Music Directors confirm that the Music Directors do not have and shall not exercise any performer's rights under the provisions of the Copyright Act 1957 ('the Act');

(c) Without prejudice to the aforesaid, in the event of any copyrights or any other rights, including performer's rights being vested by law in the Music Directors, in respect of the Music, the Music Directors hereby assign to the Producer without any limitation, reservation or condition the entire copyright and performer's rights and all other right, title or interest of whatsoever nature ... whether vested, contingent or future in or to the product, results or proceeds ... of the Services ... whether now known, or in the future created to which the Music Directors are now or may at any time after the date of this Agreement be entitled by virtue of or pursuant to any of the laws in force in any part of the world to hold to the Producer, its successors, assignees, and licensees absolutely for the whole period of such rights for the time being capable of being assigned..."

In 2009 the composers completed composing the Song and the Song was synchronised into the film.¹⁴ The High Court judgment also indicates that the PRS was informed of the composition of the Song for the film.¹⁵

¹⁴ The title of the song is 'Shukran Allah' and the title of the film is 'Kurban'.

¹⁵ *Performing Rights Society* [2012] EWHC 3010 (Ch) at [16].

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Now we come to the parties to the suit. B4U Network (Europe) Limited (B4U Network) is a satellite television broadcaster, specializing in broadcasting Bollywood movies and music videos. By a complex web of licenses,¹⁶ B4U Network acquired rights to broadcast the Song and aired it through its network. The PRS claimed that B4U Network infringed its copyright in the Song by broadcasting the song on its channel without authorisation.

At the High Court, Vos J, gave a summary judgment in relation to the Song, on the basis that B4U Network had no prospect of successfully defending its case.¹⁷

LEGAL ISSUES AND ANALYSIS OF THE *B4U* CASE

Neither at the time of entering into the agreement with the PRS, nor at the time of entering into the commissioning agreement had the Composers yet composed the Song. In other words, the issue was one of future copyright, and the manner in which it can be assigned.

Legal context

To begin with, the court recognizes it to be quite straightforward under section 9(1) read with section 11 of the UK's Copyright, Designs and Patent Act, 1988 (CDPA) that the person who creates a work is the first owner of any copyright in it.¹⁸ What completes the legal context is section 91(1) of the CDPA, which provides that an agreement in writing by the prospective owner of copyright to assign future copyright to another person will have the effect of making the assignee

¹⁶ In the High Court decision Vos, J does try to unravel the various licenses. *Performing Rights Society* [2012] EWHC 3010 (Ch) at [15]-[18].

¹⁷ *Performing Rights Society* [2012] EWHC 3010 (Ch) at [68].

¹⁸ *B4U* [2013] EWCA Civ 1236 at [17]. Moses LJ further states that there is no suggestion by either party that any of the exceptions in section 11(2) or (3) are applicable. *Ibid.*

the owner of copyright when it comes into existence,¹⁹ which had the effect of overcoming the requirement of an additional legal assignment after the work came into existence.²⁰

Arguments presented

The counsel for B4U Network contended that the Song was never owned by the Composers, since section 91 had the effect of assigning legal and equitable ownership of the copyright to the Producer. Since the agreement with the PRS required the rights that the Composers may acquire or own, and the Composers never acquired or owned the rights, no rights were assigned to the PRS.²¹

For his part, the counsel for the PRS contended that the copyright clearly belongs to the PRS as the agreement operates as a ‘present assignment of future rights’ and takes precedence over the commissioning agreement as prior in time.²²

Operative part of the decision

Moses LJ responded to the counsel for B4U Network that the issue was not what the Composers owned, but rather what they might have owned.²³ By virtue of sections 9 and 11 of the CDPA, the

¹⁹ Section 91(1) of the CDPA has been reproduced here: Where by an agreement made in relation to future copyright, and signed by or on behalf of the prospective owner of the copyright, the prospective owner purports to assign the future copyright (wholly or partially) to another person, then if, on the copyright coming into existence, the assignee or another person claiming under him would be entitled as against all other persons to require the copyright to be vested in him, the copyright shall vest in the assignee or his successor in title by virtue of this subsection.

²⁰ Moses LJ explains that Copyright Act of 1911 did not have this provision, and the rules of equity generally applied. The situation was that when an assignment in future copyright was created, it only gave rise to an equitable interest, and no rights in law. In order for a legal right to materialise, a further assignment of copyright once it comes into existence was required. In order to overcome this difficulty, it was enacted by way of statute, originally as section 37 under the Copyright Act of 1956 and then as section 91 under the CDPA that an assignment of future copyright will still have the effect of assigning legal as well as equitable rights. This eliminated the need for a further legal assignment once the copyright work came into existence. *B4U* [2013] EWCA Civ 1236 at [9]-[10].

²¹ *B4U* [2013] EWCA Civ 1236 at [7], [18].

²² *B4U* [2013] EWCA Civ 1236 at [34].

²³ *B4U* [2013] EWCA Civ 1236 at [22].

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Composers might have owned copyright in the Song. By a combination of the operation of section 91(1) and the rules of priority in equity, copyright vests with the first assignee, namely the PRS.²⁴

He further agreed that section 91(1) had the effect of transferring legal and equitable ownership in the Song, without even staying with the Composers in a *scintilla temporis*. He admits that it is strange to think of an assignor who never becomes an owner, but it is a statutory construct, just as much as the whole concept of copyright is a statutory construct.²⁵

In summary, Kitchin LJ identified four aspects to section 91(1):²⁶

- The agreement should be in writing and signed by or on behalf of the prospective owner;
- The assignment operates to vest the legal and equitable title to the copyright in the assignee as soon as the copyright comes into existence. The copyright does not pass through the assignor;
- The expression prospective owner is to be construed accordingly;
- This section operates only if the assignee would be entitled as against all other persons to require the copyright to be vested in him. This reflects the equitable principles which provide the foundation for the provision and in particular the basic rule that the person whose equity attached to the property first will be entitled to priority.

On this basis, Kitchin LJ and Underhill LJ agree with Moses, LJ, that the PRS should have copyright in the Song.

SECTION II

COMMERCIAL IMPLICATIONS OF THE *B4U* CASE

²⁴ *B4U* [2013] EWCA Civ 1236 at [23], [27], [29].

²⁵ *B4U* [2013] EWCA Civ 1236 at [23].

²⁶ *B4U* [2013] EWCA Civ 1236 at [38]-[41].

The *B4U* case has implications not only in relation to the parties to the litigation, but also vis-à-vis those who are not parties to this case. It is also essential to articulate how this case, set in its norms of its industry, could be a representative of many such cases in Bollywood.

The counsel for B4U Network makes a point about the commercial effect of an arrangement whereby composers are left with little or no freedom to monetize their rights by way of accepting commissioning arrangements, threatening their ability to earn a living.²⁷ Both Moses LJ and Kitchin LJ disagree with this on the basis that there is no sufficient evidence of this, and that the PRS has a track record of protecting around 10 million songs for its members and its agreements have included substantially the same clause 2(a) for very many years.²⁸ Even Vos, J at the High Court level realises that what he has to decide might have ramifications beyond the Song, but he chooses to decide the matter on law.²⁹

It is easy to sympathise with the judges, as a construction in any other way would have been perverse to the express provisions of the agreements and the law. As emphasised above, the rights assigned to both the PRS and the Producer were in absolute terms without reservation. The conclusion had to be that the rights were mutually exclusive.

Within the facts of the case and between the parties to the litigation

In order to appreciate how the rights in conflicting agreements might play up, it is essential to understand the scope of these rights themselves. The PRS accepts assignment of one or both these rights – the right of synchronizing with the film and the performance right in which the right of communication to the public is subsumed.³⁰ Each of these rights is considered below. Since the agreement with the PRS was subject to the UK law and the Commissioning Agreement subject to Indian laws, the scope and extent of these rights both under the UK and Indian laws need to be determined.

- **Synchronisation of the Song into the film**

²⁷ *B4U* [2013] EWCA Civ 1236 at [33].

²⁸ *B4U* [2013] EWCA Civ 1236 at [30] (Moses LJ); [33] (Kitchin LJ).

²⁹ *Performing Rights Society* [2012] EWHC 3010 (Ch) at [3], [4].

³⁰ Article 1(xix)(b) of the Articles of Association of the PRS includes the right of communication to the public within the right of public performance.

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This is a right of particular relevance to Bollywood, since so many composers depend on this industry for their work to be accepted as commissions. There is no reason why the Composers in this case should have assigned this right to the PRS, knowing that they would like to reserve the freedom to negotiate terms with the producers of Bollywood films. As for the Producer, this is truly the essence of the rights assigned by the Composers, without which all the services rendered by the Composers would be reduced to a naught. As the High Court judgment suggests, the Composers did assign this right to the PRS and hence, could not have assigned it to the Producer.

Such incorporation of the Song into the film without the authorisation of the true owner, namely the PRS, makes it an act of infringement under the UK law to the extent that it involves copying of the work.³¹ Under the Indian law, the right to make a film or sound recording in respect of the work is an act expressly restricted by copyright in a musical work.³² Therefore, incorporating the Song in the film without the permission of the PRS is an infringement of this specific right of the PRS. It is a peculiar situation where the Composers have become infringers of the works they themselves created.³³ Interestingly, if it can be argued that the musical works incorporated in the film as a whole (and not just the Song), form substantial part of the film, then under the Indian law copyright might not subsist in the film at all.³⁴

- **Performance right and the right of communication to the public**

This right is again significant to the Producer in order to be able to distribute the film by way of a broadcast, cable transmission or live internet streaming of the Song. If the Composers have already assigned these rights to the PRS in totality, no further assignment to the Producer would be possible.

³¹ Section 17 of the CDPA. It is interesting to note here that the CDPA does not protect the right of incorporating a literary, musical or dramatic work into a film as a separate right restricted by copyright.

³² Section 14(1)(a)(iv) of the Copyright Act, 1957. In this article, cinematographic film and film are used interchangeably.

³³ There is no issue of substantiality under both the UK and the Indian law since the Song in its entirety was taken. For a discussion on substantiality, see *Designers Guild v Williams* [2000] WLR 2461, 2426.

³⁴ Section 13(3) of the Copyright Act, 1957. Although this provision appears to have been incorporated to ensure that the lack of originality requirement for cinematographic films do not result in copies of old films being produced, this provision could nevertheless be used here.

The right of public performance has quite a broad sweep and includes performance that are both physical and through mechanical means under the UK law.³⁵ Under the Indian law, although performance is only defined in relation to the right of the performers, it is possible that a definition of a performance similar to that of the UK could be derived.³⁶ The right of communication to the public is described under the UK law as including electronic transmission, broadcasting and making the work electronically available to the public in such a way that members of the public may access it from a place and at a time individually chosen by them.³⁷ The right of communication to the public under the EU law (which applies to the UK) includes anything from turning a television on in a pub, to connecting televisions to broadcasts in a hotel room.³⁸ Under the Indian law, the right of communication to the public means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work, regardless of whether any member of the public actually sees hears or otherwise enjoys the work so made available.³⁹

The question then arises as to what happens to the film as a whole. Since a film is an independent copyrightable work,⁴⁰ under the UK law it is more likely that the Producer might still be entitled to

³⁵ Under Section 19(2) of the CDPA, performance includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film or broadcast of the work. Under Article 1(xviii) of the Articles of Association of the PRS, performance includes any mode of acoustic presentation, including any such presentation by means of a sound recording, film, communication to the public, or by any other means.

³⁶ Section 2(q) defines performance in relation to performer's rights to mean any visual or acoustic presentation made live by one or more performers.

³⁷ Section 20 (2) of the CDPA.

³⁸ See Poorna Mysoor, *Unpacking the right of communication to the public: a closer look at international and EU copyright law*, IPQ 166-185 2013, for an explanation of the ingredients of this right of communication to the public, and the various situations where the CJEU has held a communication to the public to have taken place.

³⁹ Section 2(ff) of the Indian Copyright Act, 1957. The explanation to this section states that for the purposes of this clause communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

⁴⁰ Section 5B (1) of the CDPA recognises 'film' as a separate copyrightable work, and section 9(2)(ab) recognises the producer and principal director as the owner of the copyright. Under the Indian Copyright Act, 1957, section 13(1)(b) recognises cinematographic films as works and section 17(1)(b) recognises the person at whose instance the film was made to be the owner of the copyright.

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publicly perform and communicate the film as such to the public, but without any of the songs. This is because it is not only the Song, but all musical works created by the Composers which are assigned to the PRS. As such, it can certainly be argued that the music created by the Composers is important to the Composer's body of work⁴¹ as well as to the audience.⁴² On the other hand, under the Indian law, due to the decision in the *EIMP* case as will be described below, the Producer becomes the owner of the songs composed by the Composers, together with being the owner of the film.⁴³

It is evident from the above analysis that a prior assignment to the PRS deprives the above aspects of the rights of the Composers which are of core importance to the Producer.

Within the facts, but beyond the parties to the litigation

Sometimes what is not stated in a judgment could be more significant than what is stated. The fundamental premise is that the Composers did not have the rights they assigned to the Producer. As a result, the Producer did not have the rights it could have licensed to the distributors. Although neither of the judgments at the High Court or appellate stage give any information about the consideration, it is entirely plausible that the Composers received consideration for assigning rights they did not have to the Producer, and the Producer received consideration for licensing the rights it did not have to the distributors. B4U Network, having lost this appeal, and no further appeal filed,⁴⁴ will be left with having to once again pay the true owner, the PRS, for broadcasting the Song.

As such, two distinct but related actions are possible:

- first, an action by B4U Network against the chain of licensors leading to the Producer for a declaration that the license is void and for the restitution of the license fee paid for the use of the rights the Producer never had;

⁴¹ The test to be applied here is whether the part used by the defendant is a substantial part of the claimant's copyright work, not whether it is a substantial part of the defendant's work. *Warwick Films v. Eisinger* [1968] 1 Ch 508; also *Designers Guild v Russell Williams* [2000] 1 WLR 2416, 2420, 2426.

⁴² *Hawkes & Sons v Paramount Film Service* (1934) 1 Ch D 593, 609 (CA).

⁴³ *EIMP* 1977 SCR (3) 206, 223. See below Section III for further discussion on this case.

⁴⁴ The solicitor representing B4U Network, Mr Nick Rose of Field Fisher & Robinson confirmed by email on 11 December 2013 that no leave for further appeal to the Supreme Court was filed.

- second, the Producer suing the Composers for a declaration that the assignment of Composers' rights to the Producer is void and for the restitution of the commission fee for assigning the rights the Composers never had.

Since the Producer and the Composers are parties located in India, Indian courts are likely to have the opportunity to resolve this legal tangle, should the Producer decide to act.

There is a possibility of a third cause of action too, unless a settlement is negotiated. It is that the synchronisation of the Song in the film by the Producer also infringes the rights of the PRS. Therefore the PRS can claim that the use of the Song by the Producers should have been authorized by the PRS, obviously since the Composers did not have rights to assign.

Under the proviso of Article 7(b), the Articles of Association of the PRS state that it is possible for a composer (member) to request the PRS to assign the film synchronisation right to the film producer who commissioned the composition, provided that the PRS obtains from the producer of the film an agreement in a form satisfactory to the PRS, providing payment to the PRS of such fees either by way of a lump sum payment or share of receipts or royalties, in respect of any exhibition of the film incorporating the composition in the cinemas in the US.⁴⁵ It may not be possible to press this provision to services, as this Article applies only to the cinemas in the US. It flies in the face of logic as to why it should only be restricted to cinemas and no other forms of distribution such as broadcasts and cable transmission, and why it should be geographically restricted to the US, when film viewership is truly global.

Be that as it may, the Composers also have a right under Article 7(cc) and (cd) to request the PRS to assign back some of the categories of the rights and forms of utilization listed therein.⁴⁶ It is wholly conceivable that the Composers have accepted commissioning work not only from the Producer, but also from other producers in Bollywood post becoming members of the PRS. It would make sense for the Composers to rely on these provisions and gain back control over rights of relevance to them. This is again problematic in that this would only work prospectively, whereas the

⁴⁵Available at <http://www.prsformusic.com/SiteCollectionDocuments/About%20MCPS-PRS/PRSMEMANDARTS2010%20-%20WEB%20VERSION.pdf>, last visited 18 November 2013.

⁴⁶ Articles 7(cc) and (cd) of the PRS Articles of Association incorporate various categories of rights and forms of utilisation such as broadcasting rights, film production right, television rights and the like.

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transactions between the Composers and the Producer on one hand and between the Producer and distributors on the other took place between 2008 and 2010. The PRS may not gloss over the fact that the Producer still needs to pay a license fee to the PRS for its use of the rights between 2008 till date.

At a more general level, it is entirely plausible that the Composers have accepted commissions for other Bollywood films by the same or different producers post becoming members of the PRS. Likewise, it is plausible that many other composers of Bollywood music have become members of a collecting society and continue to accept their works to be commissioned by Bollywood producers for providing music to films. Regardless of the specific rights assigned to the collecting societies, considering the broad sweep of the assignment to the producers, an overlap and ensuing complications along the lines described above are all too plausible.

Given all these complications that a ruling in favour of the PRS has produced, one wonders if the motivation of the counsel for B4U Network in arguing that an assignment to the PRS taking priority threatens the Composers' ability to earn a living, was actually directed towards preventing further litigation as described above. An assignment of rights to the PRS does not have to mean that the composer loses out on all abilities to monetize the rights. On the contrary, it is the job of the PRS to ensure that the Composers' rights are monetized and they get their returns. Instead of the Composers negotiating directly with the Producer, the PRS would be negotiating on the Composers' behalf. If this were to happen, it might be that the financial returns to the Producers would be based on the terms and scales of the PRS. The only loss to the Composers would be their freedom to negotiate their own terms. As will be demonstrated in the *EIMP* case below, considering how unfairly the producers treat the composers in framing the contractual terms, one wonders if it might be preferable for the composers to be represented by a collecting society in all their negotiations after all.

However, a word of caution that the collecting societies would be a better option for the composers only so long as they enjoy good governance in the distribution of royalties. As will be discussed below, when a collecting society, in this case the IPRS, is historically governed badly, even this option could fail to generate any returns for the composers.

SECTION III

THE FACTS OF THE *EIMP* CASE AND ARGUMENTS PRESENTED

The facts in brief were that the Indian Performing Rights Society (IPRS), a collecting society set up under the ICA, published in 1969 a tariff laying down the fees, charges and royalties that it proposed to collect for the grant of licences for performance in public of works in respect of which it claimed to have authority to grant such licences. Eastern India Motion Picture Association (the EIMP), an association of the producers of films, challenged the imposition of tariffs on the basis that they were the owners of the respective films along with the sound track.⁴⁷ We must pause here and point out that whereas the *BAU* case concerned a song, the composers, the film and the producer, all of whom were specifically identifiable, the *EIMP* case concerned in general a genre of work, namely the works of composers and lyricists and an association of film producers. The implications of this are that in the *EIMP* case neither the actual assignment clause in favour of the IPRS (as it stood 1969) nor the actual assignment clause in favour of the producers was stated in the High Court or the Supreme Court judgment. Further, the exact terms of the tariff and the class of users it applies to were also not stated. Two distinct problems arise here: first, the nature and extent of overlap of rights between the assignment to the IPRS and to the producers, and second, the issue of priority.

What we know from further elaboration of the facts in the High Court judgment is simply that the terms of assignment in favour of the IPRS when composers become members of the society, covered not only the existing rights but also the rights in future works of the assignor.⁴⁸ From the arguments presented by the counsel for the IPRS before the High Court, we know further that the IPRS required the film producers to seek permission of the IPRS to perform the musical work in public, regardless of whether it was a part of the film or otherwise.⁴⁹ The basis on which the IPRS argued was that a musical work is a separate work which entitles the composers to the right of public performance under section 14(1)(iii), and a film incorporating a musical work will have to seek the permission of the composer to publicly perform such musical work.⁵⁰ Therefore, it is somewhat

⁴⁷ *EIMP v IPRS*, AIR 1974 Cal 257, para 1.

⁴⁸ *EIPM* AIR 1974 Cal 257 at paras 19 and 25.

⁴⁹ Such permission would entail payment of a tariff to the IPRS, which is the subject matter of challenge in this case. *EIMP* AIR 1974 Cal 257, para 1.

⁵⁰ *EIPM* AIR 1974 Cal 257 at paras 19 and 25.

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clear that the only right that was assigned to the PRS was the public performance right, in relation to the present and future works.

The EIMP for their part contend that they are the first copyright-holders of the cinematograph films including the musical work contained in the sound track.⁵¹ As the owner of an independent copyrightable work, the producers are free to exercise their rights over the film, and the composers cannot defeat their rights. They further argued that the film includes sound track, and therefore, all rights in the film include rights in the sound track incorporating any music.⁵² However, they did not establish before the court what rights they would require from the composers to be assigned in order to make a film incorporating the composer's works.

The EIMP first took the matter to the Copyright Board, where they did not succeed. They then appealed to the Calcutta High Court, which found in their favour. The IPRS then filed an appeal to the Supreme Court, where the findings of the High Court were upheld, but with a dictum.

LEGAL ISSUES AND ANALYSIS OF THE *EIMP* CASE

Since the assignment to the IPRS also included future copyright, it is not only the works that the composers created before entering into such assignment, but also those that come into existence after such assignment should have been considered. In the absence of the specific assignment clauses to rely on, the following situations should have been considered by the court:

- (i) Works that were created before entering into an assignment with the IPRS, the rights which had already been assigned to the film producers; the question then is whether any rights of the composers survive the incorporation of their work in a film, which can then be assigned to the IPRS.
- (ii) Works that are created after entering into the assignment with the IPRS, which then subsequently get incorporated into films; the question then is whether the terms of the assignment to the IPRS are so absolute that a further assignment to the producers is not possible.

⁵¹ *EIPM* AIR 1974 Cal 257 at para 1.

⁵² 1977 SCR (3) 206 at 215.

The second situation is akin to the question that arose in the *B4U* case. Since the rights assigned to the PRS and the Producer in that case appeared to overlap under the UK law, the rule of priorities was applied to uphold the PRS's rights. In the *EIPM* case, the second situation was not considered, although argued upon in the High Court without specifically dealing with priority.⁵³ Neither the issue of priority nor the issue of copyright in future works was discussed in the Supreme Court judgment. At the same time, it was also not clear if the courts were only considering the first situation. It would appear that regardless of when the work was created, so long as it was created for being incorporated into the film, the producer's rights will be upheld.

Legal Context

The producers relied on the fact that a film is an independent copyrightable work⁵⁴ and that a bundle of rights attach to the films (independently of other works in the film).⁵⁵ But the most powerful provision relied on was section 17(a) of the ICA, which states that when a film is made for valuable consideration, the person at whose instance it was made is the first owner of the copyright, in the absence of any agreement to the contrary. This differs from the UK law which states that the producer and the principal director are the authors of films⁵⁶ and in general, authors are the first owner of copyright in such work.⁵⁷ No reference to valuable consideration is made, unless it is in the course of employment.⁵⁸

On the other hand, the most powerful provision the IPRS relied on was section 13(4) of the ICA, which states that when any work or a substantial part of any work goes into the making of a film or sound recording, the copyright in such film or sound recording does not affect the separate

⁵³ It was argued that the moment there is an original composition it is saddled with a copyright in favour of the IPRS due to the provision on future copyright. The law prevents the composer from bringing into existence anything which is not assigned to the IPRS. From this point of view the cinematograph film owner's copyright in the sound track cannot be born inasmuch as before it could be born it stood assigned to the IPRS. *EIMP AIR 1974 Cal 257*, at para 31.

⁵⁴ Section 13(1)(b) of the ICA.

⁵⁵ Section 14(d) of the ICA.

⁵⁶ Section 9(2)(ab) of the CDPA. It may be noted that the principal director was added by way of an amendment in 1996.

⁵⁷ Section 11 (1) of the CDPA.

⁵⁸ Section 11(2) of the CDPA.

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copyright in such work or its part. In contrast, the UK law provides that the subsistence of copyright in the film does not prevent the existence of copyright in the sound track of the film as a sound recording.⁵⁹ However, no other work that goes into the making of a film is specifically mentioned. The IPRS also relied on section 18(1) of the ICA, which permits the assignment of future work, provided that such assignment only takes effect once the work comes into existence. This provision appears similar to the UK law, except that the Indian law, surprisingly, is more simply worded.

Operative part of the decision

It appears that the Copyright Board gave the simplest and the clearest solution to the issue. Although badly paraphrased in the High Court judgment,⁶⁰ it appears that the Copyright Board gave section 13(4) of the ICA its fullest meaning. The Copyright Board appears to have expressed the view that in the absence of proof to the contrary, when a composer's work is incorporated into a film with the composer's consent, all that the composer is deemed to have done is to license or assign her right to make a film out of the work. All rights, including the right of public performance, are reserved by the composers by virtue of section 13(4) of the ICA. To the extent that the public performance of a film involves performance of the musical work assigned to the IPRS, it is within the powers of the IPRS to charge a license fee for such public performance of films. It would appear that to the Copyright Board it does not matter if the assignment to the IPRS took priority or not, as the rights assigned are quite distinct, unless there is proof that there was an assignment to the producers and that it was broader than the mere right of making a film out of the work.

As stated above, the EIMP did not produce any term of assignment as an example. It is possible for the Copyright Board to have proceeded on the assumption that there was no assignment, but only a consent given, for the incorporation of the composer's work into the film. In that case, the composer's right to make a film out of her work is only licensed, and not assigned. However, even if the EIMP's contention that an assignment of rights took place is to be believed, such assignment would only be restricted to the composer's right of making a film out of her work. Unless the

⁵⁹ Section 5B(5) of the CDPA.

⁶⁰ *EIMP AIR 1974 Cal 257*, at para 4.

contract with the composer provided that the valuable consideration was also for the composer licensing or assigning the right of publicly performing the composer's work incorporated in the film, a separate permission to screen the film incorporating the composer's work would be necessary. Given that the composers have a distinct right to make a film out of their work, it would stand to reason that in the absence of evidence to the contrary, only this right would be involved in a transaction with the film producers.

Unfortunately, the Supreme Court relied on a completely different logic. The Supreme Court held that once composer parts with a *portion of his copyright* by authorising a film producer to make a cinematograph film in respect of her work and thereby, have her work incorporated or recorded on the sound track of a cinematograph film, the film producer acquires on completion of the cinematograph film a distinct copyright over the film. The Supreme Court went on to state that this copyright gives the film producer the exclusive right inter alia of performing the work in public, both in respect of the visual images and the acoustic portion, including lyrics or musical works, to be heard in public. Therefore, the Supreme Court took the view that no permission of the composer for the performance of her work in public was necessary.⁶¹

Even within the above argument, it is essential to note that the Supreme Court believes that the composer parts with only a portion of her copyright and not all of it absolutely. In recognition of section 13(4) Jaswant Singh J, held that the composer retains the right of performing her work in public for profit *otherwise than as a part of the cinematograph film* and he cannot be restrained from doing so.⁶² This finding was further reinforced by Krishna Iyer, J as a footnote to Jaswant Singh, J's judgment.⁶³ This is dictum, though important, goes only so far as posing itself to be a half-hearted compensation for the composers.

If the judges had concluded here, it would have saved much confusion. Jaswant Singh, J continued to answer the question whether the producer of a film who engages a composer defeats the rights of the composer by engaging him. To begin with, the question is unhappily worded, and the answer even more so. Obviously, the question needs to be qualified to specify the rights and the extent of

⁶¹ 1977 SCR (3) 206, 221-222 (emphasis supplied).

⁶² *Id.* at page 222 (emphasis supplied).

⁶³ *Id.* at page 224.

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their application, though the word ‘defeated’ still seems inappropriate. The question should have been whether the composer loses her right to public performance of her works to the extent that the works are played as part of the public performance of the film. Considering what the judges had ruled before, the response to this question should have been that the valuable consideration under section 17(a) represents assignment of the composer’s right to public performance of her works to the extent that the works are played as part of the film. This would have ensured that the right of the composers to publicly perform their works independently of the film would have been retained.

Instead, Jaswant Singh, J reasoned that the implication of the producer engaging the composer for valuable consideration, and becoming the owner of the copyright in the film is that no copyright subsists in the composer *of the 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. On this basis, Jaswant Singh, J concludes that by engaging the composer to compose music for a film, the producer of the film defeats the copyright of the composer.⁶⁴ This final determination of the court stayed as the operating part of the decision, rather than the part that says the composer only parts with a part of the copyright and is free to exploit her rights in her works independently of the film for which they were created.

If the Supreme Court’s only objective was to drive home the point that the composers of music cannot defeat the rights of producers of a film *in the film*, then simply asserting that the film is a separate copyrightable work with rights associated of its own would have been sufficient. There was no need for the judges to go a step ahead to say that the engagement of the composers by the producers *defeats* the rights of the composers *in their own compositions*. This falsely conveys the message that the composers lose all their rights, including the rights to exploit their music independently of the film for which it was composed. A harmonious construction of the judgment should be that the producer becomes the first owner of the works incorporated in the film so long

⁶⁴ *Id.* at page 223 (emphasis supplied). This was the same line of argument followed by the High Court where relying on section 17(a) of the ICA, it held that when a composer for the first time composes something for incorporation into a film for valuable consideration, then the producer is the first owner of *such composition*. AIR 1974 Cal 257, at para 33.

as these works are publicly performed together with the film. A composer on the other hand, is free to retain the right to publicly perform her works independently of the film.⁶⁵

What the legislative provisions in India provide for is a default position where a composer allows the incorporation of her works into a film, and she transacts only with her right to make a film out of her work and nothing more. A transaction⁶⁶ in relation to any other rights must be specifically provided for by a contract. However, what this decision has made the default position to be is that where a composer allows the incorporation of her works into a film, she assigns all her rights to the producer of the film, and the producer becomes the copyright owner of not just the film, but also the composer's works. If the composer wishes to retain any rights, such reservation must be specifically provided for.

SECTION IV

COMMERCIAL PRACTICES OF FILM PRODUCERS

Regardless of what the decision in *EIMP* case says, in order to ensure that composers are not able to assert independent rights, the producers of films usually require a very broad assignment of rights to be effected in their favour. An example of the terms of this assignment is reproduced in the context of the *B4U* case above. A typical assignment will have some or more of the following aspects:

- (i) The composers agree that the *entire* copyright or *any performer's right* that arise out of them providing services of directing music to a film, vests with the film producer *as the first owner* of the copyright; this vesting provision appears to be born out of section 17(a) of the ICA, which confirms first ownership of copyright with the person at whose instance a film is made, leaving really no right at all with the composers in their own works;
- (ii) All present and future works are included, since the agreement is entered into presumably at time when none of the works would have come into existence;

⁶⁵ A similar argument is advanced in Nikhil Krishnamurthy, *IPRS v. EIMPA – Performing Right or Wrong?* 1 MIPR A-169, A-175.

⁶⁶ The neutral term transaction is used here instead of the term license or assignment. Whether a transaction is a license or an assignment also depends on the terms of the contract.

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- (iii) The assignment is for the whole of the copyright period, which means that the heirs of the copyright owner cannot benefit from the work;
- (iv) The assignment covers the whole world, so that the producer is free to publicly perform the song anywhere in the world;
- (v) The composers agree not to exercise their performer's rights, in that the composers cannot themselves perform the works they create outside of the services rendered for the film producer;
- (vi) Even if by law any copyright vests with the composers, such rights also stand assigned; this provision appears to have been meant to overcome section 13(4) of the ICA, which provides for separate existence of copyright in works that constitute a film;
- (vii) If the composers become entitled to any other right now known or in future instituted in any part of the world, such right stands assigned to the producer.

Indeed, it is hard to think of an assignment clause more comprehensive than this. With an assignment clause of this kind, it does not matter what the *EIMP* case says in its main judgment or in its dictum, the contractual terms will be given full effect to. In practice, the film producer further assigns the rights in the music to a recording company.⁶⁷ Since the first assignment to the film producers would have already stripped the composers of their rights, it does not matter the extent of rights the recording companies have as an assignee or licensee of the film producers.

Regardless of whether the film producer has the rights in music or the recording company, the following two questions arise: does the consideration for this unduly broad assignment represent the true value of the work and its potential for further commercial exploitation? The answer has always been no in relation to the Indian film industry. The industry practice of the film producers has been to pay the composers a lump sum amount, after which the composers' rights extinguish.⁶⁸ However,

⁶⁷ Indeed, this is what happened in the B4U case where the Producer purported to acquire the music rights from the Composers and then licensed it to a recording company, which in turn, through a chain of licenses finally led to B4U Network claiming the rights in the Song. *Supra* note 16.

⁶⁸ Shamnad Basheer and Prashant Reddy, Submissions to the Standing Committee on HRD regarding the Copyright Amendment Bill, p. 10.

the songs in the film are not only exploited for years to come as part of the film, but also independently or by selling the music rights to a record label.⁶⁹

An unfair distribution of returns underpins both the exploitation of the music as part of the film and independently of the film. The recognition of the exploitation of music independently of the film had, at least, found its expression in the dictum in the *EIMP* case. In contrast, the unfairness in the exploitation of music *as part of the films* had not even been contemplated. The only reference to this right was in the arguments of the IPRS in the *EIMP* case and the decision of the Copyright Board. In this sense, giving this right back to the composers would have established a just and fair distribution of returns.⁷⁰

ISSUES OF GOVERNANCE WITH THE IPRS

A related question arises: are the composers still able to earn their returns from the collecting societies? An assignment so broad as the one above would mean that the composers are left with no rights they can assign to the collecting society. However, the IPRS as a collecting society has been in existence for decades,⁷¹ to collect royalties for works of composers (including composers of film industry) being performed in public independently of the film.⁷² If the amounts earned by the composers from the collecting societies were so significant, the instances of utter penury of some of

⁶⁹ See Nitin Masilmani, *Face the Music*, Intellectual Property Magazine, September 2012, p.30, where the author says that the producer of a successfully leveraged film could recover a sizeable component of his overall investment entirely through sale of music rights.

⁷⁰ A similar argument is presented in Kirti Dahiya, *Cinematographic Lyricists Right to Royalty: Myth or Reality?* 16 JIPR 335 (2011) at pp.338-339.

⁷¹ The original signing date of the Memorandum of Association of the IPRS is 18 August 1969, available at <http://iprs.org/pdf-files/Memorandum-of-Association-17-4-2013-200513.pdf>. A list of composers is at this link: <http://www.iprs.org/cms/Membership/Members/Composers.aspx>; a list of lyricists is at this link: <http://www.iprs.org/cms/Membership/Members/Authors.aspx>. Both links last visited 17 December 2013. Though accessed post the Copyright Amendment Act, 2012, many of the veteran artists listed therein were members well before the coming into force of Copyright Amendment Act, 2012.

⁷² For a detailed explanation on how the composers earned royalties from the IPRS, see Nikhil Krishnamurthy, *Waxing Lyrical on Royalties – An analysis of the Author-Centric Amendments proposed to the Indian Copyright Act, 1957*, <http://spicyip.com/2010/03/guest-post-waxing-lyrical-on-royalties.html>, last visited 18 December 2013.

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the composers in the past would not have been cited while lobbying for the recent amendments to the ICA.⁷³

It has been convincingly argued that there was a concerted effort on part of the record companies (as assignees of film producers) to take over the governance of the IPRS, so that the record companies can walk away with all the royalties from the exploitation of the composers' rights.⁷⁴ It has also been argued that over time record companies began realizing that in any event, under the terms of the assignment the composers owned no rights at all and hence the IPRS stopped paying any royalties to the composers since 2005.⁷⁵ The IPRS does go on record to say that it was only publishers of music i.e. the recording companies who were able to prove ownership, and not the composers, which is why they had not paid the composers.⁷⁶ Unfortunately, the efforts of record companies were indeed in conformity with the ICA before the amendments in 2012, which in any event only provided for the control of the IPRS to the owners of copyright rather than the composers and authors.⁷⁷ However, evidently there is a conflict of interest between record companies on one hand and composers on the other, raising concerns of governance if the composers are not appropriately represented.

Therefore, the issue was not only with the broad assignment terms with the film producers, but also the governance of the IPRS itself which spelled doom for the composers' effort to earn royalties

⁷³ Shammad Basheer and Prashant Reddy, Submissions to the Standing Committee on HRD regarding the Copyright Amendment Bill, p. 10.

⁷⁴ Prashant Reddy, *Rights of Lyricists and Composers*, 5 NUJS L. Rev 469 (2012), at pp.487-510. The author painstakingly argues here how the record label Saregama (formerly HMV) used the courts to manipulate the internal governance of the IPRS, exhaust the defendants and drive them into giving up fighting; at the same time also using the internal mechanism of the IPRS itself to call for General Meetings to surreptitiously amend the Articles of Association to the music labels' advantage.

⁷⁵ Nikhil Krishnamurthy, *Waxing Lyrical on Royalties – An analysis of the Author-Centric Amendments proposed to the Indian Copyright Act, 1957*, <http://spicyip.com/2010/03/guest-post-waxing-lyrical-on-royalties.html>, accessed on 18 December 2013.

⁷⁶ The Director's Report of the IPRS, 2010-11, <http://www.iprs.org/cms/IPRS/AnnualReport/DirectorsReport20102011.aspx>.

⁷⁷ Before the amendment, Section 35(1) of the ICA stated that every copyright society shall be subject to the collective control of the owners of rights under this Act.

from the exploitation of their rights. In this light we will need to examine whether the amendments introduced to the ICA in 2012 set right this unfairness.

LEGISLATIVE RESPONSE TO THE PLIGHT OF THE COMPOSERS

In order purportedly to bring about a fairer distribution of royalties, the Copyright Amendment Act, 2012 was passed, and came into effect on 8 June 2012.⁷⁸ The amendments to some extent reflect a victory of the hitherto unorganised group of composers and lyricists, coming together to lobby the government to bring about changes to the law, rather than using the courts and the internal mechanism of the IPRS to counter the actions of record companies.⁷⁹

Under this Act, the following changes have been made:

- (i) A proviso to section 17(e) has been added that states that nothing contained in sections 17(b) and (c) (that deal with first ownership of film and first ownership by employment, respectively), shall affect the right of the author of literary, musical, dramatic and artistic work. This provision adds nothing new, since section 13(4) had already clearly stated that the separate existence of copyright in the works constituting the film is not affected.⁸⁰
- (ii) Three provisos to section 18(1) have been added, as follows:
 - a. No assignment that deals with a 'mode or means of exploitation' not in existence or in commercial use at the time of the assignment will be given effect to, unless the

⁷⁸ The Gazette bringing the law into force can be viewed at <http://copyright.gov.in/Documents/NOTIFICATION-20062012.pdf>, last visited 18 December 2013.

⁷⁹ Prashant Reddy, *Rights of Lyricists and Composers*, 5 NUJS L. Rev 469 (2012). The author describes here how Mr Javed Akhtar, a noted lyricist, led the lobbying by lyricists and composers to the victory, culminating in the amendment to the ICA.

⁸⁰ Clause 9.18 of Parliamentary Subcommittee's 227th Report on Copyright Amendment Bill, 2010 submitted to the Rajya Sabha on 23 November 2010, indeed claims exactly this.

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assignment makes a specific mention of it;⁸¹ this attends to the issue of evolving technology and newer forms of exploitation.⁸²

- b. The second proviso, which is the most important provision for the present discussion, can be discussed under the following three parts:
 - i. Composers whose works are incorporated in a film shall have a right to receive equal share of royalties as the producer of the film, but only to the extent that such royalties are received for any communication to the public other than as a film in cinema halls. In essence, this provision reinforces the dictum in the *EIPM* case to the extent that it recognised the survival of the right of public performance of the composer in their works other than as a film.⁸³ It goes a step ahead in stating that the composers will be entitled to royalties even if their work is communicated to the public as part of the film, but outside the cinema halls, such as television, broadcasts, etc. What is also new about this provision is that the obligation regarding equal sharing of royalties had not been statutorily dictated in the past.

Ideally, the equal share of royalties should have also been extended to the communication to the public *in* cinema halls.⁸⁴ Considering the opposition of the producers even to share royalties for communication to the public outside cinema halls, it may have been highly unlikely that a proposal of this nature could be considered. A starting point could have been a statutory requirement to share royalties on an on-going basis, and leave the percentage to be mutually negotiated. Once the composers get their 'foot in the door', so to speak, further lobbying could materialise in future.

⁸¹ By this provision, the clause in the assignment of Composers to the Producer in the *B4U* case that refers to future rights will not be enforceable, to the extent that such rights relate to a new form of exploitation.

⁸² This amendment was brought about purportedly to address the issue of significant loss incurred by the composers from the use of their works in ringtones, a mode of exploitation they had not envisaged before assigning their rights. Prashant Reddy, *Rights of Lyricists and Composers*, 5 NUJS L. Rev 469 (2012), at p. 485.

⁸³ Clause 9.18 of Parliamentary Subcommittee's 227th Report on Copyright Amendment Bill, 2010 submitted to the Rajya Sabha on 23 November 2010, indeed claims exactly this.

⁸⁴ A similar view is taken in Shamnad Basheer and Prashant Reddy, Submissions to the Standing Committee on HRD regarding the Copyright Amendment Bill, p. 11.

- ii. the composers are not allowed to assign the right to receive royalties to any person, except by way of transmission to their legal representatives or by way of assignment to a copyright society. This provision reinforces the status of an assignment to a collecting society as being a permissible manner of distribution.⁸⁵ This also formalizes the role of a collecting society such as the IPRS in distribution of the returns from exploitation of rights. If the IPRS had indeed stopped paying royalties to the composers as claimed, this provision would bring the much needed certainty.
 - iii. any agreement to the contrary is void.
- c. The third proviso has exactly the same provision, but in relation to sound recordings.
- (iii) Section 19(8) is added whereby it is provided that an assignment contrary to the terms and conditions of the rights already assigned to a collecting society is void. By this provision the Parliament has upheld the rights assigned to the collecting society. This would mean that if a case similar to the *B4U* case arose in India now, and the composer in question is already a member of a collecting society, a later assignment to a producer contrary to the terms of the assignment to the collecting society would be void.
 - (iv) Sections 19(9) and (10) have been introduced, which essentially reinforce the provisions of sections 18(1), second and third proviso.
 - (v) Section 35(1) was amended to bring the collective control of the copyright society not only under the owner of rights, but also the authors of rights. In addition, section 35(2) was introduced to ensure that there is equal representation of both the copyright owners and authors (essentially composers and lyricists). Moreover, section 35(4) was introduced to ensure that there is no discrimination between the rights of copyright owners and authors, and all members enjoy equal rights. These are big strides towards better governance, but there is a fear that this could result in deadlocks while taking important decisions on royalty sharing, given that the interests of owners and authors are

⁸⁵ The logic of this provision seems to go against the arguments raised by the counsel for the B4U Network who argued that an assignment to a collecting society taking precedence threatens the ability of composers to earn a living. However, it has been argued that this is not necessarily the case in Section II, final paragraph.

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significantly adverse to each other.⁸⁶ Equal representation between authors and composers is also followed in the UK, with the PRS being an example. However, the PRS also has two external directors and an executive director who constitute the board of directors of the PRS, who will potentially bring in the much needed neutrality in resolving tough issues of revenue sharing.⁸⁷

Although some of these amendments reinforce the provisions already in existence, and to the extent that these amendments bring certainty to the rights of the composers and formalize some of their rights, the amendments are welcome. However, they are not as revolutionary as might have been, had they included the rights of the composers to share in the revenues of the exhibition of the film.

The constitutionality of the amendments to sections 17, 18 and 19, inter alia, is being challenged by the film producer Bharat Anand.⁸⁸ The constitutional validity as well as the market implications (or the absence thereof) of these amendments will unfold in the not too distant future.

CONCLUSION

In summary, the ideal situation would be the way the Copyright Board conceived it in the *EIMP* case, where a composer can part with only the right of making a film out of her work, be it by way of licence or by way of assignment. That would leave the composer with all the freedom to exploit the other rights, be it by way of becoming a member of a collecting society or otherwise. In this sense, the collecting society will also have the right to receive royalties for the exhibition of the films incorporating the music, for and on behalf of the composers. In this ideal situation, the collecting society is also presumed to distribute the royalties fairly.

The worst case scenario is an assignment by a composer to a film producer along the lines quoted in the *B4U* case. Such assignments do not even give any room for the composers to exploit the musical works independently of the film. Effectively, such assignments bypass even the dictum in

⁸⁶ Prashant Reddy, *Rights of Lyricists and Composers*, 5 NUJS L. Rev 469 (2012), at p. 522.

⁸⁷ The constitution of the current board of directors of the PRS can be found at the following link: <http://www.prsformusic.com/aboutus/governance/PRSboard/Pages/default.aspx>, last visited 3 April 2014.

⁸⁸ Prashant Reddy, *The constitutional challenge by film producers to the Copyright (Amendment) Act, 2012*, <http://spicyip.com/2013/05/the-constitutional-challenge-by-film.html>, last visited 17 December 2013.

the *EIMP* case. In addition, the rights in music get assigned to the recording companies, which then go on to license further rights to broadcasters or cable television channels, in addition to becoming members of the collecting societies to claim revenues for the exploitation of the music independently of the film.

An equally sub-optimal scenario is like in the *B4U* case, where the composers assigned not only the public performance right, but also the right to synchronise the musical works into the film, to a collecting society. The track record of either the PRS or the IPRS in negotiating terms for film synchronization right with the film producers has not been tested. Indeed, the IPRS has historically never expressed inclination to manage any rights other than those that relate specifically to performance of literary, dramatic and musical works. In addition, considering the historical malfunctioning of the IPRS and the hawkish nature of record companies in taking control over it as explained above, this option would be unattractive to composers.

It is these worst case scenarios stated above which the Copyright Amendment Act, 2012 tries to redress. However, as stated above, this amendment only creates a statutory right of equal share in royalties for communication to the public of the composers' works other than through the exhibition of film in cinema halls. Though a step in the right direction, it does not go far enough to share the royalties from the exhibition of the film itself. Further, equal representation in the collecting societies by both composers and copyright owners might become stumbling block in their functioning.

One must wait and see how the industry moulds itself around these amendments. Until then, the saga continues for the composers in their search for a fairer distribution of returns for works they create. It is only hoped that in this sequel, the composers will find the classic Bollywood happy ending.
