

Media Hotline

September 17, 2010

FM RADIO - ROYALTIES REDUCED TO GLOBAL STANDARDS

The Indian Copyright Board (“**Board**”) finally settled the long standing royalty dispute between private FM radio stations and Music companies. The Board passed a landmark order fixing the royalty rate for broadcast of sound recording on FM radio by providing a revenue-sharing model as follows: 2% of net advertisement earnings of each FM radio station to be distributed on a pro rata basis to all music providers.

The above order was passed in the matter of Music Broadcast Pvt. Ltd & Ors. (“**Applicants**”) vs. Phonographic Performance Ltd (“**PPL**”) ¹, where the Board granted a compulsory license under Section 31(b) of the Copyright Act, 1957 to nine applicants for the repertoire managed by PPL ² for a royalty calculated as stated above.

“Board” room trivia: Facts, Arguments & Evidence

Nine applications under section 31(1) (b) ³ of the Copyright Act, 1957 were filed before the Board for the grant of compulsory license for broadcast of sound recordings forming a part of PPL’s repertoire. These applications for compulsory license were filed because PPL refused to grant the licenses of the sound recordings managed by it at the rates suggested by the FM radio companies.

These applications were heard and clubbed together owing to the similarity in the issues raised in them. While deciding the royalty terms, the Board took into account the following points: (i) losses made by the private FM radio broadcasting industry in India; (ii) promotion of music by the FM radio, (iii) piracy and the effect on the music industry, (iv) revenue earned and the revenue earning capacity of PPL through various streams of revenue, (v) public interest and (vi) royalty rates in foreign jurisdictions.

THE ARGUMENTS AND REBUTTALS URGED BY BOTH SIDES WERE AS FOLLOWS:

1. HIGH ROYALTY FEES DRIVE THE “FREE-TO-AIR SERVICE” INTO MAJOR LOSSES:

PPL was charging the Applicants approx. Rs. 2400 per needle hour ⁴ [approx. USD 51.00 per needle hour] or 20% of the net advertising revenue, whichever was higher. The Applicants alleged that this heavy license fees close to 12-18% of their revenue was a detriment to the growth of their business and not in sync with the global standards. Their *raison d’etre* for seeking this compulsory license was that music is an essential ingredient for the survival of the radio industry and is restricted to broadcast any other kind of content since the terms of the Grant of Permission Agreement (“**GOPA**”) ⁵, entered into between the Ministry of Information and Broadcasting in India and the Applicants, impose restrictions on a radio channel prohibiting it from broadcasting content like news and current affairs. GOPA also obliges the radio channel to be a “free to air” service i.e. no subscription fee can be charged from the public at large. Ironically for PPL, its expert witness admitted in his cross examination that the royalty rate of Rs 1500 (as it was initially in 2001) and Rs 2400 are “exorbitant” and “unreasonable”.

2. HIGH ROYALTY PAYOUT FROM LIMITED ADVERTISEMENT REVENUES- AN EMBARGO ON PROFITABILITY:

The Applicants also argued that limited advertising revenue further made it difficult to pay the royalties demanded by the music companies to keep playing the music, the main component of the radio. They supported this argument with statistics provided in the FICCI-KPMG Report ⁶ which states that the size of the radio advertisement industry in India as a percentage of the advertising industry in India as a whole is a mere 4% in face of a global average of 8%. It was also brought to the Board’s notice that All India Radio ⁷ (“**AIR**”) earns 40% of the total advertising revenue available to radio industry in India while the remaining 300 private players distribute the remaining 60% amongst themselves. In fact during cross-examination of witnesses, the main witness for PPL also agreed that Radio Mirchi, the only profit generating radio channel, would succumb to the pressure of high royalty payments, sooner than later.

3. ROYALTIES CHARGED NOT IN TUNE WITH GLOBAL STANDARDS:

The Applicants also brought on board an expert witness who recommended the revenue sharing method over the absolute figure method because *inter alia* the absolute figure method is arbitrary, does not adjust inflation and is not used globally. He also stated that in Australia, 0.4% of revenue share was the royalty charged and given the differences in level of development, 0.25% royalties is reasonable for India. The Applicants proposed a royalty rate of 1% - 2.5% of the net advertising revenue of a private FM broadcaster keeping in sync with the global standards.

4. HIGH ROYALTIES DEFEATS PUBLIC INTEREST:

PPL argued that the FM radio broadcasting is purely a commercial profit driven venture and no public interest is served. The Applicant’s rebutted that the main aim behind “free to air” service is public interest and high royalty fees is defeating that very interest of the public. The Board sided with Applicants and observed that this issue was not a

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valid point to be raised in this situation and should be brought up before the concerned Government Authority, if at all.

5. DIGITIZATION OF MUSIC AND PIRACY: MAIN FACTORS IN REDUCING PHYSICAL SALES

PPL also argued that the radio channels had negatively impacted the sales of music CDs and other physical formats. However, interestingly some of the witnesses of PPL admitted that the digitization of the music industry along with increasing piracy are factors responsible for reduction in the number of physical units sold. The Board dismissed PPL's arguments and also pointed out that PPL had not assessed losses due to mobile uploads; television and iPods. The Board also observed that in fact radio industry popularizes music and artists.

THE ORDER:

To save the radio channels from "pulling their shutters down", the Board ordered the implementation of the revenue sharing model with the Music Companies albeit subject to the terms and conditions laid down by the Board. Turning down the needle hour model, it stated that "*the revenue model cannot be one which is a bare deal between the licensee and licensor and has to take into consideration the listener and the advertiser*".

Thus, the Board preferred linkage of the royalty with (i) advertisement revenue as against gross revenue as it is truly reflective of response of the listeners; and (ii) net revenue as against gross revenue as it is truly reflective of the net receipt in the kitty of the broadcaster.

The Board, thus, directed the Registrar of Copyright to grant each Applicant a compulsory license to PPL's repertoire and ordered that 2% of net advertisement earnings of each FM radio station accruing from the radio business shall be set aside by each Applicant for pro-rata distribution of compensation to all music providers including PPL in proportion to the music provided by the respective music providers and broadcast by each Applicant. It also stated the date by which payment should be made, the bank guarantee to be given and the interest to be paid in delay of payments. For arriving at "net advertisement earnings", the Board excluded all Government and municipal taxes paid, if any, and commission paid towards the procurement of such advertisements to the extent of 15% of such advertisement earnings. The validity of this license granted by the Registrar of Copyrights to the Applicants is till September 30, 2020.

CONCLUSION & ANALYSIS:

The operative part of the order of the Copyright Board reads as follows:

"(a) 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station shall be set apart by each complainant for pro rata distribution of compensation to all music providers including the respondent herein in proportion to the music provided by the respective music providers and broadcast by the complainant. Complainant shall be deemed to be a music provider for the music provided by it or received by it free of cost and broadcast. For arriving at "net advertisement earnings", all Government and municipal taxes paid, if any, and commission paid towards the procurement of such advertisements to the extent of 15% of such advertisement earnings shall be excluded;"

FROM THE ABOVE WORDING, THE FOLLOWING TWO ISSUES ARISE:

1. India has the peculiar situation where some of the music labels having substantial repertoire, are not members of PPL, including Yashraj and Super Cassettes (T-Series) whose radio broadcast right is not administered by PPL. The wording of the order of the Board appears to cover not only PPL but other owners of sound recording as well. However, the other owners were not parties to the proceedings and were not heard. Hence, it is unclear whether the Registrar of Copyright is bound to grant compulsory license for the royalty specified by the Board in relation to sound recordings owned by non-PPL owners as well. In fact recently, in response to a writ petition filed against the Copyright Board's order by Super Cassettes, the Delhi High Court observed while passing an interim order that the rates fixed by the board do not apply to Super Cassettes (T-Series).

2. Further, from the above wording, it is not clear whether 2 % royalty is to be allocated only in relation to license of sound recording rights or also in relation to license of publishing rights i.e. the owners of musical and lyrical works. In India, one school of thought is that no royalties are due to owners of publishing rights when sound recording is communicated to public. However, recently the, Madras High Court has held that owners of publishing rights should also be entitled to royalty payment in such a case. In the present matter since Indian Performing Right Society Ltd.

("IPRS")⁸ or other owners of publishing rights were not party or even heard, it is not clear whether the order will apply to them as well.

The Board has not given a detailed explanation of how the global standards have been applied to the Indian scenario while arriving at the figure of 2% of net advertisement earnings as royalty. Industry sources and newspapers have reported that PPL shall be challenging this order shortly in the appropriate High Court. If this order is upheld by the High Court, it will change the entire business model of radio companies and will help improve profitability of several radio stations even in smaller towns. There will surely be an increase in the enthusiasm with respect to foreign collaborations in this industry and the upcoming Phase III bidding process for licenses for operating radio channels.

- **Ranjana Adhikari, Vyapak Desai & Gowree Gokhale**

¹ See *Music Broadcast Pvt. Ltd & ors vs. Phonographic Performance Ltd*; dated August 25, 2010

² PPL is a Copyright Society in India set up in respect of Sound Recordings. PPL is mainly engaged in administering the broadcasting / telecasting and public performance rights on behalf of over 160 music companies which are its members.

³ Section 31 - Compulsory licence in works withheld from public-

¹) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work

(a) [...]

(b) has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable, the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to re-publish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and there upon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of Copyright Board, on payment of such fee as may be prescribed.

4 "One needle hour is the duration of music played during any given 60 minutes. If music is played for 40 minutes during a one-hour slot, it is taken as one needle hour" <http://www.financialexpress.com/news/jarring-notes-over-fm-music-royalty/672936/> as visited on September 16, 2010

5 All private FM radio channels are established pursuant to the terms of GOPA entered into between the Ministry of Information and Broadcasting and the respective entities wishing to establish, maintain and operate FM radio broadcasting channels.

6 See FICCI-KPMG - Media and Entertainment Industry Report 2009

7 AIR is a national radio service planned, developed and operated by the Prasar Bharati Broadcasting Corporation of India. As per PPL's new agreement with AIR effective from 15th September, 2008, rates for the royalties are Rs. 525 per needle hour for FM non-metro and Rs. 600 for FM metro.

8 IPRS is a society representing composers and authors. It handles the performing rights, the mechanical and synchronization rights of its members.

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