Copyright and Related Rights Law

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WEEK - 08

LECTURE – 39

Right to Receive Royalty

Welcome back to this course on copyright and related rights law. This week we have discussed broadcasting rights; we have also discussed resale share rights or the resale royalty right. In today's session and the next, we are going to take a look at another kind of right that is present in the Copyright Act in India, called the right to receive royalty. The right to receive royalties has arisen in India in response to certain issues that were faced by authors such as lyricists and composers in the industry with respect to the compensation they were receiving from the commercial exploitation of their works. Let us take a look at the report of the Parliamentary Standing Committee on the Copyright Amendment Bill 2010. In which the committee is taking note of the fact, that the independent rights of authors of literary and musical works in cinematograph films are being wrongfully exploited by the producers and music companies by virtue of the Supreme Court judgment, in IPRS versus Eastern India Motion Pictures Association 1977, which held that the film producer is the first owner of the copyright and authors and music composers do not have separate right.

You would recall that when we discussed section 17 of the Indian Copyright Act, we had seen that with respect to cinematograph films and even sound recordings, sections 17(b) and 17(c) were of such a nature that their application would mean that the producer would be the first owner of the underlying works. We had seen that this would be, despite the fact that section 13 spoke of a separate copyright in the underlying works. What this committee focused on was that this particular application of law, fueled by the understanding of the Supreme Court in this 1977 judgment, had in fact led to the adoption of certain wrongful practices in the industry. First ownership was used as a weapon against fair revenue distribution to lyricists and composers.

In your mind, when you think of a possible solution to this issue, how do you think this issue could be resolved? I am sure you remember that we discussed an important amendment that was made in the 2012 amendment to section 17. Under which the

proviso that was added stated that the underlying works of cinematograph films will not be affected by 17(b) and 17(c). But is that enough? Because the primary form of commercial exploitation of lyrics and musical works would be through the sound recording or the cinematograph film that carries that sound recording. So, if at all there has to be fairness in terms of the commercial utilization of such works, Then there must be a right to receive some share from the utilization of such underlying works that are part of the sound recording. Meaning that there is no separate usage of the lyrics being considered, but rather the sound recording itself; when that happens, there should be some kind of share.

But let's look at what the copyright amendment bill was proposing; it was saying that a proviso should be inserted under section 18. Section 18, you would recall, is the provision on assignments. Under section 18, it was suggested that this proviso, which would have read: provided also that the author of the literary or musical work is included in a cinematograph film or sound recording, shall not assign the right to receive royalties from the utilization of such work in any form other than as part of a cinematograph film or sound recording. Except to the legal heirs or to a copyright society for collection and distribution, any agreement to the contrary shall be void. When we look at this provision, do we feel that this solves the issue? What is the issue that we are discussing? We were saying that the primary source of revenue generated for works such as lyrics or composition would be through the communication of the sound recording or the cinematographic film.

To then say, as you can see in this provision, that the author of the literary or musical work included in a cinematograph film or sound recording shall not assign the right to receive royalties. From the utilization of such work in any form other than as part of the cinematographic film or sound recording. Doesn't this pose a problem? Because the right to receive royalties doesn't seem to be attached to the communication of the sound recording itself. This problem was highlighted by Sri Javed Akhtar. Who had stated, that the inclusion of sound recordings in the proposed amendment, would mean that when music and lyrics were exploited as part of sound recordings, the right to royalties would not arise.

Since sound recordings were the main medium through which lyrics and music were exploited on various platforms, authors would be denied royalties in respect of such exploitation. He further mentioned, that the effect of the language, other than as part of the cinematograph film in sections 18 and 19, would lead to a situation where television or cable broadcasts of films, and even the distribution and exhibition of films on mobile platforms through 3G technology, at that time would result in a denial of royalties to authors. You would note that the apprehension raised by Sri Javed Akhtar is a very reasonable objection. For any such insertion of a right that is based on fairness, To be denied application over the primary form through which revenue is to be generated would

be unreasonable. The provision that was finally inserted into the 2012 amendment to the Indian Copyright Act was different from what was intended.

Let us see these two insertions. Under section 18, this proviso reads: provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties. To be shared on an equal basis with the assignee of copyright for the utilization of such work in any form, other than for the communication to the public of the work, along with a cinematograph film in a cinema hall. What we are seeing is that, in variance with the earlier provision, which was proposed to be inserted through the copyright amendment bill, right to receive royalties would apply to all such forms of commercial utilization of the film itself, which is not the display of the film in film theatres or in cinema hall as has been stated in this provision. Therefore, the question is not of the independent usage of such works.

The question is about the communication of the work through the film itself. Therefore, one dimension of the apprehensions raised by Sri Javed Akhtar is satisfied. Another dimension is solved through another proviso added by the same amendment, which also states that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film, shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work, except to the legal heirs of the authors or to a collecting society for collection and distribution, and any assignment to the contrary shall be void. Specifically regarding sound recordings as well, any such separation of communication with sound recordings for independent usage of the underlying work has been removed. Therefore, any commercial utilization of the sound recording itself would lead to a claim for the right to receive royalties.

Let us now understand whether the right to receive royalties is similar to a copyright. What is copyright? We have seen that copyright is certain rights which are provided under section 14 of the Copyright Act, the title of which is meaning of copyright. But the right to receive royalties is not even present in a separate provision. It is included as a proviso to a provision that deals with assignment, which leads to a question: Is this a copyright, or is this something like copyright? If it is copyrighted, then why is it not mentioned in section 14? After all, isn't the right to receive royalties emanating from the utilization of one's work? Let us look at how the Bombay High Court is seeking to answer this important question in a case that arose before it. In Indian Performing Rights Society versus Rajasthan Patrika, the Bombay High Court was providing a prima facie consideration on whether the right to receive royalties can be considered a right or not.

This was in consideration of whether there had been a change of scenario post the 1977 Supreme Court decision, and the inclusion of such a proviso under the 2012 amendment. You can see the court stated that it is of the opinion that the plaintiff IPRS is claiming

that, merely because sections 13 and 14 of the Act have not been amended. It ought not to ipso facto, lead to the conclusion that the amendments have fallen short of the object for which they were brought about. What was the object for which the 2012 amendment was brought about? As we have discussed, the committee clearly stated that the amendment was being brought because - The Supreme Court decision in 1977, which provided first ownership to producers, was in fact being used in a manner that caused wrongful exploitation of lyricists and composers. The IPRS we have discussed is a copyright society that represents the interests of lyricists and composers.

The view taken by IPRS is that if it is seen that just because sections 13 and 14, section 13, which talks about works in which copyright subsists, and section 14 which talks about copyrights themselves, just because these provisions, do not contain the right to receive royalties that it is not a right would be to defeat the object of the 2012 amendment itself. Accordingly, the court says there is substance in the contention raised on behalf of IPRS that, in a given situation, even a proviso can give rise to a substantive right in favor of a party. It would depend on the nature of the proviso in the context of the scheme of the statute and the interplay of various provisions of the statute. It thus emerges that simply because this is a proviso within a provision that deals with assignment and is not covered under sections 13 and 14, which specifically deal with copyright - That in itself would not mean that the right to receive royalties should not be considered a substantive right. The court then says, A strong prima facie case is made out by the plaintiff IPRS in its favour, indicating that the amendments made to the Copyright Act in the year 2012, even if in the form of addition of provisos to section 17 and 18, do have the effect, of creating a substantive right in favour of authors of underlying literary and musical works, to assert that the position of law has changed in their favour.

It is significant that although Sections 13 and 14 of the Act have not been amended, but the said provisions as they stand when read in conjunction with amended 17, 18 and 19 demonstrate that there is indeed a change in position of law brought about in favour of such authors of works. The court is very clear in saying that what must be kept in mind is the object behind which this amendment came in 2012. And when we keep that in mind, we can see that just because the right to receive royalties has not been inserted in section 14 which primarily deals with copyright, The proviso that inserts it cannot be rejected on the grounds of inserting a substantive right. It must be seen in the context of the other provisions of the Act, which are sections 13 and 14. On that consideration, it is important how sections 13 and 14 are termed.

It is not that sections 13 and 14 are providing what the content of that provision specifically is, but rather it is very clear that sections 13 and 14 are subject to other provisions of the Act as well. Sections 13 and 14 incorporate the words subject to the provisions of this section and other provisions of this Act. And therefore, the insertion of the provisos in section 18 would mean that it has to be read in conjunction with section

14. Can there be an objection through section 16? Section 16 states that there shall be no copyright except as provided in this Act. It says, "No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or any other law for the time being in force.

But nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence." What's important for us to understand here is that, this provision says that there will be no copyright except as provided under this act or any other law in force. What we can say is that section 16 admits that copyright is not limited to Section 14. It states that copyright is something that can be present in this Act, in the provisions of this Act. which then substantiates that any argument that copyright is only contained within Section 14 would be erroneous and, any insertion with respect to a right that is made in another part of the Act, even as a proviso to a section that deals with assignment, in the context of other provisions of the Act can be stated to be a substantive right.

In justifying this position, the court says that it is of the opinion that the right to collect royalties emanates from the copyright held by the authors in such literary and musical works. It is on the basis of such copyright that the right to collect royalties arises. This court is of the opinion that the purpose of the amendments brought out in the Copyright Act in the year 2012, cannot be defeated by seeking an escape route of claiming, that the right to collect such royalties, under the amended provisions does not fall within the definition of copyright. Which brings us to an important question.

Now that we have understood that such a right can, in fact, be considered a substantive right. How do you determine the royalty rate? As we have seen, the proviso does not give us any headway on how royalty amounts should be fixed objectively; rather, the proviso says that the right to receive royalties will be shared on an equal basis. Let us also see the difference between the right to receive royalties and the resale share right. We had seen that resale share rights are a determination made by the commercial court, whereas the right to receive royalties is an industry determination made on the foundation of equal share on an equitable basis. In terms of state intervention, we can see it is more related to resale share rights.

Can the right to receive royalties be used in such a way that it is shared equally? What we understand is that, on a case-by-case basis, depending on the contribution of the author, it should be an equitable consideration. That should ideally be the scenario. If not that, then a uniform basis, which is a minimum standard for authors, should be considered as an equitable basis or an equal share. But because this is a case-by-case consideration, and because this is a determination by the industry and not something that has been decided by the Act, this is, in fact, quite subjective. In the next session, we will continue our

discussion on the right to receive royalties, in which we will talk about how this right can even be extended to other stakeholders within the Copyright Act, such as performers.

Thank you for joining me. See you all in the next session. Thank you.