Copyright and Related Rights Law

Dr. Rohan Cherian Thomas

Faculty of Law

NALSAR University of Law, Hyderabad

WEEK - 11

LECTURE – 54

Statutory Licensing

Welcome back to this course on copyright and related rights law. In our earlier sessions, we have been discussing how a copyrighted work can be used without authorization and how it can be compelled for authorization. In this sense, we have discussed fair use, fair dealing, permitted acts, and we have also discussed compulsory licensing. In today's discussion, we are going to consider what statutory licensing is. Let us make a quick distinction between compulsory licensing and statutory licensing. With respect to compulsory licensing, we understand that there needs to be a ground that is generated or that emerges.

And upon such generation or emergence, authorization can be compelled. In cases of statutory licensing, the grounds are considered to be existing. The only requirement, then, is that the statute sets out a framework, the satisfaction of which should lead to a license. Let us recall what we discussed in Section 31.

We had discussed that Section 31 deals with a compulsory license that can be issued in cases where a work is withheld from the public. How is a work withheld from the public? We understood that an effort was made by a prospective licensee to obtain a license from the rights holder. The right holder refused to allow republication, refused to allow communication, and upon such refusal, the ground for issuing a compulsory license because of the work being withheld from the public arose. Keep this in mind with respect to compulsory licensing: the ground is something that is generated. It is a matter of individual scenarios.

Naturally, what this will mean is that for a ground to exist on which a general statutory framework would be set out, it would have to be a ground that is affecting stakeholders in general. Please keep in mind that I am re-emphasizing that in a compulsory license, the ground which has generated is based on a specific circumstance with a specific right holder. Whereas a ground that has been considered to exist over which a statutory

framework is set based on which a license is issued - We must understand that such a ground will be a general ground and not specific to any particular copyright holder. On that note, let us recollect what we understand about broadcasting, as we will be discussing one specific provision within the Copyright Act for our better understanding of statutory licensing. We understand that broadcasting is a type of communication to the public.

What do you remember about communicating with the public? Do you remember that communication to the public is a copyright issue? Do the authors of works have a copyright to communicate the work to the public under section 14? Therefore, where there is a work in existence, the broadcasting of such work or of a recording in which such work subsists is permitted. The broadcast of that recording is something that has to be authorized by the copyright holder. What issues, then, can we imagine in terms of an effort for broadcasting organizations to receive licenses from individual owners? Perhaps the most important issue here is that there are multiple interested stakeholders involved. A broadcasting organization will have to negotiate on every single usage with respect to many different music labels and owners of works, and this will lead to a delay in communication. Any such delay in communication will necessarily impact the public interest in receiving it.

Therefore, an overall cycle of issues would result if broadcasting organizations were simply left to negotiate communications of works in a piecemeal fashion. Instead, would it be possible to consider a kind of standardized rate system? After all, communication of works in the market is going out to various parts of the geographic territory. It could be split into the duration of usage. And based on these considerations, based on the market considerations, is it not possible for a standardized system of rates? Which broadcasting organizations could simply pay the owner of the work rather than engage in negotiations every single time? What will this standardized system do? It will eliminate the issue of delays; it will benefit the public interest in receiving such communication. We see then that the Delhi High Court, in a case before it, Entertainment Network India versus PPL, has explained the objective of Section 31D as follows.

The court has said, "It would suffice to note that the objective behind Section 31D is to give broadcasting organizations access to sound recordings." In a fast and convenient manner without disturbing the economic rights of the copyright owners. The proceedings are in rem and bind all stakeholders; that is, the music labels as well as the owners of copyright in the works. This provision thus gives statutory assurance to the public and confers a right in favor of radio broadcasters to broadcast the copyrighted work. What we had considered issues that would plague such communication by broadcasting organizations has, according to the Delhi High Court, been solved by Section 31D.

How does Section 31D solve this? According to the court, providing a fast and convenient manner in which broadcasting can be done without disturbing the economic rights of the sound recording producer and other owners of works is important. According to the court, this is something that is generally applicable, and therefore any kind of standardized system that is brought within the ambit of the statute can be something that will be used to the benefit of the public. Let us then see how Section 31D sets out its framework for use. Section 31D, as its title states, is a statutory license for the broadcasting of literary and musical works and sound recordings. You would note that in our earlier discussion on compulsory licenses, in the title of the provision itself, it is very clearly stated that Section 31 is a compulsory license.

Section 31D is a statutory license. Please remember that these are different kinds of licensing mechanisms. Section 31D was inserted into the Copyright Act by way of the 2012 Amendment Act. What this says is that any broadcasting organization desirous of communicating with the public by way of a broadcast, Or, by way of performance of a literary or musical work and sound recording that has already been published, may do so subject to the provisions of this section. Therefore, as we were discussing, the statute sets out certain conditions.

Let us then take a look at these conditions. Section 31D states that there must be prior notice provided by the broadcasting organizations of their intention to communicate such a work. Necessarily then, the owner of the rights is who must be notified, and because this is a licensing framework within the statute, the registrar of copyrights must be notified. On the factors that must be considered within this particular notice. Perhaps the most pivotal aspect would be the geographical territory that is sought to be covered by such communication and the duration for which and during which such communication will take place.

Such an expansive application in terms of geography and duration will assist in considering the payment that will have to be made to the owner. Which is where we come to perhaps one of the most important aspects of Section 31D. Which is that Section 31D is built on the foundation that there is a possibility of standardization, and therefore, there will have to be a fixation of rates. The fixation of rates presently under Section 31D is a responsibility that is given to the Commercial Court. But it was not always this way.

Prior to the Commercial Court, responsibility for the fixation of rates was with the Intellectual Property Appellate Board. This particular body, the IPAB, is no longer in existence. It was replaced by the Tribunal Reforms Act in 2021, wherein the Commercial Court now holds the responsibility. The rates of royalties, which will be fixed under Section 31D, will be set separately for radio broadcasting and separately for television broadcasting. This is quite obvious in a sense because of the kind of impact that the communication will have on these different media.

And necessarily, then based on the demand and on the separate market, the rates of royalties will also be distinguishable. On that point, though, it must be noted that rates with respect to radio broadcasting have been fixed, but rates with respect to television broadcasting have not been fixed. Let us look at Rule 29 within the copyright rules of 2013, which supplements Section 31D. The first important consideration within Rule 29 that we must keep in mind is that when Section 31D talks about a prior notice, That prior notice must be served to the owner of the copyright as well as to the registrar of copyright. Second, this particular notice must be given five days in advance before such communication is made.

And there must also be a payment that is made to the owner of the copyright. Surely, whenever a communication is sought to be made by a broadcasting organization, it is known for certain the time at which it is going to be broadcast. Therefore, it is only reasonable that a notice for a time period of five days, as provided under Rule 29, be affirmed. And second, the payment that is made is based on the rates that have been fixed by the body that has been specifically given this responsibility under Section 31D. Let us consider the question that a prior notice which needs to be given under 31D should be given five days in advance before communication to the public takes place.

But what if the work is a newly published work and the communication is to be published sooner than in these five days? According to Rule 29, it is said that if this is the scenario, then notice should be served before the communication of the work. But let us also consider that there might be certain urgent situations in which communication must be made in the public interest. There cannot be a waiting period with respect to a notice that must be served, and only then should communication happen. Rule 29 then provides that such a notice must be served within 24 hours of this communication. Let us see how this communication system works.

Where there is an intent to communicate, there should be five days' notice in advance. If it's a newly published work that falls within the span of these five days, then before the communication to the public and third, If it's urgent and communication has to take place without waiting for any notice period, then it should occur within 24 hours of the communication taking place. Another important consideration that must be kept in mind is that every notice that is issued is only with respect to a specific copyright, meaning that it involves only one owner. So where multiple works belonging to different owners are going to be used, what this means is that there will have to be multiple notices. And this is only rational, is it not? Because the work that is being used is connected to a specific right.

The geographical usage and the duration of usage could be distinct with respect to that specific work or the repertoire of works. Therefore, the copyright owner whose work is being communicated will have a notice specific to one owner. Let us then see how these

rates of royalties, which are standardized rates, are supposed to be revised. Because naturally markets change, the rates that were fixed in one year will necessarily have to undergo a review and revision. Under Rule 31 of the Copyright Rules 2013, it is provided that such a revision of the rate of royalties must occur at least once a year.

But this process has been entangled in certain complex issues. The body that was assigned the responsibility of fixing rates and such a revision was the Intellectual Property Appellate Board. which had fixed rates with respect to radio broadcasts; but because the IPAB has been replaced by the commercial court, these rates and their fixation are facing certain issues. Let us also consider an important point concerning a broadcast that could happen over the Internet. You must have noted that Section 31D is only talking about radio and television broadcasting.

But is broadcasting not happening over the Internet? Do the issues that a radio broadcaster would have to face with respect to receiving permissions for communication, Will these issues not also apply to Internet broadcasters? Seemingly, they would. And this is a question that was considered by the Bombay High Court. In this case of Tips Industries versus Wynk Music. The court was considering whether section 31D could be said to be inclusive of internet broadcasting. The court stated that the Copyright Amendment Act 2012 had introduced section 31D; at that time, internet broadcasts were happening.

And despite this, if the legislature included a section in which only radio and television broadcasting was present, Then this would only show that the intent of the legislature was to restrict Section 31D to radio and television broadcasting. In the words of the court, it said that internet broadcasting organizations cannot enjoy the benefits of the statutory license under section 31D. The intention of the legislature while enacting the amending legislation, namely the Copyright Amendment Act 2012, was to restrict the grant of statutory license under 31D to radio and television broadcasting organizations. The Bombay High Court, in referring to Section 31D and in making a distinction between compulsory licensing provisions, provides the best summary that we could hope for in closing this discussion. The court explains: Section 31D is only a departure from the old scheme of licensing to the limited extent that it does away with a hearing for the copyright owner.

An inquiry for determining the necessity and/or requirement of a license and the Registrar's Act of issuing a license. It, however, does not do away with the prior determination of the rates for defining the statutory license to be exercised. We can see that the statutory license would be applicable because there is a ground that is generally applicable, and therefore does not require any kind of hearing that needs to be conducted to determine whether there is an individual ground for the issuance of a license, as long as there is a fixation of a standardized rate that can be used as the basis for payment,

Depending on the nature of usage, such a statutory license is covered. From the next session and a few sessions thereafter, we will be looking at infringement.

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