Delhi Registry –Cum-Bench
G-62 to 67 & 196 to 204, August KrantiBhawan, BhikajiCama Place,
New Delhi – 110 066

OP (SEC-31D)/3/2020/CR/NZ
OP (SEC-31D)/4/2020/CR/NZ
OP (SEC-31D)/1/2020/CR/NZ
OP (SEC-31D)/2/2020/CR/NZ
OP (SEC-31D)/5/2020/CR/NZ
OP (SEC-31D)/6/2020/CR/NZ
OP (SEC-31D)/7/2020/CR/NZ
OP (SEC-31D)/8/2020/CR/NZ
OP (SEC-31D)/9/2020/CR/NZ
OP (SEC-31D)/1/2020/CR/WZ

THURSDAY,THIS THE 31st DAY OF DECEMBER, 2020

HON'BLE SHRI JUSTICE MANMOHAN SINGH	**CHAIRMAN**
HON'BLE SHRI N. SURYA SENTHIL	**TECHNICAL MEMBER (COPYRIGHT)**
HON'BLE SHRI S.P. CHOCKALINGAM	**TECHNICAL MEMBER (COPYRIGHT)**

1. **OP (SEC-31-D)/3/2020/CR/NZ**

MUSIC BROADCAST LIMITED
5TH FLOOR, RNA CORPORATE PARK, OFF
WESTERN EXPRESS HIGHWAY KALANAGAR,
BANDRA (EAST), MUMBAI - 400 051
ALSO AT:
203, OKHLA INDUSTRIAL ESTATE, PHASE III,
NEW DELHI - 110 020

…APPLICANT/APPELLANT

(Represented by: Dr. Abhishek Manu Singhvi Sr. Advocate, with Mr. Sagar Chandra, Mr. Avishkar Singhvi, Ms. Surabhi Iyer, Mr. Madhvi Khanna, Ms. Shubhie Wahi, Mr. Raghu Vinayak Sinha & Ms. Garima Raonta – Advocates)

Versus

1. **TIPS INDUSTRIES LTD**
   601, DURGA CHAMBERS, 6TH FLOOR, LINKING
   ROAD, KHAR (WEST), MUMBAI - 400 052

2. **EROS INTERNATIONAL FILMS PRIVATE LIMITED**
   201, KAILASH PLAZA, PLOT NO. A-12, OPP LAXMI
   INDUSTRIAL ESTATE, LINK ROAD, ANDHERI
   (WEST), MUMBAI - 400 053

3. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
CRESENT TOWERS, 7TH FLOOR, B-68, VEERA ESTATE, OFF NEW LINK ROAD, ANDHERI (WEST), MUMBAI - 400 053,
AND AT:
A-46, GROUND FLOOR, DEFENCE COLONY, NEW DEHLI - 100 024

4. **SAREGAMA INDIA LIMITED**
33 JESSORE ROADDUM DUM KOLKATA - 700 028
AND AT:
A-62, 1ST FLOOR, FIEE COMPLEX, OKHLA INDUSTRIAL AREA, PHASE - II, NEW DELHI - 110 020

5. **SONY MUSIC ENTERTAINMENT PVT. LTD.**
RAHEJA CENTRE, 92 MAIN AVENUE, LINKING ROAD, SANTACRUZ (WEST) MUMBAI - 400 054

6. **SUPER CASSETTES INDUSTRIES PRIVATE LIMITED**
E-2/16, WHITE HOUSE, ANSARI ROAD, DARYAGANJ, NEW DEHLI - 110 002
ALSO AT:
PLOT NO. 1, SECTOR 16 A, FILM CITY, NOIDA, U.P

7. **THE INDIAN PERFORMING RIGHTS SOCIETY LIMITED**
GOLDEN CHAMBERS, NEW ANDHERI LINK ROAD, ANDHERI (WEST) MUMBAI - 400 053

…RESPONDENTS

Represented by –

TIPS INDUSTRIES LIMITED
Mr. Harsh Kaushik, Mr. Abhay Chattopadhyay, Ms. Anushree Rauta, Ms. Parul Sharma, Mr. Navankur Pathak and Ms. Pranita Saboo & Ms. Astha Pandey – Advocates

EROS INTERNATIONAL MEDIA LTD
Mr Neel Mason, Ms Ridhima Pabbi, Mr Vihan Dang, Mr Uday S Chopra, Ms Sanyukta Banerjie, Ms Ekta Sharma, Mr Shivang Sharma, Ms Ramya Ramkumar and Ms Megha Sharma – Advocates

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

SAREGAMA INDIA LIMITED
Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates

SONY MUSIC ENTERTAINMENT PVT. LTD.
Mr. Virag Tulzapukar Senior Advocate, with Mr. Amit Jamsandekar, Mr. Rishi Agarwal, Mr. Vaibhav Shukla, Ms. Vinita Muley, Ms. Niyati Kohli & Megha Bengani – Advocates

SUPER CASSETTES INDUSTRIES PRIVATE LIMITED
Mr. Amit Sibal, Senior Advocate, with Mr Neel Mason, Ms Ridhima Pabbi, Mr Vihan Dang, Mr Uday S Chopra, Ms Sanyukta Banerjie, Ms Ekta Sharma, Mr Shivang Sharma, Ms Ramya Ramkumar and Ms Megha Sharma – Advocates

INDIAN PERFORMING RIGHTS SOCIETY LTD.
Mr. Saikrishna Rajagopal, Advocate, with Mr. Amit Dutta,Mr. Himanshu Bagai, Ms Deepshikha Sarka, Ms Pallavi Sondhi, Mr. Vivek Prasad, Ms. Namrata Dubey, Advocates and Mr. Javed Akhtar, well-known author&lyricist in person.

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2. **OP (SEC-31-D)/4/2020/CR/NZ**

ENTERTAINMENT NETWORK (INDIA) LIMITED
PLOT NO. 6/F-6, 3RD FLOOR, SECTOR 16-A, FILM CITY, NOIDA - 201 301
REGSITERED AT:
MATULYA CENTRE, 4TH FLOOR, 'A' - WING, SENAPATI BAPAT MARG, LOWER PAREL (WEST), MUMBAI - 400 013

…APPLICANT/APPELLANT

(Represented by: Mr. Neeraj Kishan Kaul, Senior Advocate, with Mr. Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Ms. Sneha Herwade, Mr Gurmukh Choudhri & Ms. Sanya Dua – Adv)

Versus

1. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
CRESENT TOWERS, 7TH FLOOR, B-68, VEERA ESTATE, OFF NEW LINK ROAD, ANDHERI (WEST), MUMBAI - 400 053,
AND AT:
A-46, GROUND FLOOR, DEFENCE COLONY, NEW DEHLI - 100 024

2. **TIPS INDUSTRIES LTD**
601, DURGA CHAMBERS, 6TH FLOOR, LINKING ROAD, KHAR (WEST), MUMBAI - 400 052

3. **SAREGAMA INDIA LIMITED**
33 JESSORE ROADDUM DUM KOLKATA - 700 028
AND AT:
A-62, 1ST FLOOR, FIEE COMPLEX, OKHLA INDUSTRIAL AREA, PHASE - II, NEW DELHI - 110 020

4. **SONY MUSIC ENTERTAINMENT PVT. LTD.**
RAHEJA CENTRE, 92 MAIN AVENUE, LINKING ROAD, SANTACRUZ (WEST) MUMBAI - 400 054

5. **THE INDIAN PERFORMING RIGHTS SOCIETY LIMITED**
GOLDEN CHAMBERS, NEW ANDHERI LINK ROAD, ANDHERI (WEST) MUMBAI - 400 053

…RESPONDENTS

Represented by –

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

TIPS INDUSTRIES LIMITED
Mr. Harsh Kaushik, Mr. Abhay Chattopadhyay, Ms. Anushree Rauta, Ms. Parul Sharma, Mr. Navankur Pathak and Ms. Pranita Saboo & Ms. Astha Pandey – Advocates

SAREGAMA INDIA LIMITED
Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates

SONY MUSIC ENTERTAINMENT PVT. LTD.
Mr. Virag Tulzapukar Senior Advocate, with Mr. Amit Jamsandekar, Mr. Rishi Agarwal, Mr. Vaibhav Shukla, Ms. Vinita Muley, Ms. Niyati Kohli & Megha Bengani – Advocates

INDIAN PERFORMING RIGHTS SOCIETY LTD.
Mr. Saikrishna Rajagopal, Senior Advocate, with Mr. Amit Dutta,Mr. Himanshu Bagai, Ms Deepshikha Sarka, Ms Pallavi Sondhi, Mr. Vivek Prasad, Ms. Namrata Dubey, Advocates& Mr. Javed Akhtar,well-known author &lyricist in person

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3. **OP (SEC-31-D)/1/2020/CR/NZ**

RAJASTHAN PATRIKA PRIVATE LIMITED
KESAR GARH, JAWAHARLAL NEHRU, JAIPUR - 302 004 RAJASTHAN, INDIA

…APPLICANT/APPELLANT

(Represented by: Mr. Neeraj Kishan Kaul, Senior Advocate, with Mr. Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Ms. Sneha Herwade, Mr Gurmukh Choudhri & Ms. Sanya Dua – Adv)

Versus

1. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
   CRESENT TOWERS, 7TH FLOOR, B-68, VEERA ESTATE, OFF NEW LINK ROAD, ANDHERI (WEST), MUMBAI - 400 053,
   AND AT:
   A-46, GROUND FLOOR, DEFENCE COLONY, NEW DEHLI - 100 024
2. **SAREGAMA INDIA LIMITED**
   33, JESSORE ROADDUM DUM, KOLKATA - 700 028, WEST BENGAL
3. **SONY MUSIC ENTERTAINMENT INDIA PVT. LTD.**
   RAHEJA CENTRE, 92 MAIN AVENUE, LINKING ROAD, SANTACRUZ (WEST) MUMBAI - 400 054

4. **ZEE ENTERTAINMENT ENTERPRISES LIMITED**
   18TH FLOOR, A WING, MARATHON FUTUREX, N M JOSHI MARG, LOWER PAREL, MUMBAI - 400 013

5. **SUPER CASSETTES INDUSTRIES PRIVATE LIMITED**
   E-2/16, ANSARI ROAD, DARYA GANJ, NEW DELHI - 110 002

6. **YESH RAJ FILMS PRIVATE LIMITED**
   5, SHAH INDUSTRIES ESTATE, OFF VEERA DESAI ROAD, ANDHERI (WEST), MUMBAI - 400 053
7. **TIPS INDUSTRIES LIMITED**
   601, DURGA CHAMBERS, 6TH FLOOR, OPP. B.P.L. GALLARY 278/E, LINKING ROAD, KHAR (WEST), MUMBAI - 400 052

8. **EROS INTERNATIONAL FILMS PRIVATE LIMITED**
   201, KAILASH PLAZA, PLOT NO. A-12, OPP LAXMI INDUSTRIAL ESTATE, LINK ROAD, ANDHERI (WEST), MUMBAI - 400 053

9. **TIMES MUSIC/JUNGLEE MUSIC**

10. **A DIVISION OF BENNETT COLEMAN & COMPANY LIMITED**
    TIME OF INDIA BUILDING, DR. DADA BHOY NEOROJI ROAD, MUMBAI - 400 001

…RESPONDENTS

Represented by –

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

SAREGAMA INDIA LIMITED
Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates

SONY MUSIC ENTERTAINMENT PVT. LTD.
Mr. Virag Tulzapukar Senior Advocate, with Mr. Amit Jamsandekar, Mr. Rishi Agarwal, Mr. Vaibhav Shukla, Ms. Vinita Muley, Ms. Niyati Kohli & Megha Bengani – Advocates

ZEE ENTERTAINMENT ENTERPRISES LTD.
Mr. Hemant Singh, Senior Advocate, with Ms. Mamta Jha, Mr. Vipul Tiwari & Mr. Sambhav Jain – Advocates

SUPER CASSETTES INDUSTRIES PRIVATE LIMITED
Mr. Amit Sibal, Senior Advocate, with Mr Neel Mason, Ms Ridhima Pabbi, Mr Vihan Dang, Mr Uday S Chopra, Ms Sanyukta Banerjie, Ms Ekta Sharma, Mr Shivang Sharma, Ms Ramya Ramkumar and Ms Megha Sharma – Advocates

TIPS INDUSTRIES LIMITED
Mr. Harsh Kaushik, Mr. Abhay Chattopadhyay, Ms. Anushree Rauta, Ms. Parul Sharma, Mr. Navankur Pathak and Ms. Pranita Saboo & Ms. Astha Pandey – Advocates

EROS INTERNATIONAL MEDIA LTD
Mr Neel Mason, Ms Ridhima Pabbi, Mr Vihan Dang, Mr Uday S Chopra, Ms Sanyukta Banerjie, Ms Ekta Sharma, Mr Shivang Sharma, Ms Ramya Ramkumar and Ms Megha Sharma – Advocates

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4. **OP (SEC-31-D)/2/2020/CR/NZ**

HT MUSIC AND ENTERTAINMENT CO. LTD.
UNIT 701 A, 7TH FLOOR, TOWER 2, INDIABULLS
FINANCE CENTRE, SENAPATI BAPAT MARG,
ELPHINSTONE ROAD, MUMBAI - 400 013
MAHARASHTRA, INDIA

…APPLICANT/APPELLANT

(Represented by: Mr. Neeraj Kishan Kaul, Senior Advocate, with Mr. Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Ms. Sneha Herwade, Mr Gurmukh Choudhri & Ms. Sanya Dua – Adv)

Versus

1. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
   CRESENT TOWERS, 7TH FLOOR, B-68, VEERA ESTATE, OFF NEW LINK ROAD, ANDHERI (WEST), MUMBAI - 400 053,
   AND AT:
   A-46, GROUND FLOOR, DEFENCE COLONY, NEW DEHLI - 100 024
2. **SAREGAMA INDIA LIMITED**
   33, JESSORE ROADDUM DUM, KOLKATA - 700 028, WEST BENGAL
3. **TIPS INDUSTRIES LTD**
   601, DURGA CHAMBERS, 6TH FLOOR, LINKING ROAD, KHAR (WEST), MUMBAI - 400 052
4. **LAHARI MUSIC PRIVATE LIMITED**
   4TH FLOOR, TTMC, BMTC BUILDING, YESHWANTHPUR CIRCLE, YESHWANTHPUR, BANGALORE - 560 022
5. **ZEE ENTERTAINMENT ENTERPRISES LTD.**
   18TH FLOOR, 'A' WING, MARATHON FUTUREX, NM JOSHI MARG, LOWER PAREL, MUMBAI - 400 013
6. **SONY MUSIC ENTERTAINMENT PVT. LTD.**
   RAHEJA CENTRE, 92 MAIN AVENUE, LINKING ROAD, SANTACRUZ (WEST) MUMBAI - 400 054

…RESPONDENTS

Represented by –

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

SAREGAMA INDIA LIMITED
Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates

TIPS INDUSTRIES LIMITED
Mr. Harsh Kaushik, Mr. Abhay Chattopadhyay, Ms. Anushree Rauta, Ms. Parul Sharma, Mr. Navankur Pathak and Ms. Pranita Saboo & Ms. Astha Pandey – Advocates

LAHARI MUSIC PRIVATE LIMITED.
Ms. Geetanjali Visvanathan, Mr. Aditya Gupta & Aiswarya Kane – Advocate

ZEE ENTERTAINMENT ENTERPRISES LTD.
Mr. Hemant Singh, Advocate, with Ms. Mamta Jha, Mr. Vipul Tiwari & Mr. Sambhav Jain – Advocates

SONY MUSIC ENTERTAINMENT PVT. LTD.
Mr. Virag Tulzapukar Senior Advocate, with Mr. Amit Jamsandekar, Mr. Rishi Agarwal, Mr. Vaibhav Shukla, Ms. Vinita Muley, Ms. Niyati Kohli & Megha Bengani – Advocates

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5. OP (SEC-31-D)/5/2020/CR/NZ

D B CORP LTD.
PLOT NO. 280, SARKHEJ GANDHI NAGAR
HIGHWAY, NEAR. YMCA CLUB, MAKARBA,
AHMEDABAD - 380 051, GUJARAT
HAVING OFFICE AT:
FC 10 & 11, SECTOR 16 A, FILM CITY NOIDA - 201
301

…APPLICANT/APPELLANT

(Represented by: Mr. Neeraj Kishan Kaul, Senior Advocate, with Mr. Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Ms. Sneha Herwade, Mr Gurmukh Choudhri & Ms. Sanya Dua – Adv)

Versus

1. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
   CRESENT TOWERS, 7TH FLOOR, B-68, VEERA
   ESTATE, OFF NEW LINK ROAD, ANDHERI
   (WEST), MUMBAI - 400 053,
   AND AT:
   A-46, GROUND FLOOR, DEFENCE COLONY,
   NEW DEHLI - 100 024

2. **TIPS INDUSTRIES LTD**
   601, DURGA CHAMBERS, 6TH FLOOR, LINKING
   ROAD, KHAR (WEST), MUMBAI - 400 052

3. **SAREGAMA INDIA LIMITED**
   33 JESSORE ROADDUM DUM KOLKATA - 700 028
   AND AT:
   A-62, 1ST FLOOR, FIEE COMPLEX, OKHLA
   INDUSTRIAL AREA, PHASE - II, NEW DELHI - 110
   020

4. **SONY MUSIC ENTERTAINMENT PVT. LTD.**
   RAHEJA CENTRE, 92 MAIN AVENUE, LINKING
   ROAD, SANTACRUZ (WEST) MUMBAI - 400 054

5. **THE INDIAN PERFORMING RIGHTS SOCIETY LIMITED**
   GOLDEN CHAMBERS, NEW ANDHERI LINK ROAD,
   ANDHERI (WEST) MUMBAI - 400 053

…RESPONDENTS

Represented by –

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

TIPS INDUSTRIES LIMITED
Mr. Harsh Kaushik, Mr. Abhay Chattopadhyay, Ms. Anushree Rauta, Ms. Parul Sharma, Mr. Navankur Pathak and Ms. Pranita Saboo & Ms. Astha Pandey – Advocates

SAREGAMA INDIA LIMITED
Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates
SONY MUSIC ENTERTAINMENT PVT. LTD.
Mr. Virag Tulzapukar Senior Advocate, with Mr. Amit Jamsandekar, Mr. Rishi Agarwal, Mr. Vaibhav Shukla, Ms. Vinita Muley, Ms. Niyati Kohli & Megha Bengani – Advocates

INDIAN PERFORMING RIGHTS SOCIETY LTD.
Mr. Saikrishna Rajagopal, Senior Advocate, with Mr. Amit Dutta,Mr. Himanshu Bagai, Ms Deepshikha Sarka, Ms Pallavi Sondhi, Mr. Vivek Prasad, Ms. Namrata Dubey, Advocates and Mr. Javed Akhtar, well-known author &lyricist in person.

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6. **<u>OP (SEC-31-D)/6/2020/CR/NZ</u>**

NEXT RADIO LIMITED
UNIT 701 A, 7TH FLOOR, TOWER 2, INDIABULLS
FINANCE CENTRE, SENAPATI BAPAT MARG,
ELPHINSTONE ROAD, MUMBAI - 400 013
MAHARASHTRA, INDIA

…APPLICANT/APPELLANT

(Represented by: Mr. Neeraj Kishan Kaul, Senior Advocate, with Mr. Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Ms. Sneha Herwade, Mr Gurmukh Choudhri & Ms. Sanya Dua – Adv)

Versus

1. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
   CRESENT TOWERS, 7TH FLOOR, B-68, VEERA
   ESTATE, OFF NEW LINK ROAD, ANDHERI
   (WEST), MUMBAI - 400 053,
   AND AT:
   A-46, GROUND FLOOR, DEFENCE COLONY,
   NEW DEHLI - 100 024

2. **SAREGAMA INDIA LIMITED**
   33 JESSORE ROADDUM DUM KOLKATA - 700 028
   AND AT:
   A-62, 1ST FLOOR, FIEE COMPLEX, OKHLA
   INDUSTRIAL AREA, PHASE - II, NEW DELHI - 110
   020

3. **TIPS INDUSTRIES LTD**
   601, DURGA CHAMBERS, 6TH FLOOR, LINKING
   ROAD, KHAR (WEST), MUMBAI - 400 052

4. **LAHARI MUSIC PRIVATE LIMITED**
   4TH FLOOR, TTMC, BMTC BUILDING,
   YESHWANTHPUR CIRCLE, YESHWANTHPUR,
   BANGALORE - 560 022

5. **ZEE ENTERTAINMENT ENTERPRISES LTD.**
   18TH FLOOR, 'A' WING, MARATHON FUTUREX, NM
   JOSHI MARG, LOWER PAREL, MUMBAI - 400 013

6. **SONY MUSIC ENTERTAINMENT PVT. LTD.**
   RAHEJA CENTRE, 92 MAIN AVENUE, LINKING
   ROAD, SANTACRUZ (WEST) MUMBAI - 400 054

7. **THE INDIAN PERFORMING RIGHTS SOCIETY LIMITED**
   GOLDEN CHAMBERS, NEW ANDHERI LINK
   ROAD, ANDHERI (WEST) MUMBAI - 400 053

…RESPONDENTS

Represented by –

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

SAREGAMA INDIA LIMITED
Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates

TIPS INDUSTRIES LIMITED
Mr. Harsh Kaushik, Mr. Abhay Chattopadhyay, Ms. Anushree Rauta, Ms. Parul Sharma, Mr. Navankur Pathak and Ms. Pranita Saboo & Ms. Astha Pandey – Advocates

LAHARI MUSIC PRIVATE LIMITED.
Ms. Geetanjali Visvanathan, Mr. Aditya Gupta & Aiswarya Kane – Advocate

ZEE ENTERTAINMENT ENTERPRISES LTD.
Mr. Hemant Singh, Senior Advocate, with Ms. Mamta Jha, Mr. Vipul Tiwari & Mr. Sambhav Jain – Advocates

SONY MUSIC ENTERTAINMENT PVT. LTD.
Mr. Virag Tulzapukar Senior Advocate, with Mr. Amit Jamsandekar, Mr. Rishi Agarwal, Mr. Vaibhav Shukla, Ms. Vinita Muley, Ms. Niyati Kohli & Megha Bengani – Advocates

INDIAN PERFORMING RIGHTS SOCIETY LTD.
Mr. Saikrishna Rajagopal, Senior Advocate, with Mr. Amit Dutta,Mr. Himanshu Bagai, Ms Deepshikha Sarka, Ms Pallavi Sondhi, Mr. Vivek Prasad, Ms. Namrata Dubey, Advocates & Mr. Javed Akhtar, well-known author &lyricist in person

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7. **OP (SEC-31-D)/7/2020/CR/NZ**

DIGITAL RADIO (MUMBAI) BROADCASTING LIMITED
FLAT NO. 401, 4TH FLOOR, DAKHA HOUSE
18/17, W.E.A. KAROL BAGH, NEW DELHI - 110 005

…APPLICANT/APPELLANT

(Represented by: Mr. Neeraj Kishan Kaul, Senior Advocate, with Mr. Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Ms. Sneha Herwade, Mr Gurmukh Choudhri & Ms. Sanya Dua – Adv)

Versus

1. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
   CRESENT TOWERS, 7TH FLOOR, B-68, VEERA ESTATE, OFF NEW LINK ROAD, ANDHERI (WEST), MUMBAI - 400 053,
   AND AT:
   A-46, GROUND FLOOR, DEFENCE COLONY, NEW DEHLI - 100 024

2. **SAREGAMA INDIA LIMITED**
   33 JESSORE ROADDUM DUM KOLKATA - 700 028
   AND AT:
   A-62, 1ST FLOOR, FIEE COMPLEX, OKHLA INDUSTRIAL AREA, PHASE - II, NEW DELHI - 110 020

3. **ZEE ENTERTAINMENT ENTERPRISES LIMITED**
   18TH FLOOR, A WING, MARATHON FUTUREX, N M JOSHI MARG, LOWER PAREL, MUMBAI - 400 013
   AND AT:
   19, FILM CITY, SECTOR 16 - A, NOIDA - 201 301

4. **THE INDIAN PERFORMING RIGHTS SOCIETY LIMITED**
   GOLDEN CHAMBERS, NEW ANDHERI LINK ROAD, ANDHERI (WEST) MUMBAI - 400 053

…RESPONDENTS

Represented by –

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

SAREGAMA INDIA LIMITED
Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates

ZEE ENTERTAINMENT ENTERPRISES LTD.
Mr. Hemant Singh, Senior Advocate, with Ms. Mamta Jha, Mr. Vipul Tiwari & Mr. Sambhav Jain – Advocates

INDIAN PERFORMING RIGHTS SOCIETY LTD.
Mr. Saikrishna Rajagopal, Senior Advocate, with Mr. Amit Dutta,Mr. Himanshu Bagai, Ms Deepshikha Sarka, Ms Pallavi Sondhi, Mr. Vivek Prasad, Ms. Namrata Dubey, Advocates and Mr. Javed Akhtar, well-known author &lyricist in person

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8. **OP (SEC-31-D)/8/2020/CR/NZ**

SOUTH ASIA FM LIMITED
NO. 73, MURASOLI MARAN TOWERS, AMIN ROAD, MRC NAGAR, CHENNAI, TAMIL NADU - 600 028

…APPLICANT/APPELLANT

(Represented by: Mr. Neeraj Kishan Kaul, Senior Advocate, with Mr. Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Ms. Sneha Herwade, Mr Gurmukh Choudhri & Ms. Sanya Dua – Adv)

Versus

1. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
   CRESENT TOWERS, 7TH FLOOR, B-68, VEERA ESTATE, OFF NEW LINK ROAD, ANDHERI (WEST), MUMBAI - 400 053,
   AND
   A-46, GROUND FLOOR, DEFENCE COLONY, NEW DEHLI - 100 024

2. **SAREGAMA INDIA LIMITED**
   33 JESSORE ROADDUM DUM KOLKATA - 700 028
   AND AT:
   A-62, 1ST FLOOR, FIEE COMPLEX, OKHLA INDUSTRIAL AREA, PHASE - II, NEW DELHI - 110 020

3. **TIPS INDUSTRIES LTD**
   601, DURGA CHAMBERS, 6TH FLOOR, LINKING ROAD, KHAR (WEST), MUMBAI - 400 052

…RESPONDENTS

Represented by –

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

SAREGAMA INDIA LIMITED

Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates

INDIAN PERFORMING RIGHTS SOCIETY LTD.
Mr. Saikrishna Rajagopal, Senior Advocate, with Mr. Amit Dutta,Mr. Himanshu Bagai, Ms Deepshikha Sarka, Ms Pallavi Sondhi, Mr. Vivek Prasad & Ms. Namrata Dubey – Advocates

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9. OP (SEC-31-D)/9/2020/CR/NZ

RELIANCE BROADCAST NETWORK LIMITED
401, 4TH FLOOR, INFINITI LINK ROAD,
OSHIWARA, ANDHERI WEST MUMBAI - 400 053

…APPLICANT/APPELLANT

(Represented by: Mr. Neeraj Kishan Kaul, Senior Advocate, with Mr. Abhishek Malhotra, Ms. Shilpa Gamnani, Ms. Atmaja Tripathy, Ms. Sneha Herwade, Mr Gurmukh Choudhri & Ms. Sanya Dua – Adv)

Versus

1. **SUPER CASSETTES INDUSTRIES PRIVATE LIMITED**
   E-2/16, WHITE HOUSE, ANSARI ROAD,
   DARYAGANJ, NEW DEHLI - 110 002
   ALSO AT:
   PLOT NO. 1, SECTOR 16 A, FILM CITY, NOIDA, U.P
2. **THE INDIAN PERFORMING RIGHTS SOCIETY LIMITED**
   GOLDEN CHAMBERS, NEW ANDHERI LINK ROAD, ANDHERI (WEST) MUMBAI - 400 053

…RESPONDENTS

Represented by –

SUPER CASSETTES INDUSTRIES PRIVATE LIMITED
Mr. Amit Sibal, Senior Advocate, with Mr Neel Mason, Ms Ridhima Pabbi, Mr Vihan Dang, Mr Uday S Chopra, Ms Sanyukta Banerjie, Ms Ekta Sharma, Mr Shivang Sharma, Ms Ramya Ramkumar and Ms Megha Sharma – Advocates

INDIAN PERFORMING RIGHTS SOCIETY LTD.
Mr. Saikrishna Rajagopal, Senior Advocate, with Mr. Amit Dutta,Mr. Himanshu Bagai, Ms Deepshikha Sarka, Ms Pallavi Sondhi, Mr. Vivek Prasad, Ms. Namrata Dubey and Mr. Javed Akhtar, well-known author &lyricist in person.

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10. OP (SEC-31-D)/10/2020/CR/WZ

HT MEDIA LIMITED
HINDUSTAN TIMES HOUSE,
18-20, KASTURBA GANDHI MARG,
NEW DELHI – 110 001

…APPLICANT/APPELLANT

(Represented by:Mr. Krishnendu Datta, Mr. Ashish Verma, Mr. Hardik vashisht & Mr. Rahul Gupta – Advocates)

Versus

1. **PHONOGRAPHIC PERFORMANCE LIMITED INDIA**
   CRESENT TOWERS, 7TH FLOOR, B-68, VEERA ESTATE, OFF NEW LINK ROAD, ANDHERI (WEST), MUMBAI - 400 053,
   AND AT:
   A-46, GROUND FLOOR, DEFENCE COLONY, NEW DEHLI - 100 024

2. **SAREGAMA INDIA LIMITED**
   33 JESSORE ROADDUM DUM KOLKATA - 700 028
   AND AT:
   A-62, 1ST FLOOR, FIEE COMPLEX, OKHLA INDUSTRIAL AREA, PHASE - II,
   NEW DELHI - 110 020

3. **TIPS INDUSTRIES LTD**
   601, DURGA CHAMBERS, 6TH FLOOR, LINKING ROAD, KHAR (WEST), MUMBAI - 400 052

4. **ZEE ENTERTAINMENT ENTERPRISES LIMITED**
   18TH FLOOR, A WING, MARATHON FUTUREX, N M JOSHI MARG, LOWER PAREL, MUMBAI - 400 013

5. **SONY MUSIC ENTERTAINMENT PVT. LTD.**
   RAHEJA CENTRE, 92 MAIN AVENUE, LINKING ROAD, SANTACRUZ (WEST) MUMBAI - 400 054

6. **THE REGISTRAR OF COPYRIGHT**
   COPYRIGHT OFFICE, DEPARTMENT OF INDUSTRIAL POLICY & PROMOTION, MINISTRY OF COMMERCE & INDUSTRIES, BOUDHIK SAMPADA BHAWAN, PLOT NO. 32, SECTOR 14, DWARKA, NEW DELHI - 110 075

…RESPONDENTS

Represented by –

PHONOGRAPHIC PERFORMANCE LIMITED
Mr. Parag P. Tripathy, Senior Advocate, with Mr. Pragyan Sharma, Mr. Neeraj K Gupta Mr. Liliaan Daas, Mr. Eeshan Pandey & Gurnoor Kaur.

SAREGAMA INDIA LIMITED
Mr. Akhil Sibal, Senior Advocate, with Mr Ankur Sangal, Ms. Sucheta Roy and Mr. Shantanu Rawat – Advocates

TIPS INDUSTRIES LIMITED
Mr. Harsh Kaushik, Mr. Abhay Chattopadhyay, Ms. Anushree Rauta, Ms. Parul Sharma, Mr. Navankur Pathak and Ms. Pranita Saboo & Ms. Astha Pandey – Advocates

ZEE ENTERTAINMENT ENTERPRISES LTD.
Mr. Hemant Singh, Senior Advocate, with Ms. Mamta Jha, Mr. Vipul Tiwari & Mr. Sambhav Jain – Advocates

SONY MUSIC ENTERTAINMENT PVT. LTD.
Mr. Virag Tulzapukar Senior Advocate, with Mr. Amit Jamsandekar, Mr. Rishi Agarwal, Mr. Vaibhav Shukla, Ms. Vinita Muley, Ms. Niyati Kohli & Megha Bengani – Advocates

ORDER

1. By this common Order, we propose to decide the ten applications. The facts, documents and legal issues involved are similar which are concerning the issuance of the licenses by the respective owners/ assignees of the copyright in lieu of the royalties towards the broadcasting of the sound recordings.

2. The subject ten applications seeking Statutory License under Section 31D of the Copyright Act, 1957,readwithRule31oftheCopyrightRules,2013,havebeenfiledbyMusic Broadcast Ltd. and other radio broadcasters before this Board, the details of the same are mentioned above against the respondents, calling upon this Tribunal to fix royalties for communication of Sound Recordings to the public by way of broadcastthroughRadio.As per the Rules, by way ofPublic Notice dated 22.09.2020, this Board has invited the suggestions of all the interested persons. This Board videPublic Notice dated 18.09.2020 and published on 22.09.2020 stated ashereunder:

> ***"This is for information of all concerned that in view of Section 31D of the Copyright Act, 1957, read with Rule 31 of the Copyright Rules, 2013 and upon an application in this regard filed by Music Broadcast Ltd. and other radio broadcasters, the Intellectual Property Appellate Board (IPAB) is required to fix royalties for communication of Sound Recordings to the public by way of broadcast through Radio under section 31D of the Copyright Act, 1957 and the rules thereto*.**
>
> ***This Public Notice is issued to inform all those interested persons of the IPAB's intention to fix royalties for broadcast of sound recordings through radio, as mandated under Section 31D of the Copyright Act, 1957, read with Rule 31 of the CopyrightRules,2013andthesuggestionsofalltheinterestedpersonsareinvited in thisregard.***
>
> ***Inaccordance with subrule(3)ofRule31,itisstatedthatanyownerofcopyright oranybroadcastingorganizationoranyradiobroadcasteroranyotherinterested person may, within thirty days from the date of this publication, give its suggestions, in writing, with adequate evidence as to the rate of royalties to be fixed for broadcast of sound recordings and musical work through radio. No further time will be granted for the purposes of suggestions after the expiry of 30 days of PublicNotice."***

3. The applicants andrespondents have filed the replies/suggestions and large number of documents along with written submissions.

4. Indian Performers Rights Society (hereinafter referred as IPRS) filed applications/invention application before IPAB on 17.09.2020. The Notice was issued in the said applications.

5. IPRS's Intervention Applications were premised on the fact that when songs are broadcasted through radio, the payment of royalties are implicated/triggered on twin basis, which includes one related to the exploitation of IPRS's rights, since IPRS is an owner of rights (through assignment from the authors and composers) in relation to literary and musical worksincorporated in sound recordings. Another basis of the royalty is the sound recording as a whole as a separate work, the right to receive royalty lies with the producers or his assignee i.e. music companies or other successors. This is owing to the fact that, owners of copyright in the literary and musical works, who have obtained ownership of copyright by virtue of assignments in their favour. i.e., Music Publishers (Saregama India Ltd., Sony Music India, Tips Industries Limited, etc.) are members of IPRS and have assigned their rights in favour of IPRS through Deeds of Assignment in addition to Authors and Music Composers member who have assigned to IPRS the obligation to collect Author's share of Royalty.

6. This tribunal taking into consideration IPRS's arguments in its intervention applications and during the hearing of September 18, 2020 and later on 23.11.2020, eventually allowed IPRS's intervention applications by impleaded IPRS as a "Respondent" on 23.11.2020 and also proceeded to record the objections of Petitioners leaving them to be decided in this final order.

7. Replies to the said applications have been filed by the applicants/broadcasters.

8. In the meanwhile, IPRS while arguing the application of intervention has suggested that royalty in the underlying works (lyrics and musical composition) of sound recording with respect to FM Radio Stations which are the subject matter of the cases should also be fixed independently at the time of fixing the royalties of sound recording. It is stated by them that actually the applicants ought to have sought this direction through a separate prayer, but for reasons known to them, no specific relief thereof is sought. The detailed arguments are addressed on its behalf. Mr. Javed Akhtar, well-known author and lyricist so appeared and made his suggestion orally. So on 23.11.2020, IPRS has also filed fresh application requesting to fix royalty in respect of underlyingworks as per compliance of Section 31-D, read with Rule 31(1) of the Rules 2013.

9. The prayer of IPRS application was opposed by the applicants/Radio Broadcasters on the ground of maintainability among other grounds. Noting the protest of the Radio Companies, an order was issued by us for a Public Notice under the statutory compliance on 23.11.2020. In the meanwhile the arguments were addressed by all the parties in relation to fixing of royalties under Section 31(1)D for Sound Recording and concluded on 27.11.2020. We will consider all these rival contention of the parties in detail in the later part of this Judgment.

It was decided to hear the fixing of Royalties under Section 31D for underlying literary and musical works in a Sound Recording on 28.12.2020. In the meanwhile it was ordered to file replies to the said application of IPRS. IPAB have received the Reply filed by the broadcasters/Respondents for fixation of Royalty for underlying works. On the concluding day of the arguments on 28-12-2020, Mr. Alexander Wolf President of USA based SESAC and John Phelan representing UK based organization ICMP presented their views in support of IPRS claim of separate royalty rates for the underlying work in the sound recordings. Mr. C.M. Lall, Senior Advocate with Mr Ankur Sangal, Advocateon behalf of Universal Music Publishing Pvt. Ltd. also appeared before us and make his submission. The submission on behalf of M/s. Turnkey Music & Publishing Pvt. Ltd. also received through post. Mr. Mustaba, learned Senior Advocate along with Gyatri Roy, Advocate appeared and addressed the arguments on the issue of fixing the royalty on behalf of Yashraj Files for some time. More than sixty representations/suggestionshave been received from the public after the issuance of Public Notice and we have gone through the same. One of the owners of the broadcasters has also made his submission orally before us.

10. **ORIGIN OF FM RADIO INDUSTRY IN INDIA**

10.1 Priorto1995,AllIndiaRadio(hereinafterreferredtoas"AIR")hadamonopoly in India with no other radio broadcasting agency in the market. Radio stations in India were run by the state broadcaster AIR, which was the sole operator. With a view to reviving the dropping radio listenership at the advent of growing popularity of satellite television, around late 90's, the government made an attempt at privatizing radio. As a first step towards this, AIR licensed out time slots on its channels to private companies to produce content. Thus, some of the Applicants like EntertainmentNetworkIndiaLtd.(ENIL) belonging to Times of India group were successful and were allotted time slots on the All India Radio, Mumbai and Delhi for Indian and Foreign songs. With evolving times, the entry of private players into radio began as an experimental arrangement. The evolution of the Radio Industry began in 1997, with Times of India's Times FM (Bennett, Coleman and Company Limited) and Mid-Day Group's Radio Mid-Day having same presence in the radio industry. The first slots were allotted in Delhi and Mumbai and gradually expanded to other prominent markets. The Times of India group launched "Times FM" which was then available on 5 AIR frequencies in the cities of Mumbai, Delhi, Kolkata, Chennai and Goa. This first step lasted for a few years, and ended in June 1998, as the sale of these slots was stopped by the Indian government.

10.2 Around May 2000, Government of India, decided to open Radio Broadcasting to private operators. As the next step to privatization, the Government of India allowed the private sector into FM radio broadcasting by opening up the frequencies in the FM band (87.5-108 MHz). As part of Phase I of the policy on expansion of FM radio broadcasting services through private agencies, 108 frequencies were made available in 40 cities to

private broadcasters. The first private radio station to operate was Radio City in Bangalore in 2001.Thereafter, the Phase-II of FM expansion was announced in 2005, when 337 frequencies in 91 cities were put up for auction. Phase-II was followed by Phase-III in 2015.

10.3 In Phase 3 (2015) cities populated by 1 lakh people and above were taken into consideration. The introduction of Phase 3 (2015) was held online and in two batches, with regulations that further expanded growth opportunities to the benefit of the radio industry in India. The license fee was further lowered to 2.5% of Non- Refundable One-Time Entry Fees or 4% of Gross Revenue, whichever is higher. The license period was extended from 10 to 15 years, permitted FDI in the private FM radio sector was increased from 20% in Phase 2 to 26% in Phase 3, which was ultimately raised to 49% under the government route in 2015. These significant changes were coupled with flexibility displayed by the government.

10.4 At present there appears to be a total of 385 private FM radio stations throughout the country. 32 of these FM radio stations appear to be in the Metro Cities (Category A +), 58 FM Radio stations in category A, 64 FM Radio Stations in Category B, 188 FM Radio Stations in Category C, and 36 FM Radio Stations in Category D. Five FM Radio Stations in Jammu & Kashmir and two in the North East do not appear to be classified in the categories. The categorisation of the cities is done on the basis of population.

11. LITIGATION HISTORY

11.1 The issue of quantum of license fee payable by the FM Radio companies to the Respondent music companies has been the subject matter of dispute for long time. An application seeking issuance of a compulsory license was filed with the Copyright Board in 2001, against the licensing terms of PPL (Phonographic Performance Limited) for sounds recordings on the ground of unreasonableness by Bennett Coleman Company. As the Copyright Board, at that time, did not hold meetings/sessions regularly and the Applicant sought to commence broadcast urgently, as per the terms of the license to operate its radio stations, the Applicant filed a suit seeking interim relief before the Hon'ble High Court of Calcutta in 2001 *(Bennett Coleman Company Limited and Anr. v. Phonographic Performance Ltd., Civil Suit No. 480 of 2001)*. The Hon'ble High Court of Calcutta granted an interim order dated September 28, 2001 and permitted the Applicant to broadcast the sound recordings that were a part of PPL's repertoire by paying at a rate of RFs. 400/- per needle hour.

11.2 The Copyright Board did take up the matter for hearing and had passed an interim order dated November 19, 2002 in *Music Broadcast Private Limited and Ors. v. Phonographic Performance Ltd., 2003 (26) PTC 70 (CB),* (hereinafter referred to as 'Copyright Board Order of 2002'). In the absence of evidence and applying the Income Tax principle of Best Judgment Assessment, the Copyright Board determined the weighted average rate of

music at INR 661 per needle hour. Subsequently, PPL sought modification of the earlier interim order of the Calcutta High Court dated September 28, 2001 in view of the Copyright Board Order of 2002. On March 26, 2004, the Calcutta High Court modified the license fee from INR 400 per needle hour to INR 661 per needle hour with the condition that in the event the Copyright Board Order of 2002 is altered by the Appellate Authority, the present interim order dated March 26, 2004 issued by the Calcutta High Court would also stand altered accordingly. PPL's appeal against the modified order, before the division bench of the Calcutta High Court was dismissed.

11.3 It is noteworthy that simultaneously, PPL and the radio companies, filed cross appeals against the Copyright Board Order of 2002 before the Hon'ble Bombay High Court. Vide its judgment and order dated April 13, 2004 in *Phonographic Performance Limited v. Music Broadcast (P) Ltd. & Ors., (2004) 29 PTC 282*, the Hon'ble Bombay High Court set aside the Copyright Board Order of 2002 and remanded the matter back to the Copyright Board for reconsideration and fixation of license fee in terms of Section 31(1)(b) of the Act. The judgment of the Bombay High Court was affirmed by the Supreme Court, on appeal in *ENIL v. Super Cassettes India Ltd., (2008) 13 SCC 30* decided on May 16, 2008. The Hon'ble Supreme Court remanded the matter back to the Copyright Board for fixation of license fee by hearing the matter afresh on merits after appreciating the evidence to be led by the parties.

11.4 Subsequently, the Copyright Board vide judgment and order dated August 25, 2010 (hereinafter referred to "Copyright Board Order, 2010") determined the license fee at 2% of net advertising earnings earned by each FM radio station, pro-rated to its use of the music from the repertoire in question. By way of C.M.A Nos. 3293/2010 clubbed with 3382-3385, 3387-3399 of 2010, PPL, the Respondent in those proceedings, challenged the Copyright Board Order before the Hon'ble High Court of Madras, inter alia, seeking stay of the Copyright Board Order dated 25.08.2010. However, the Hon'ble High Court of Madras was pleased to dismiss the stay application of PPL vide a detailed and reasoned order dated 22.12.2010. A Special Leave Petition, being SLP No. 5727-5735 of 2011, was filed before the Hon'ble Supreme Court of India, challenging the Madras High Court order which denied the grant of interim injunction as sought by PPL. While the Hon'ble Court was pleased to grant a stay on the order of the Madras High Court, for a period of 15 days, however, after conclusion of hearing in the subject matter, vide order dated April 05, 2011, the Hon'ble Apex Court was pleased to reinstate the order of the Madras High Court and thereby giving effect to the Copyright Board Order, 2010. Thereafter, the Supreme Court observed that the issue with respect to quantum of compensation to be paid to PPL should be decided by the Madras High Court while deciding the main appeal. It is also to be noted, that after issuance of the Supreme Court order dated April 05, 2011, various Courts, including but not limited to the Delhi High Court, the Madras High Court, and Bombay High Court, either by way of a pro tem arrangements, or by consent of parties, or otherwise, have also arrived at an interim license fee rate, which is the same as the rate determined by the Copyright Board in its order dated August 25, 2010.

11.5 A reading of CB Order 2010, clearly shows that while deciding the Compulsory license terms, the Copyright 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) license fee rates in foreign jurisdictions. In other words, the principle factors which were considered by the Copyright Board while fixing royalty rate, were the capacity of the licensees to pay and the financial health of the licensors as quoted under:

> *"in matter of determining the specific rate as percentage of revenue, we have been persuaded by various factors. Capacity of the licensees to pay and the financial health of prospective licensors are at the first instance most important factors to be kept in view. It is true that FM radio industry is in a very bad state of financial health…Their survival and growth is very much essential for nation building."* @para 30.26 of CB Order 2010.

11.6 A perusal of the CB Order also makes it abundantly clear that it is a well-reasoned order and was not altered, varied or stayed, despite appeals up to the Hon'ble Supreme Court of India and has stood the test of time for over the past ten years. However, it is pertinent to mention that the Copyright Board in its own wisdom held that its order dated August 25, 2010 would be valid for a period of 10 years until September 30, 2020. So the compulsory license thus issued came to an end on 30th September 2020 resulting in this fresh batch of litigations.

11.7 It is to note that in the meanwhile the Copyright Act was also amended incorporating certain new provisions in the year 2012, providing for the remedy to the broadcasters for a statutory Licensing scheme for playing music/songs in the FM radio in addition to the existing Compulsory License regime.

Efforts by Government to Promote the growth & Development of Broadcasting Companies & Economics behind the Paying capacities of FM Broadcasters

12.The Government has been pursuing the growth and development of FM radio broadcasting in the private sector as a vehicle of societal development. FM radio broadcasters owe a social obligation towards nation building.. The FM broadcasters in the private sector are disentitled to a variety of income beneficial broadcast unlike the state sector broadcaster i.e. AIR. FM broadcasting in the private sector is very restrictive in the matter of programme broadcasts and the listeners were not saddled with any cost and thus a reasonable royalty rate had to be determined. Music providers, while not losing sight of the limitations and policy framework settled for the FM broadcasters, must have a reasonable cost of their products. Out of the two alternative modes of policy framework of tariff, i.e. NPH and revenue sharing, the former is riddled with its own complexities of operational nature in a heterogeneous society like India. The capacity of the licensee to pay to the licensor is dependent upon his advertisement revenue which has a direct linkage to both the quantitative and qualitative aspect of the listeners. In a situation where the segment of

listeners, even if greater in number, belongs to poorer classes of the society and are not buyers of the goods normally advertised for, it shall result in lesser advertisement revenue. The roles and responsibilities of FM radio in public interest were also taken into account and it was noted that a high royalty rate would make the objectives of the Government policy in having penetration into the backward areas unfeasible.Capacity to pay, financial state as well as expected growth of both the Radio Industry and the Music Industry was also considered. The economic condition of the radio industry was also taken into consideration since the entire private broadcasting sector was in losses.Revenue as a percentage being given in other jurisdictions throughout the world in both developed and developing societies was also taken into account. Linkage of revenue with advertisement revenue as it is truly reflective of response of the listeners.

13. In the meantime, the government auctioned licenses in the FM spectrum gradually through Phase II. Phase 2 (2005) of the FM license auctions resulted inthecoverageofcitieswithapopulationof3lakhandabove.InPhase3(2015) citiespopulatedby1lakhpeopleandaboveweretakenintoconsideration.Phase 2 auctions of FM spectrum licensing in 2005 introduced a number of reforms to the policy guidelines, including the modification of the prevailing exorbitant spectrum licensing system to a rational license fee structure. As per policy guidelines of FM licensing Phase 1, annual licenses were to be renewed at an increment of 15% on the existing license fee. For Phase 2, renewal of annual licensesmovedfromafixedlicenseregimetoarevenue-basedmodelof10%of One Time Entry Fees or 4% of Gross Revenue, whichever is higher. It is pertinent to note that barter transactions are also to be disclosed as per the agreement with GOPA. The new business model included only a percentage of the revenues to be paid as annual spectrum fees. This eventually saw many corporateplayerstoventureintotheFMbusinessevenastheexistingoneswere expanding. This is evidenced by a rise in the number of radio stations from 21 stations in Phase 1 to 245 stations in Phase 2. During this phase, the radio industry was a rapidly growing sector indicated by positive trends. A list of the Radio Broadcasters that joined the PPL collective during Phase II of the evolutionoftheRadioIndustryisbeingfiledseparately**.**The applications filed before the Copyright Board were taken up for hearing together culminating in the order dated25.08.201

14. The introduction of Phase 3 (2015) was held online and in two batches, with regulationsthatfurtherexpandedgrowthopportunitiestothebenefitoftheradio industry in India. The license fee was further lowered to 2.5% of Non- RefundableOne-TimeEntryFeesor4%ofGrossRevenue,whicheveris higher. The license period was extended from 10 to 15 years, permitted FDI in the private FM radio sector was increased from 20% in Phase 2 to 26% in Phase 3, which was ultimately raised to 49% under the government route in 2015. These significant changes were coupled with flexibility displayed by the government. Itismentioned that several Radio companies illegally and in an arbitrary manner started paying PPL at 2% of the Net Advertisement Revenue inspite of the fact that the order of 25.08.2010 was and can be applied only to those who had filed applications under Section 31 and for the then existing radio stations. As per PPL contention, some of

the Radio Broadcasting stations have continued to play the repertoire of PPL even without paying.

15. Reading of CB Order 2010 shows that while deciding the Compulsory license terms, the Copyright 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) license fee rates in foreign jurisdictions. In other words, the principle factors which were considered by the Copyright Board while fixing royalty rate, were the capacity of the licensees to pay and the financial health of the licensors as quoted under:

> *"in matter of determining the specific rate as percentage of revenue, we have been persuaded by various factors. Capacity of the licensees to pay and the financial health of prospective licensors are at the first instance most important factors to be kept in view. It is true that FM radio industry is in a very bad state of financial health…Their survival and growth is very much essential for nation building."*

A perusal of the CB Order also makes it abundantly clear that it is a well-reasoned order supported by documentary evidence and was not altered/withdrawn or stayed, despite appeals up to the Hon'ble Supreme Court of India and has stood the test of time over the past ten years. However, it is pertinent to mention that the Copyright Board in its own wisdom held that its order dated August 25, 2010 would be valid for a period of 10 years until September 30, 2020. So the compulsory license thus issued came to an end on 30th September 2020 resulting in this fresh batch of litigations. It is also interesting to note that in the meanwhile the Copyright Act has also been amended incorporating certain new provisions in the year 2012, providing exclusively to the broadcasters a statutory Licensing scheme for playing music/songs in the FM radio in addition to the existing Compulsory License options.

15.1 **<u>STATUTORY LICENSE INTRODUCED BY 2012 AMENDMENTS</u>**

The Copyright Amendment Bill, 2010, clarifiedin its 'Statement of Object and Reasons', that the amendment act seeks to introduce a system of statutory licensing to broadcasting organizations to access to literary and musical works and sound recordings, without subjecting the owners of copyright works to any disadvantages.Section 31D provides for a mechanism to balance the public interestvis-a-vis the private interest and has got an in-built mechanism to take care of the interest of the owner. Guidelines have been provided for the purpose of fixing royalty under Rule 31(7) and (8). There are requisite provisions providing the copyright owners to be given reasonable opportunity of being heard. It was meant to be a Public policy of supporting the development and growth of private radio broadcasting without harming the rights and interests of the copyright owners whereby laying foundations for nurturing a symbiotic relationship.

The Copyright Amendment Act, 2012 which came into force on 8thJune, 2012, introduced Section 31-D which provides a Statutory License to all broadcasting organizations. As per Section 31-D of the Copyright Act, 1957, a statutory license is granted to all broadcasting organizations desirous of communicating to the public by way of a broadcast inter alia sound recording which has been published, provided that such broadcasting organization while exercising its right to statutory license, shall pay to the owner of rights, royalties in the manner and at the rates fixed by the Appellate Board. It is ensured that the introduction of Section 31-D confers upon broadcasting organizations, the right to commence broadcast of any sound recording, upon giving a reasonable notice to the owner of copyright in the work and upon payment of royalty as determined by IPAB.

Section 31-D was introduced not only as a right in favour of broadcasting organizations but also with the objective to ensure public access to Sound Recordings over the FM radio, without subjecting the broadcasting organizations to endless negotiations with the owners of the sound recordings while seeking license for utilizing the copyrighted work for communication to the public.

15.2 The Parliamentary standing committee, in relation to the Copyright (Amendment) Bill of 2012 at para 15.2, noted the following:

> *"The Committee finds that the introduction of system of statutory licensing has been proposed so as to ensure that public has access to musical works over the FM radio networks and at the same time, the owner of copyright works is also not subject to any disadvantages. The Committee has been given to understand that this system would work in favour of users of copyright works who would then not be subject to lengthy, expensive and monopolistic negotiations by the owners of the work."*

15.3 The introduction of the system of statutory licensing came as a respite to Radio Broadcasters as the access to copyright works by broadcasters under the old regime was dependent on voluntary licensing based on negotiations failing which leads to compulsory licensing, which may be a time consuming process, if voluntary licenses are not materialized.It is pertinent to mention that the intent behind introduction of Section 31-D was to ensure greater access to musical works by the public, as prior to this provision, the broadcasting organizations were subjected to prolonged licensing negotiations ornegotiation deadlock resulting in unlicensed usage of copyrighted works resulting in court litigation. These disputes also hamper the growth of the radio industry and music industry by spending their valuable resources on court cases. It is noteworthy, that the constitutional validity of Section 31 -D has been affirmed by the Division Bench of the Hon'ble High Court of Madras in *South Indian Music Companies Association v. Union of India and Anr. So* Section 31-D of the Act,confers a right on every broadcasting organization to get a license by the statute itself which can be exercised upon notice and payment of royalties in the manner and at the rates fixed by the Appellate Board. Needless to say Rule 31 of the Copyright Rules, 2013 (Hereinafter "Rules") details the manner of determination of royalty for the same by the Appellate Board.

15.4. Admittedly, the Copyright Board Order of 25th August 2010 ("CB Order") dealt only with the provisions under Sec 31(1)- compulsory licensing. There was no provision for statutory license in 2010, which only came in 2012 by way of amendment. Sec 31D and Rules 29 to 31 were introduced specially dealing with the subject of statutory licence.

15.5. In 2010 which was pre amendment times, there were no prescribed factors or rules even in regard to compulsory licensing in existence.

15.6 Section 30 deals with licenses by ownership of property i.e. consensual method by negotiation between the partiesin demand due to technological advancements, Compulsory Licensing under Section 31 of the Copyright Act 1956, was introduced to put together a regime that regulates the pricingmechanism. Acompulsorylicense isavailableunderSection31(1)(b)of theCopyrightActifthecopyrightownerunnecessarilyrefusestograntalicense to a broadcaster, or unreasonably refuses terms for a license proposed by the broadcaster which the broadcaster considers reasonable. The parameters which are to be considered by the Copyright Board in granting compulsory license are to be found in Rule 8 of the Copyright Rules, 2013. In the Copyright Rules, 1958 which were the predecessor to the Copyright Rules, 2013, there was no provision analogous to Rule 8 dealing with the parameters to be kept in mind by the Copyright Board in finalizing theterms.

15.7 Prior to the amendment in 2012, the compulsorylicensingwasonlyavailableunderSections31,31Aand31Bofthe Copyright Act 1956 in respect of work unreasonably withheld from the public, orphanworks andworksforthe differently abled.

15.8. The scope of Section 31 of the Copyright Act was interpreted by the Hon'ble Supreme Court in Super Cassettes Industries Ltd v Music Broadcast, (2012) 5 SCC488,wherein itwasheldthatit*is "therightoftheownertodecideonwhat termsandconditions(whichneednotnecessarilyberelatedtomoneyalone),he would part with the copyright of his work if ever he decides to part with it"* and *"Section 31 of the Copyright Act creates an exception to the abovementioned principle of the right of the owner of the copyright."*

15.9 TheCopyright (Amendment)Act,2012introducedaregimeofstatutorylicense forthefirsttimeinIndiainrespectoftelevisionandradiobroadcastingorliterary and musical works and sound recordings under Section 31D. Thus, there were now three categories oflicenses:

(i) Voluntary Licenses based on consensus between the owner and the licensee under Section-30 of the Act;

(ii) Compulsory License where the license was granted by the Copyright Board founded on a refusal by the owner to accept the terms offered by the proposed licensee/complainant under Section 31(1)(b) of the Act; and

(iii) Statutory License for broadcasting introduced by Act 27 of2012 under Section 31-D of the Act.

15.10 Section 31D which deals with statutory licenses contemplated that any broadcasting

organization desirous of communicating to the public any literally ormusicalwork/soundrecordingwhichhasalreadybeenpublishedwasentitled to do so in accordance with the provisions of this Act. In other words, the publicationrightwasgiventotheproposedlicenseeinsofarasthebroadcasting organization, a term not defined but which has a common sense meaning based on the definition of "broadcasting" under section 2(dd), which broadly refers to communication to the public by means of wire and/or wireless media and it includesre-broadcasting.

> ***" 31D. Statutory licence for broadcasting of literary and musical works and sound recording.—***
>
> *(1) Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical workand sound recording which has already been published may do so subject to the provisions of thissection.*
>
> *(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the AppellateBoard*
>
> *(3) The rates of royalties for radio broadcasting shall be different from television broadcasting and the Appellate Board shall fix separate rates for radio broadcasting and televisionbroadcasting.*
>
> *(4) In fixing the manner and the rate of royalty under sub-section (2), the Appellate Board may require the broadcasting organisation to pay an advance to the owners ofrights.*
>
> *(5) The names of the authors and the principal performers of the work shall, except in case of the broadcasting organisation communicating such work byway of performance, be announced with thebroadcast.*
>
> *(6) No fresh alteration to any literary or musical work, which is not technically necessary for the purpose of broadcasting, other than shortening the work for convenience of broadcast, shall be made without the consent of the owners ofrights.*
>
> *(7) The broadcasting organisation shall—*
>
> *(a) maintainsuchrecordsandbooksofaccount,andrendertotheownersofrights such reports and accounts;and*
> *(b) allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may beprescribed.*
>
> *(8) Nothing in this section shall affect the operation of any licence issued or any agreement entered into before the commencement of the Copyright (Amendment) Act,2012.*

15.11 The Copyright Rules, 2013 giveseffect to this legislative intent. Rule 29(1) provides for different periods of advance notice and advance payment to the copyright owner. Rule 29(4) prescribes numerousfacts that must be provided in respect of each sound recording. Then, as regards the determination ofroyalty,rule 31(7) prescribes principles for tariff fixation that cannot be applied to a whole repertoire, but only to specific sound recordings or groupings thereof.

"Rule 31 (7): The Board while determining royalty shall take into consideration the following factors, namely:

(a) time slot in which the broadcast takes place and different rates for different time slot including repeatbroadcast;

(b) different rates for different class ofworks;

(c) different rates for different nature of use ofwork;

(d) the prevailing standards of royalties with regard to suchworks;

(e) the terms and conditions included in the Grant of Permission Agreement (GOPA) between Ministry of Information and Broadcasting and the broadcaster for Operating Frequency Modulation (FM) Radio Broadcasting Service;and

(f) such other matters as may be considered relevant by theBoard"

16. **The Legislative Intent of Section31-D and the Statement of objects as well as 227th Rajya Sabha Parliamentary Report on Statutory Licensing**

The proposalsandrecommendations bythe 227th Rajya SabhaCommitteereport on the new statutory licensing regime were asfollows:

a. To ensure that public has access to public works over FM radionetwork

b. To ensure that the owner of the copyright works is not subject to any disadvantages

c. To void lengthy, expensive and monopolistic negotiations for the use of such copyright for hassle free access to freeworks

d. To ensure adequate return to the owners ofworks.

17. Theintentionofthelegislaturewhileenactingthenewstatutorylicensingregimein its 2012 amendment to the Copyright Act was to ensure adequate return to Copyright Owners and not to subject them to any disadvantage. The legislature while doing so was conscious that Section 31D was an exception or a departure from free market and willing buyer/willing seller mechanisms. The procedure of 31D was only to ensure that theusers get license without anyhassle at a rate that closely resembles the rate that may have been agreed in a freely negotiated agreement between the parties.

18. Co-jointly reading of the intention as well as the Statement of Object and Reasons clarify that the Act of 2012 introduced Statutory Licensing (Section 31D) for all sound recordings to ensure that while making a sound recording the interest of the Copyright Owner is duly protected. The system of Statutory Licensing was a benefit given to broadcasting organizations to access sound recordings in a fast a convenient manner without disturbing the economicrights of copyright owners.

19. It is a settled law that the Parliamentary Reports and the Statement of Objects and Reasons laid down by the legislature are only for the purpose of an interpretive aid for the courts so as

to understand the intention of the legislature while enacting astatute.ThescopeoftheAct affirms the freedom to contract as the foremost choice to an owner by which the owner mightchoosetopublishhis/herwork.WhilegrantingaStatutoryLicense,the right and interests of the owner should be taken into due consideration as the same is equivalent to a right ofproperty.

STATUTORY LICENSE DISNTINGUISHED FROM COMPULSORY LICENSE

20. The Copyright Board Order 2010 was rendered in proceedings under Section 31(1)(b) of the Act, in respect of compulsory license. As stated earlier the compulsory license is issued to an applicant if he shows the Appellate Board that Respondent copyright owner has refused to allow broadcast sound recordings on unreasonable terms. The Appellate Board after enquiring the Copyright owner only if satisfied that the refusal is unreasonable, can direct the Registrar of Copyrights to issue compulsory license for broadcasting of such copyrighted works for the payment of fee prescribed. The procedure to be followed is given in Rules 6 to 10 of Copyright Rules 2013(hereinafter referred Rules). It makes it amply clear that an application seeking Compulsory License can be even refused by the Appellate Board and the order of the board is binding the parties alone. Whereas the present applications are being made under Section 31-D for the right of a broadcasting organisation to secure a statutory license, and for fixation of a license fee in respect thereof. The language of Section 31-D and specifically sub-sections (2), (3) and (4) thereof provide that such broadcasting organization while exercising its right to statutory license, shall pay to the owner of rights, license fee in the manner and at the rates fixed by the Appellate Board. The language of the section also makes it amply clear that once the Royalty is fixed by the Appellate Board for Sound Recordings then it is an order in rem in the sense it shall be binding all the copyright owners of all sound recordings irrespective of the fact they are a party in this proceedings or not.

21. There was no provision in the Act of statutory licensing prior to the amendment. The licenses for broadcasting were governed by the provisions of Section 31 of the Act which were in the nature of compulsory licenses. S. 31 was brought on the statute book in specifically in respect of compulsory license for "works withheld from public" upon a "complaint". Reasonableness is the criteria for the said complaint for the compulsory license under Section 31. Section 31 requires that the complainant's opinion to the effect that the demand of royalty by the owner is unreasonable.

22. The balance between the copyright owners and the public is achieved by the legislation by putting reasonable restrictions on the right itself by virtue of the provisions of Section 31 D. The Amendment to the Act and the introduction of Section 31D on the statute book, so as to make a provision of statutory licensing, while retaining the provision of compulsory licensing, is only to take care of procedural hurdles and to provide a smooth mechanism and not intended to dilute the copyright of the owner in its work.

23. The Standing Committee Report clearly mentions, as far as it relates to the provision of statutory licensing, that the Copyright (Amendment) Bill, 2010 seeks to amend the Copyright Act, 1957 with certain changes for clarity, to remove operational difficulties and to address certain newer issues that have emerged in the context of digital technologies and the internet. The Object and Reasons appended to the Bill at clause IX mentions that the Bill introduces a system of statutory licensing in the cases of broadcasting organizations intending to have access to literary and musical works and sound recordings without subjecting the owners of the copyright to any disadvantage.

24. At this juncture, it is to note that on account of limitations on the nature of content that is permitted to be broadcast on the private FM radios, pursuant to the Government Policy and as per terms on Grant of Permission Agreement executed by the Radio Companies, with the Ministry of Information and Broadcasting (MIB), the content that is broadcast on such radio stations, is only' music'. Further they are 'Free to Air', so the main source of FM Radio stations are the advertisement revenue. Thus, there is a direct co-relation between the radio airplay of the sound recordings/ music, the consequent advertisement revenues.

25. **Powers of Intellectual Property Appellate Board& Scope of Statutory License Under Copyright Act**

Section 12 of the Copyright Act, 1957 specifies the powers and procedure of the Intellectual Property Appellate Board. Section 12 sub clause (1) clearly states that the IPAB shall have the power to "*regulate its own procedure*".In terms of Section 31D of the Act read with Rule 31 of Copyright Rules, 2013 IPAB has been vested with the power to determine the rates of royalty for Radio Broadcasting in respect of sound recording. The IPAB like the erstwhile Copyright Board is also deemed to be a Civil Court under Section 12(7) of the Act.

25.1 TheproceedingsbeforetheBoardaredeemedtobe"*judicial proceedings*" andthatthisBoarddischarges"*quasi-judicial functions*".Referenceinthisregard may be made to *Super Cassettes Industries Limited v. Music broadcast Pvt. Ltd.* [2012 5 SCC 488] . The relevant portion of the order is extracted ashereunder:

> *"59. As would be noticed, the Copyright Board has been empowered to regulate its own procedure and is to be deemed to be a Civil Court for the purposes of Sections345and346oftheCodeofCriminalProcedure,1973,andallproceedings before the Board shall be deemed to be judicial proceedings within the meaning of Sections193and228oftheIndianPenal Code.Theprovisionsclearlyindicatethat the Copyright Board discharges quasi-judicial functions, which as indicated in Sections19-A,31,31-A,32and52,requirestheBoardto decidedisputesinrespect of matters arisingtherefrom."*

25.2 Thejurisdiction and discretion exercisedbythisBoardfordeterminingtherateof royalty is not adversarial in nature. It is akin inquiry and consultative decision by IPAB which aims to assist and facilitate the parties seeking and the party giving the license to arrive at the licensing arrangement based on the practices prevalent and relevant criterion prescribed under the Act and Rules. Reference in this regard is made to the Delhi High Court's

observations in *Phonographic Performance Ltd. v. Radio Mid Day (West) India Limited* [2010(43)PTC377(Del)].The relevant portion of the order is extracted ashereunder:

> *"33. What does such an inquiry entail? Frankly, we were unable to find any precedent in this regard. But, on first principles, there can be no doubt that the CopyrightBoardmaydeviseitsownprocedureandwhiledoingso,itisexpectedto adhere to the principles of naturaljustice.*
>
> ……..
>
> *37. Applying these principles, it is quite clear that an inquiry by the Copyright Board entails a decision, rather than an adversarial adjudication. In arriving atits decision, the Copyright Board need not necessarily examine a witness. It may take a decision on affidavits, depending upon the requirements of the matter in hand. Only if it is necessary to cross examine the deponent of an affidavit (as an exception rather than as a rule) the Copyright Board may require the attendance of such a person and then permit cross examination.*

25.3 It is settled law that a Tribunal or an Authority like IPAB is a creature of statute and can exercise only such powers that are vested in it by thestatute. In the absence of any specific vesting of power, no such power can be assumed or deduced. In other words, the IPAB is not empowered to exercise jurisdiction that has not been expressly mentioned in the statute or given to it otherwise. Reference in this regard is made to *Super Cassettes Industries Limited. V. Music Broadcast Pvt. Ltd.* [2012 5 SCC 488]. The relevant portion has been extracted hereunder:

> "……
>
> *62.AshasbeenheldbythisCourtininnumerablecases,a Tribunalisacreatureof Statute and can exercise only such powers as are vested in it by theStatute."*

Had the power to issue to statutory license not vested in the IPAB, the question of issuing a Statutory License with respect could not have arisen.

25.4 AreadingofSection31DoftheActshowsthattheexpression used the words *"which is already been published"*. It indicates that the power that has been given to the IPAB is only with regard to publishedworksandnotthosewhichareyettobecreatedpostthedateofthePublicnotice in terms of Rule 31 of the Rules, thus, excluding *"future works"* from the jurisdiction of the IPAB. Again, in Section 31 of the Act i.e. Compulsory Licensing, the legislature has statedthataCompulsoryLicensecanbeissuedonlyfor"*workwhichhasbeen published*" –excluding "*futureworks*".

25.5 On the contrary, the legislature has provided for "futurerights"andalsoamechanismtodealwiththesameinSection30oftheAct.Section 30 specifically provides that a license can be granted with respect to existing as well as *"future works"* by the prospective owner. In the proviso to Section 30, the mechanism as to how the license in respect of future work is to operate has been mentioned by stating that "*the license*" with respect to future work "*shall take effect only when the work comes into existence*". Thus, The legislative mandate was only to provide the said power and mechanism only to a license issued under Section 30 which is a voluntary licenseandnotto issue

eitheracompulsoryorastatutorylicenseschemeinasmuchasthe same is an exception to the licensingscheme.

25.6 Sections 31 and 31D of the Copyright Act are exception to the generalscheme of licensing.Suchaprovisionthereforemeritsastrictinterpretation.It is an interpretation which operates within the confines of the language of Section 31 and Section 31D. The language as also the intention of both Section 31 and Section 31D is clear and unambiguous. Hence, Section 31 and Section 31D have to be read strictly to only include existing works within theambit.

25.7 The legislature while enacting Section 31D had the wisdom of noticing judicial pronouncements on the issue of "future rights" including the fact that the order of the Copyright Board dated 25.08.2010, in Music Broadcast Pvt. Limited. V. Phonographic Performance Ltd., passed a Compulsory License even with respect to future rights as also the fact that the same was vehemently challenged in the Appeal which is pending before the Madras High Court. Inspite of the above, the legislature chose to exclude the term "*future works*" from the ambit and reach of Section 31D and instead confinedthe operation of the said Section only to works "*which is already beenpublished"*.

26. It is settled position in law that a provision of a statute should have to be read as it is, in a natural manner, plain and straight, without adding, substituting or omitting any words. While doing so, the words used in the provision should be assigned and ascribed their natural, ordinary or popularmeaning.Therefore,inviewoftheaboveobservationsandthelanguageandintentofSection 31D of the Act, it is established beyond doubt that the intention of the legislature was not to extendtherigorsofaStatutoryLicenseregimeunderSection31DoftheActto"future works".

27. All parties have made the statement that the recording of statement of witness is not necessary in view of documentary evidence already produced. The matter be decided on the basis of pleadings, documents and legal issues. Even otherwise, as mandated under Rule31(5), it is not possible to decide the matter within two months if evidence of witnesses are recorded.

28. There is, no doubt, that apart from above, IPAB has also heard the suggestions of their parties on two days where they made their suggestions from public and point of view in detail orally. `.

29. It is contented on behalf of all applicants that there is no delay in filing the present applications as the applicants have filed the present applications now because the erstwhile Copyright Board was not functioning since 2010 till 2017. Pursuant to the 2017 amendment in the Finance Act, 2017, the powers of the Copyright Board were transferred to the IPAB.

However, until August, 2020, no Technical Member for Copyright had been appointed by the IPAB for adjudication of disputes. Therefore, the applicants had no choice but to file the present applications in the end of August and September, 2020.

30. **REPRESENTATIONS FROM INTERESTED PARTIES AND PUBLIC**

30.1 There is, no doubt, that apart from above, IPAB has also heard the suggestions of other parties on two days, where they have made their suggestions from public and their point of view was heard in detail orally.

30.2 Representation received via email on October 16. 2020, from Sowmya Chowdhury, CEO of M/s. Recorded Music Performance Ltd., stating:

a. A company representing more than 100 music labels as members and awaiting for Registration as Copyright Society for Sound Recording from Govt. Of India.

b. Argues for increase in royalty as currently, radio broadcasters are the main source of Music available to general public whereas there are very few modes of revenue generation available to Music labels since physical sale of Cassettes, CD's & LP's are literally non-existent.

c. The IPAB should simply fix licence fees on the basis of market rates which can be derived from past voluntary licensing. The broadcasters should disclose any licences that they may have obtained from record labels outside the compulsory licence system or before it, as a basis.

d. Section 31D and rules 29 and 31 makes it clear that the statutory licence fee cannot be a blanket fee for bulk licensing. Such bulk licence fees can indeed be settled between licensor and licensee on a voluntary basis

e. The statutory licence applies only to published works, not to future works, hence the bulk licensing model does not fit so the last order of IPAB needs a relook towards more space for Copyright owners.

f. Rules 31(7) and 31(8) that statutory licences fees have to be fixed separately for different times of the day, for different natures of use (e.g. it might be different for background music), and for different circumstances, e.g. music already notified to the copyright owner for a programme, or (with some mark-up) for music not scheduled in and notified in the programme, or included at the last minute, or used for a longer period than originally notified.

g. Another obvious reason why statutory licences have to be granted for specific sound recordings is that section 31D (2) specifically requires that the notice be given for a work i.e. it must specify a work (or list of specific works) and rule 29 requires so much detail that it can only be provided for specific works. So, the broadcaster needs to provide a list of work to the copyright owner to determine the license fees. Such refinements in the licence fees, which the rules require, can only be fixed on the needle-hour model.

30.3 Representation received via email and hard copy on October 16. 2020, from Sanjay Tandon, CEO of M/s. Indian Singer's Right Association., stating:

a. Seeks the indulgence of IPAB to clarify that fixing of 'radio royalty' for "Sound recordings" and "musical works" under Section 31D, would not prejudice Singer's Right to receive Royalty under section 39A as 'Performers Right'.

b. They further states that Performers right to receive royalty is inalienable and non-assignable under section 38A rw Sec.18(1), but the radio broadcasters continue to exploit the performances of ISRA members without due payment of Royalty.

30.4 Representation received via email on October 16. 2020, from M.Vijayan, COO of M/s. Malar Publications Private Limited., stating,

a. Proposed pricing model that takes into consideration the current practice of 2% of the Gross Revenue as the Royalty Fee payable and also introduce a City wise new Fixed Needle Hour rate (varying by time band) and then bring into effect, the quantum fee whichever is the higher of the two models.

b. Further states that during pandemic Radio Business were affected to a great extent resulting in extremely low revenues and this existing economic condition for Radio Broadcasters are likely to continue for the next 12 months. Hence, have proposed a Fixed Needle Hour Rate model based on the Categories of the Stations/ markets, to minimize the implications (for the Music industry) on account of poor performance of the Radio Industry.

c. They further states that it would be unfair to apply the Fixed Needle Hour rate Model, in a uniform way for all A+ Metro Cities. The Fixed Needle Hour Cost should be lower for Chennai, as compared to Delhi or Mumbai. Similarly this proposed model should take into account the State and its various markets. Therefore it is also proposed that the fixed fee takes into consideration the business potential of each market. The variance at best should be limited to 1%.

30.5 Representation received via email on October 16. 2020, from Swaminathan J Sridhar, Secretary of M/s. South Indian Music Companies Association., stating:

a. An association of music producers started in 1996, based in Chennai owning labels in Tamil, Telugu, Malayalam, Kannada, Sanskrit, Hindi and Punjabi movies and music albums.
b. That in view of the prior agreements entered between members and the radio broadcasters, no application filed u/s 31D will be maintainable against the members, placing reliance on Sec 31D(8)
c. Without prejudice following suggestions is made for fixing royalties-Southern markets are different from copyright owned by PPL and other copyright owners therefore different rates should be fixed for Southern states.
d. As per Hon'ble SC decision in Entertainment Network India Limited Vs. Super Cassette each case of royalty has to be decided on its own merits and that fixation cannot be done across the board.
e. Fair royalties that are neither excessive nor meager can be fixed by considering cost of acquisition, economic status of members and profitability of Radio broadcasters.
f. Further stated that wrt South Indian music industry , several music companies are closed due to rampant piracy, downfall in the physical sales of film music and higher coast of acquisition due to acquiring by independent music companies who are not sister companies of big production houses as that happens in Hindi film industry are to be considered.
g. FICCI Report on Media and Entertainment for the year 2019-2020 is relied and extracted to show the State-wise total share of radio advertisements.

h. It is further stated that Hon'ble tribunal should restrict the scope of the present proceedings only to only Hindi films and devotional music / sound recording in the Hindi language.

i. It is further submitted that non-advertisement component revenues like music festivals, award functions and other national events that generate considerable revenue, therefore rates should not be fixed based on net advertisement revenue but on needle per hour basis, similar to Copyright Board's order of 2002 fixing Rs.660/- per Needle hour.

30.6 Similar writtern representations were received via email on October 16. 2020, from:

a. P. Dhakshinamoorthy, Proprietor BRAVO., Chennai
b. Baskar K of Amutham Music Private limited
c. Partner of New Music , Chennai
d. Ghanshyam Hemdev of Sree Devi Video Corporation
e. Poonam Chand of Star Music Chennai
f. Five Star Audio of Chennai

g. Arockia Dass of Track Musics , Chennai
h. Sruthilaya Audio Recording , Chennai
i. Modern Digitech Media LL.P., Chennai
j. Murali of Mass Audios, Chennai
k. Rajesh S Dhupad, CEO, Symphony Recording Co., Chennai
l. Vijay Musicals Chennai
m. Satyam Audios , Kochi, Kerala
n. Naadham Music Media of Chennai
o. C. Prakash of M/s Real Music Chennai
p. M/s Millenium Audios, Calicut, Kerala

30.7 Representation received via email on October 16. 2020, from Lauri Rechardt, Chief Legal Officer, IFPI, London, stating:

a. IFPI – representing the recording industry worldwide – and its national group networks represents some 8,000 record companies. IFPI has affiliated industry associations and collective management organisations (or "music licensing companies") in over 60 countries, including Indian Music Industry (IMI).

b. IFPI works with over 80 music licensing companies worldwide ("MLCs", which are the sound recording producers' collective management organisations), including PPL India.

c. This task of tribunals and other rate-setting bodies such as the IPAB can be notoriously difficult because the tribunal has to determine a rate that reflects what the parties would have agreed in a freely negotiated agreement, but without having comparable freely negotiated agreements to use as benchmarks. While tribunals have the benefit of the evidence adduced by the parties, to which it will attribute weight appropriately, the tribunal has the unenviable task of having to assume the role of the market.

d. "The Tribunal's task is one of evaluation or estimation. The starting point will be a search for a market. If there is a market, probably the market value will be the value which prevails. If there is no market, or if the object ... is not well sought after so that comparable sales are not easily found, the court will have to construct or endeavour to construct, a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. This becomes a much more theoretical exercise. It involves a degree of subjective judgement and minds will often differ as to what the appropriate outcome is."

e. "The dominant form of rate setting remains one of 'judicial estimation', whereby a rate is set by broad consideration of a range of often differing

factors (historic rates, 'access to music', 'promotional effects', etc) with no consistent framework underpinning the assessment".

f. Applying a number of adjustment factors to take into account differences between radio and interactive music streaming services, PwC concluded that "the average royalty rate, applied globally, would be 16.3 per cent.

g. A similar rate-setting standard was introduced in Canada in 2018, requiring the Copyright Board to consider: " what would have been agreed upon between a willing buyer and a willing seller acting in a competitive market with all relevant information, at arm's length and free of external constraints;"

h. European Union law provides that rates set by collective rights management organisations must reflect the "the economic value of the use of the rights in trade" and that rate should also take into account "the economic value of the service provided by the collective management organisation" (i.e. the value to the user of having access to a single licensing point for the rights of numerous right holders)

i. Statutory licences such as that in section 31D of the Indian Copyright Act inherently, "skew bargaining power dramatically in favour of licensees. The institutional arrangement encourages rational licensees to always refuse to deal and to delay as they benefit economically from doing so". It is therefore incumbent upon rate-setting bodies to set rates according to objective standards and on the basis of sound economic evidence.

j. The present proceedings are unusual compared to typical rate-setting proceedings because the IPAB has before it evidence of rates that have been agreed in the market for the use of sound recordings by broadcasters. These rates, although agreed "in the shadow" of the section 31D statutory licence (which as explained above skews the bargaining power in favour of the user), represent the best possible comparator evidence the IPAB could have (as explained by PwC – see extract above – when explaining that the problem ordinarily facing tribunals is the absence of evidence of an actual market), and therefore should be the starting point for the IPAB's considerations. This evidence is of far greater value than for instance international rates, which for the reasons explained below, are of little or no value to the IPAB.

k. International rates are often highly misleading as benchmarks and should be regarded by the IPAB with extreme caution. The IPAB should scrutinise whether the foreign rates before it were arrived at in the same or similar circumstances and applying the same or similar considerations as in the present proceedings. Market conditions and rate-setting standards vary

considerably from one country to another, as established by PwC. Foreign rates cannot therefore be taken at "face value". PwC's analysis explains why foreign rates typically offer little value as comparators; they are set according to legal standards and in market conditions that are not comparable. Applying the test of the UK Copyright Tribunal, they "have not been arrived at in the same or similar circumstances and applying the same or similar considerations".

l. The negotiated rates agreed between record companies and radio broadcasters in India provide the exact comparator that most tribunals around the world are denied, often because of the applicable legal framework that denies right holders the opportunity to negotiate individual agreements directly with the radio stations.

m. We understand that it has been proposed in the current proceedings that the IPAB should use rates in Australia, Canada and Japan for the use of sound recordings in radio broadcasting as reference points for setting the tariff under section 31D. It should not do so because first, these rates are not a representative sample of the applicable rate around the world and second, these rates were set in conditions that, for the following reasons, bear no resemblance to the Indian legal framework and market.

n. Australia: The rate in Australia is constrained by an historic anomaly in the Copyright Act which caps the payments by commercial radios to sound recording copyright owners to a maximum of 1 percent of the broadcasters' gross annual revenues9 . The 1 percent cap is an arbitrary, outdated and unfair restriction on the licence fees. Furthermore, in a report to the Australian Government on the Australian intellectual property legal framework, the Intellectual Property and Competition Review Committee recommended abolishing the legislative 1 percent cap, stating: "The Committee accepts that the current caps were implemented to ease the burden imposed on the radio broadcasting industry by payments for the broadcasting of sound recordings. However, since the time of their introduction, the economic circumstances of the commercial radio industry have evolved, and the Committee does not believe capping remains warranted [...] To achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis, the Committee recommends that s. 152(8) of the Copyright Act be amended to remove the broadcast fee price cap."

o. Canada - The Canadian rate cited as an example is no longer in in force. The said commercial radio rates relate to the years 2012-2014. As such they reflect neither the new statutory ratesetting criteria under the Canadian Copyright Act, which came into effect on 1 April 2019, nor the changes to the Canadian

Copyright Act, which makes U.S. recordings eligible for broadcast remuneration under the tariff effective 1 July 2020. The proceedings to set the new rate are currently ongoing before the Canadian Copyright Board, albeit slowly given the current circumstances, for the period of 2015-2018 and potentially beyond.

p. Japan - The Japanese rate is misleading because it is not a radio rate to begin with. Rather, it applies to broadcasters' combined television and radio revenue, and takes into account the fact that far less television airtime is dedicated to recorded music when compared to radio where the majority of airtime is used to play recorded music. It is therefore also irrelevant as a benchmark.

30.8 IFPI further stated that the IPAB has been asked to consider foreign rates, the IPAB should be aware that there are also foreign rates set at much higher levels than the other foreign rates put before the IPAB. These include:

- The US satellite radio rate - The headline rate set by the Copyright Royalty Board for US satellite radio broadcasters for the use of sound recordings is 15.5 percent of Gross Revenues15 .
- The Danish commercial radio rate is 5.2 - 8.5 percent of commercial revenues (with minimum guarantees).
- The Finnish commercial radio tariffs set the maximum rate at to 11.76 percent of radios' revenue.
- The French commercial radio rates range from 4 - 7 percent (the lowest rate applying to broadcasting with revenues lower than EUR 500,000).
- The Irish commercial radio rates sets a maximum rate of 5.25 percent of broadcasters' advertising revenues (as defined in the tariff).
- The German commercial radio rate varies between 5.58 percent and 2.79 percent of radios' revenues, while depending on the share of music of station's airtime.
- In Norway, a formula is applied, which means that national broadcasters dedicating 70 percent or more of airtime to music pay over 7% of their revenues to sound recordings right holder.
- The UK rate for commercial broadcaster with net broadcasting revenues of £1,548,664 or more is 5 percent (net broadcasting revenue means 85 percent of gross broadcasting revenue).

30.9 IFPI further stated that the IPAB these examples were cited to IPAB,not with the purpose of proposing that IPAB should follow them, but to illustrate the lack of utility to the IPAB of a wide range of international rates, particularly when the IPAB has actual evidence before it of rates agreed in the market in India. IFPI respectfully urged the IPAB to approach its rate-

setting task by applying the only fair rate setting standard, which is to establish a rate that reflects what the parties would have agreed in market-based negotiation.

31. **Two ways by which the rates can be fixed:**

A. Section 30: Consensual method by negotiations between the parties without resorting to Sec 31D; this method is open and available. Such rate will be consensual.

B. When there is no consensus, rate can be fixed by IPAB, under Sec 31D read with Rules 29 to 31.

We agree with the submissions of Mr. Virag Tulzapurkar, learned senior counsel that a balanced perspective is required to be undertaken of the questions involved and the aim should be as to how best to resolve them in this consultative decision-making process. This is not an adversarial proceeding because under Rule 31(3) suggestions are to be given by all interested parties. In that light, IPAB issued a public notice and invited suggestions from all interested parties to present their view point. IPAB will take into consideration all the suggestions and accordingly fix rate/s of royalty which it deems fit in its wisdom. Thus, it is a matter of record that IPAB has not only heard the parties, but also third parties suggestions.

32. Before discussing the matters further, it is become necessary to deal with the facts mentioned by each petitioners. The common facts, apart from the facts already mentioned in earlier part of our order, are taken from petition no. OP(31-D)/4/2000 filed by Entertainment Network India Ltd, their cases and submissions would be dealt with in the subsequent part of our order.

Case of Petitioners/Applicants

33. **Description of parties - Sl.no.1 (Appeal no. OP (SEC - 31D)/3/2020/CR/NZ)**

In the matter of

Music Broadcast Limited	…	Applicant/ Petitioner
Versus		
Tips Industries Ltd.	...	Respondent no.1
Eros International Films Pvt. Ltd	...	Respondent no.2
Phonographic Performance Ltd. India	...	Respondent no.3
Saregama India Limited	...	Respondent no.4
Sony Music Entertainment Pvt. Ltd.	...	Respondent no.5
Super Cassettes Industries Pvt. Ltd.	...	Respondent no.6
The Indian Performance Rights Society Ltd.	...	Respondent no.7

33.1 The Applicant, Music Broadcast Limited, formerly known as Music Broadcast Private Limited, is a private FM Radio Broadcaster operating under the name of Radio City FM. It is India's first and leading FM Radio station which started its operation in India in July, 2001. The Applicant currently has 39 stations, including 11 newly acquired stations in Phase III auctions. The Applicant being a Radio Station consistently comes up with tools and initiatives to raise social awareness over spectrum of issues including but not limited to Women Empowerment, Voter Awareness, Road Safety etc. over the years.

33.2 It is submitted that in the year 2001 the Applicant had moved an Application before the Copyright Board for compulsory license against Phonographic Performance Limited (PPL), the Respondent therein. After extensive litigation and contest, the Copyright Board vide order dated 25th August, 2010 (Hereinafter referred to as '**CB Order**'), decided upon a rate of 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station to be distributed to the content owners on a pro rata basis, as the rate for the compulsory license for broadcast of sound recordings by Radio Broadcasters.

33.3 It is further submitted that Section 31-D was introduced as a right in favour of broadcasting organizations to ensure public access to Sound Recordings over the FM radio without subjecting the broadcasting organizations to expensive and monopolistic negotiations with the owners of the sound recordings while seeking license for utilizing the copyrighted work for communication to the public.

33.4 It is further submitted that the Parliamentary standing committee, in relation to the Copyright (Amendment) Bill of 2012 noted the following:

> *"15.2 The Committee finds that the introduction of system of statutory licensing has been proposed so as to ensure that public has access to musical works over the FM radio networks and at the same time, the owner of copyright works is also not subject to any disadvantages. The Committee has been given to understand that this system would work in favour of users of copyright works who would then not be subject to lengthy, expensive and monopolistic negotiations by the owners of the work.*"

33.5 It is submitted that the introduction of the system of statutory licensing came as a respite to Radio Broadcasters as the access to copyright works by broadcasters under the old regime was dependant on voluntary licensing. As a result, unreasonable terms and conditions were being set by the copyright societies and owners of Copyright works for grant of voluntary license.

33.6 It is thus submitted that as per Section 31-D of the Act, every broadcasting organization has been granted a license by the statute itself which can be exercised upon notice and payment of royalties in the manner and at the rates fixed by the Appellate Board. It is further submitted that Rule 31 of the Copyright Rules, 2013 (Hereinafter "Rules") details the manner of determination of royalty for the same by the Appellate Board.

33.7 It is submitted that vide the present Application, the Applicant herein is seeking determination by this Appellate Board, of the Royalty rate in terms of Section 31-D of the Copyright Act, 1957, read with Rule 31 of the Copyright Rules, 2013 for broadcast of Sound Recordings through Radio and to enable the Applicant to exercise the statutory license granted to the Applicant by the Copyright Act, 1957.

33.8 It is also submitted that the Radio industry has, over the past several years, been adversely affected with a staggered growth rate, which has dwindled over the years. It is submitted that there has been a significant reduction in the growth rate and decline of Radio over the years. The Applicant, thus, humbly recommends that the rate of royalty payable by the radio broadcasters for broadcast of sounds recordings through radio be fixed at 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station to be distributed to the content owners on a pro rata basis in consonance with the erstwhile CB Order.

33.9 It is submitted that after extensive litigation and deliberation, the Copyright Board vide CB Order dated 25th August, 2010, decided upon a rate of 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station to be distributed to the content owners on a pro rata basis, as the rate for the compulsory license for broadcast of sound recordings by Radio Broadcasters for reasons which have already been detailed above. It is submitted that the rationale and finding of the Copyright Board has not been set aside by any Court or Tribunal and is therefore still valid and subsisting even in the current scenario.

33.10 It is further submitted that as per Rule 31(7) (d) of the Copyright Rules, 2013, the Appellate Board, while determining the royalty, ought to consider the prevailing standards of royalties with regard to such works. It is thus submitted that the prevailing rate of royalty for broadcast of Sound Recordings through Radio is fixed at2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station to be distributed to the content owners on a pro rata basis as determined in the erstwhile CB Order.

33.11 Therefore, the Applicant submits that this Appellate Board may also determine 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station to be distributed to the content owners on a pro rata basis, as the rate of royalty payable by the Applicant to broadcast and communicate to the public sound recordings through Radio.

34. **<u>Description of parties –Sl. No. 2 (Appeal no. OP (SEC-31D)/4/2020/CR/NZ)</u>**

In the matter of

Entertainment Network (India) Limited … Applicant

Versus

Phonographic Performance Limited	…	Respondent No.1
Tips Industries Ltd	…	Respondent No.2
Saregama India Limited	…	Respondent No.3
Sony Music Entertainment Pvt Ltd	…	Respondent No.4
The Indian Performing Performance Rights Society Limited	...	Respondent No.5

34.1 The Applicant, Entertainment Network (India) Limited ("**ENIL**"), is a broadcasting organization, incorporated in the year 1999, under the Companies Act 1956. It is a subsidiary of Bennett, Coleman & Company Limited, the flagship company of The Times of India Group. The Applicant company is listed on the Bombay Stock Exchange of India Limited and the National Stock Exchange of India Limited.

34.2 The Applicant operates in the private FM radio broadcasting segment. It, *inter alia*,owns and operates Radio Mirchi which is one of India's most popular and foremost radio stations with an unparalleled reputation and an exceedingly high recognition. Radio Mirchi is a free-to-air radio station and serves a public purpose by facilitating an outreach of music and similar such content to the masses at large, free of cost.

Prior to the year 1995, radio stations in India were run by the state `broadcaster, All India Radio (herein after referred to as "**AIR**"), which was also the sole operator. With a view to reviving the dropping radio listenership, given the growing spread and popularity of television, the government made an attempt at privatizing radio. As a first step, AIR licensed out time slots on its channels to private companies to produce content and further invite/attract advertisements in those time slots. The Times of India group, of which the Applicant is a part, was one amongst those that were successful in getting time slots from AIR. The Times of India group launched "Times FM" which was then available on 5 AIR frequencies in the cities of Mumbai, Delhi, Kolkata, Chennai and Goa. This first step lasted for a few years, and ended in June 1998, with AIR not renewing the license for the time slots.

34.3 As the next step to privatization, around May 2000, the Government of India invited the private sector into FM radio broadcasting by opening up the frequencies in the FM band (87.5-108 MHz). As part of Phase I of the policy on expansion of FM radio broadcasting services through private agencies, 108 frequencies were made available in 40 cities to private broadcasters. The Applicant launched 7 (seven) radio stations during the Phase I of the radio reforms. A total of 21 radio stations came up in 12 cities during Phase-1.

34.4 Thereafter, the Phase-II of FM expansion was announced in 2005, when 337 frequencies in 91 cities were put up for auction. In Phase-II, the Applicant herein acquired licenses for running FM radio stations in 25 (twenty-five) more cities. Phase-II was followed by Phase-III in 2015. In the first batch of Phase-III FM radio auctions, the Applicant had acquired FM radio licenses to operate in 17 (seventeen) new cities and in the second batch of Phase-

III FM Radio auctions, it had acquired FM radio licenses to operate in 21 (twenty-one) new cities. Before the first batch of Phase-III auctions, the Applicant acquired 4 radio stations from the TV Today group in the year 2015. All put together, the Applicant currently operates 73 (seventy-three) FM radio stations under various brand names and registered trademarks RADIO MIRCHI/MIRCHI LOVE/MIRCHI 95 etc., in 63 (sixty three) cities across India.

34.5 Respondent No. 1, Phonographic Performance Limited India (hereinafter referred to as "**PPL**"), claims to be a performance rights organization licensing its members' sound recordings for communication to public in the areas of public performance and broadcast. It is pertinent to note that PPL registered as a Copyright Society for the purposes of Section 33, prior to the amendments to the Copyright Act, 1957 (hereinafter referred to as "**Act**"), which amendments were made effective from 21.06.2012. Thereafter, PPL was given time for a year to re-register itself as a Copyright Society under the Copyright (Amendment) Act, 2012.However, PPL, after applying for re-registration, has voluntarily abandoned/withdrawn its application for re-registration. It is noteworthy that as per Section 33(1) of the Act, only copyright societies registered under Section 33(3) are authorized to issue or grant licenses in respect of copyrighted works. The Application is filed without prejudice to the Applicant's right to challenge PPL's claim to license sound recordings of its members' repertoire. PPL currently, on its website claims to own and/or control a substantial portion of the music repertoire available in India including, rights of 356 music labels, with more than 3 million sound recordings. PPL claims to represent some of the largest music labels such as Sony Music Entertainment, Saregama, Super Cassettes India ("**T-Series**"[Limited rights]) Warner Music, Venus Music and certain regional labels like Aditya Music, Anand Music, Lahari Music and many more. The PPL website sets out the list of members and the rights assigned to PPL viz: public performance rights and radio broadcasting rights available with PPL.

34.6 It is further submitted that while Respondent No.1's right to administer and license the sound recordings claimed to be part of its repertoire is questionable in view of the lack of its registration as a copyright society pursuant to Section 33 of the Act, the Applicant seeks determination of a statutory license fee, which is a determination, *in rem,* against all music labels/ music providers in addition to the Respondents herein. It is noteworthy that Section 31-D of the Act confers upon the broadcasting organizations, the right to commence broadcast of any sound recording, merely upon giving a notice of five days (and in an unusual situation, 24-hour) to the owner of copyright in the work and paying the license fee as determined by this Tribunal.

34.7 Respondent No. 2, Tips Industries Limited, (hereinafter referred to as "**Tips"/ "Respondent No. 2"**) is a leading music company that claims to own the exclusive right to issue licenses for the public performance/ communication to the public including broadcasting of all works contained in its repertoire. It is listed on the National Stock Exchange of India Limited and the BSE Limited.

34.8 Respondent No. 3, Saregama India Ltd., (hereinafter referred to as "**Saregama"/ "Respondent No. 3"**) is a leading music company operating in India since 1902. The company is listed on the National Stock Exchange of India Limited, BSE Limited and Calcutta Stock Exchange. Respondent No. 3 claims to be is the owner of sound recordings of Indian music across 14 different languages. Respondent No. 2 was a member of PPL till 2015 and Respondent No. 3 is currently a member of PPL but has sent a communication to the Applicant indicating that its membership of PPL shall cease w.e.f. 01.10.2020.

34.9 Respondent No. 4, Sony Music Entertainment Pvt. Ltd., (hereinafter referred to as "**Sony**" / "**Respondent No. 4**") is a well know music label in India. It is a wholly owned subsidiary of Sony Music Entertainment Inc., an incorporated company based out of New York, U.S.A. It is the first music label in India to be 100% foreign owned. Respondent No. 4 boasts of an extensive catalogue of Hindi / Bollywood soundtracks, Indie pop, regional music international music etc. Like Respondent No. 3, Respondent No. 4 is also currently a member of PPL however, Respondent No.1 has recently issued a communication to the Applicant indicating that the membership of both Respondent No. 3 and 4 with PPL shall cease w.e.f. 01.10.2020.

By way of the present application, the Applicant seeks determination *in rem*, by this Tribunal, of a license fee rate in terms of Section 31-D of the Act, read with Rule 31 of the Copyright Rules, 2013 (hereinafter referred to as "**Rules**").

34.10 The Respondent No.2/ Tips (Serial no.4/2020) was represented by Respondent No. 1 before the Copyright Board, the Madras High Court and the Hon'ble Supreme Court and therefore the order of the Copyright Board dated August 25, 2010 is binding upon Respondent No.2. But, now, it is the case of Tips that since March 31, 2015, it withdrew its mandate of private FM Radio Broadcasting from PPL with effect from July 1, 2015, who has taken a plea that the Copyright Board Order, 2010 did not apply to TIPS. Prior to April 2015, TIPS did not raise/challenge the order of the Copyright Board Order, 2010 under Section 72 of the Act.

34.11 On the basis of the Copyright Board Order, 2010 that the Applicant has been carrying on its business with due compliance and has been regularly releasing payments of the requisite royalties to the music providers along with the corresponding reports and requisite data as prescribed under the Copyright Board Order, 2010. While the Respondent in the aforementioned proceedings before the Copyright Board in 2010 was Phonographic Performance Limited, the Applicant has been making payments to the music providers/ labels, including but not limited to Respondent No. 2 at the pro-rated rate of 2% of net advertisement revenues as per the Copyright Board Order, 2010. Similar payments are being made by the Applicant to Respondent No.2 from September 2010, till date. Up until April 2015, no dispute has been raised by Respondent No. 2. After April 2015, however, Respondent No.2 stopped accepting any royalties under the pretext that it allegedly is no longer a member of and/or associated with Respondent No.1. The Respondent No. 2, under the said pretext, is attempting to avoid the applicability of the Copyright Board

Order, 2010 so as to arm twist the Applicant to pay a higher license fee. The Copyright Board Order, 2010 is operative upon the music providers in general and is now a benchmark for payment of license fee to most music providers since as far back as August2010.

34.12 The Respondent No.2 was an active party to the proceedings before the Copyright Board and it is a matter of fact that the financial statements of Respondent No.2 for the years 2005-2006 and 2006-2007 were even part of the proceedings and were taken on record during the course of evidence by the Board in the proceedings which *inter alia* lead to the passing of the Copyright Board Order, 2010. In fact, even when the Copyright Board Order, 2010 was appealed by Respondent No. 1 before the Hon'ble High Court of Madras and the Hon'ble Supreme Court and the said Courts refused to grant a stay on the Copyright Board Order, 2010, Respondent No. 2 was a member of PPL. The Respondent No. 2 individually did not challenge the Copyright Board Order, 2010 as an aggrieved party under Section 72 of the Act when it was a member of PPL, and it did not even file any appropriate proceedings to assail the Copyright Board Order, 2010 post its alleged dissociation with PPL.

34.13 The dispute between the Applicant and Respondent No.2 further culminated with the latter filing a suit being suit no LC-VC -84 of 2020 against the Applicant and another party before the Hon'ble Bombay High Court. The said suit shall be subsequently numbered and the interim application filed is pending adjudication before the Hon'ble Bombay High Court. It is further noteworthy that Respondent No. 2 had also filed an application for Interim Relief. It is respectfully submitted that there is no ad-interim or interim order passed by the Hon'ble Bombay High Court qua the Applicant pertaining to its FM radio broadcast of Respondent No. 2's repertoire from its terrestrial FM radio stations.

34.14 By email dated August 07, 2020, Respondent No. 3, though currently a member of PPL, informed the Applicant that it would be exiting Respondent No. 1' s membership with effect from September 30, 2020. Incidentally, the date of exit of Respondent No. 3 from Respondent No. 1 coincides with the date of expiry of the Copyright Board Order, 2010.The Applicant submits that the Copyright Order, 2010 is binding on Respondent No. 3, in as much as, it is a currently a member of PPL and was represented before the Copyright Board, the Madras High Court and the Supreme Court when the Copyright Board Order, 2010 was subjected to challenge. Accordingly, vide the present application, the Applicant also seeks determination of right, *in rem,* for grant of statutory license and payment of license fee/ rates and for communication to the public by way of broadcast of, inter alia, Respondent No. 3's copyrighted works/sound recordings. It responded to the said email of Respondent No 3 vide email dated August 21, 2020.

34.15 The Respondent No. 1 vide email dated August 28, 2020, informed the Applicant that Respondent No. 4's assignment arrangement with PPL in respect of Private FM radio broadcasting licensing will stand terminated with effect from October 01, 2020. Therefore, Respondent No.4, though currently a member of PPL, its repertoire will be excluded from

Respondent No. 1's repertoire for purposes of FM radio broadcasting with effect from October 01, 2020. Incidentally, the date of exit of Respondent No. 4 from Respondent No. 1 again coincides with the date of expiry of the Copyright Board Order, 2010. The Applicant submits that the Copyright Order, 2010 is binding on Respondent No. 4, in as much as, it is a currently a member of PPL and was represented before the Copyright Board, the Madras High Court and the Supreme Court when the Copyright Board Order, 2010 was subjected to challenge. Accordingly, vide the present application, the Applicant also seeks determination of right, *in rem,* for grant of statutory license and payment of license fee/ rates and for communication to the public by way of broadcast of, inter alia, Respondent No. 4's copyrighted works/sound recordings.

34.16 There are multiple/too many entities/groups of entities with whom the Applicant has to negotiate with and execute contracts for the payment of music royalties, namely the Respondent No. 1, South Indian Music Companies Association (SIMCA), individual labels with in Hindi/Bollywood music and scores of individual regional music labels within the country. There is no single window collective licensing scheme for administration of rights of sound recordings in the music industry, despite the statutory mandate for single copyright society for each class of work under the Act. As per the statutory regime, copyright owners of sound recordings, music and literary works are not mandatorily required to be members of collective licensing scheme/ society. Thus, individual music labels may attempt to remain independent of the copyright society/ collective licensing scheme such as that of Respondent No. 1 or SIMCA and may license their copyrighted works independently to the Applicant. This is evident from the conduct of certain labels such as Respondent No. 2 which exited Respondent No. 1 in 2015, and the conduct of Respondent Nos. 3 and 4 who will exit PPL with effect from October 01, 2020.

34.17 The Applicant at the time of filing the present Application does not know and is unable to anticipate the total number of music labels which may withdraw their mandate/assignment from the Respondent No.1. Therefore, in the interest of justice, the Applicant craves leave of this Tribunal to alter and amend the present application to add and/or modify the present facts / submissions in order to seek adequate reliefs by way of the present Application.

34.18 The Applicant submits that there is only one instance where the Copyright Board Order, 2010 was initially stayed completely, *qua* one music label/ party, i.e., Super Cassettes Industries Limited, which was an interim order dated September 15, 2010, passed by a Single Judge of the Delhi High Court in W.P No. 6255 of 2010. On appeal, even that order was modified by the Division Bench of the Delhi High Court, vide order dated May 11, 2011 in LPA No. 448 of 2011. The modified order recorded that the judgment and order of the Copyright Board Order, 2010 can be relied upon by the Appellant therein or any other party in its subsequent attempt to move an application for compulsory license.

34.19 The Applicant submits that while the earlier decision of the Copyright Board Order, 2010 was rendered in proceedings in respect of grant of compulsory license under Section

31(1)(b) of the Act, the present application is being made under Section 31-D of the Act for the newly created right of a broadcasting organisation to secure a Statutory License, and for fixation of a license fee in respect thereof. The language of Section 31-D and specifically sub-sections (2), (3) and (4) thereof provide that such broadcasting organization while exercising its right to statutory license, shall pay to the owner of rights, royalties in the manner and at the rates fixed by the Appellate Board. Accordingly, the Applicant herein has filed the present application before the Tribunal.

LEGISLATIVE INTENT BEHIND INTRODUCTION OF SECTION 31-D:

34.20 It is submitted that the Applicant seeks determination of the license fee at half the rate fixed by the Copyright Board in 2010. The Applicant, therefore, seeks a rate of 1% of net advertisement earnings of each FM radio station of the Applicant accruing from the radio business of the particular station pro-rated to the actual minutes of use of music by the FM radio station of the music provided by the Respondents as well as other music labels, in addition to the ruling in the Copyright Board Order, 2010 which allowed for determination of license fee with a pro-rated distribution to music providers on the basis of proportion of music provided.

The Applicant submits that the rate of license fee offered by Respondent No.1 is extremely high and unreasonable, leaving the Applicant with no option but, to exercise the involuntary licensing scheme under Section 31-D of the Act. The said unreasonable rates are set out on Respondent No.1's website, at https://s3-ap-south-1.amazonaws.com/ppl-inida-prod/leadership%2F1596085121325-Radio+Tariif+ for+website.pdf. A perusal of the following rates as charged by Respondent No.1 make it abundantly clear that the rates demanded are exorbitant, baseless and arbitrary:

i. The voluntary license is being offered at alternative rates. For Phase-I and Phase-II licensees the rate is the higher of *Rs.2400 per needle hour*, or *20% of net advertising revenue*. The rate for the Phase-III licensees is, however, a lower, flat rate of Rs.750 per needle hour in case the broadcast takes place in the 8 Metro cities identified therein, or Rs.650 per needle hour in case of any other city. It is also mentioned in the document made available at the aforesaid URL, that the said flat fee rates are concessional "early-bird" rates, are valid only till 31.3.2020, and are available only to those Phase-III licensees who have set up new stations.
ii. The Applicant submits that the aforesaid tariff scheme has serious issues such as: (i) the rate is unsupported by any study/evidence; (ii) there is no reasonable basis to classify Phase-I and II licensees differently from "new" Phase-III licensees, since, after the Migration of Phase-I and II licensees, with effect from April 01, 2015, all licensees are Phase-III licensees; (iii) the flat fee amount fails to take into consideration, even the standard or methodology that is prevalent, i.e., a percentage of net advertising revenue, to calculate the license fee. This also fails to consider the amount of usage and the amount of revenues earned by the relevant radio station; (iv) additionally, the rate of 20% which is sought to be used as a comparator to seek

license fee based on net advertising revenue, is demonstrably arbitrary and baseless, especially given the findings in the Copyright Board Order, 2010.

34.21 Vide email dated August 09,2020, Respondent No. 1 has unilaterally proposed a new rate for voluntary license that it seeks to bring into effect post September 30, 2020. The proposed new rates are set out below:

i. A+ category City- Higher of 7% of Net Advertisement Revenue (**NAR**) or Per Needle Hour (**PNH**) Rs. 10,000
ii. A Category City - Higher of 7% of NAR or PNH Rs. 2,500
iii. B Category City- Higher of 7% of NAR or PNH Rs. 1,250
iv. C Category City- Higher of 7% of NAR or PNH Rs. 625
v. D Category- Higher of 7% of NAR or PNH Rs. 315

34.22 The Applicant states that it responded to the said email Respondent No 1 vide its email dated August 13, 2020.Vide email dated August 27, 2020, Respondent No. 1 has issued a response to the Applicant's reply dated August 13, 2020. A perusal of the said email makes it clear that the Respondent No. 1's sole intention is to pressurize the Applicant to accept its exorbitantly high and arbitrary rates, post expiry of the Copyright Board Order, 2010, thus necessitating and justifying the reliefs sought by way of the present Application. \

34.23 A perusal of the above proposed rates demonstrates a stark difference between the current tariff rates of Respondent No. 1 and the excessively exorbitant tariff rates that Respondent No.1 proposes to levy after expiry of the Copyright Board Order, 2010. It is stated that the Respondent No. 1 has baselessly arrived at the above arbitrary rates, despite consciously noting that the Covid-19 pandemic has severely jeopardized and affected major businesses including that of radio as well as music industry. It is also noteworthy that the arbitrariness of the rates is evident from the fact that there is at least a 14-fold increase between the rates that PPL had offered in March 2020. The aforesaid proposal is completely out of sync with the global average rates for license fees paid by radio broadcasters. In most countries of the world including in North America, Asia, Australia, New Zealand as well as Africa, the total royalty payable ranges between 1 to 5% of net advertising revenues. This has been the practice for decades. There are several reasons why the rates are within this range, one of the important ones being that FM radio has a symbiotic relationship with music labels. While labels provide music, which helps radio stations attract listeners, radio stations help in discovering new music, and sustaining interest in old music. Evidence of this is the fact that when a new song or album is released, labels and music artists pressurize radio stations to play these songs on high rotates. There could be a case made where radio stations shouldn't pay anything to labels; in fact, even charge them for promoting the songs. However, as a respect for the concept of copyrights, radio stations worldwide pay royalties in the range of 1-4% of their revenues. The rate is towards the higher end of this range in the more developed countries of North America, Australia and New Zealand. In the medium-income and low-income countries of Asia and Africa, the royalty rates tend to be towards the lower range. In India, the rate of 1% is thus appropriate. It must be pointed out that only in a few

countries in Europe do royalty rates extend up to 6% of advertising revenues. However, in countries like the UK, this rate includes a simulcast of the FM radio feed on the internet. These rates are thus not comparable with rates in other countries which are lower. It is thus submitted that a rate of 1% of the net advertisement revenue earned by the Applicant distributed on a pro-rated manner to music providers on the basis of music provided as also on the basis of actual minutes of airplay of the music on the radio station not only balances the interest of both parties but is also in line with global trends.

34.24 It is submitted that the Copyright Board in the Copyright Board Order, 2010, also noticed that radio airplay has a positive impact on the sales of music, which is the essential business of the members of Respondent No.1. This fact is not only true of India, but also resonates with various other jurisdictions, including but not limited to the USA. It is also pertinent to note that as recently as February 2019, the US House of Representatives was considering a proposal to not subject the local FM radio stations to any payment for performances, under a proposed legislation termed as the Local Radio Freedom Act. The preamble to the said proposed legislation/proposal tabled in the House of Representatives observes:

> *"Whereas for nearly a century, Congress has rejected repeated calls by the recording industry to impose a performance fee on local radio stations for simply playing music on the radio and upsetting the mutually beneficial relationship between local radio and the recording industry;*
>
> *Whereas local radio stations provide free publicity and promotion to the recording industry and performers of music in the form of radio air play, interviews with performers, introduction of new performers, concert promotions, and publicity that promotes the sale of music, concert tickets, ring tones, music videos and associated merchandise;*
>
> *Whereas Congress found that "the sale of many sound recordings and the careers of many performers benefited considerably from airplay and other promotional activities provided by both non-commercial and advertiser-supported, free over-the-air broadcasting"*

34.25 The Applicant submits that there is a direct co-relation between the radio airplay of the sound recordings owned and controlled by the members of Respondent No. 1 as also by other music labels including Respondent No. 2, Respondent No. 3 and Respondent No. 4 and the consequent increase in popularity of the Respondent music companies' repertoire. There also exists a symbiotic relationship between the airplay of music and the advertisement revenue earned by the Applicant. Given that the universe/repertoire of music available on license to all radio operators is the same, there are multiple other factors, such as the curation/selection of content to be broadcast, the Radio Jockey engagement, etc., which also differentiates one broadcaster from another. Accordingly, a rate of license fee, based on a percentage of net advertising revenue, provides a clear co-relation between the copyrighted works used and the revenue earned by the Applicant.

Contrary to this, a fixed fee model based on needle hour rate, fails to consider the growth of revenue and/or losses incurred by the radio industry. Rates based on needle hour ignore the fact that there are radio stations with large listenership and others with small

listenership. A radio station with large listenership earns more revenues and one with small listenership earns less revenue. This distinction exists from one category of cities to another and also within each category, based on various factors, none of which are considered when the license for rate is framed on a Per Needle Hour basis. A needle hour-based license fee regime would charge both types of radio stations the same royalty. This would make it affordable for the big stations and unaffordable for the smaller stations. In view of this, it is submitted that a license fee fixed based on percentage of net advertisement revenue earned by the Applicant radio operator is a more objective criteria for determination of license fee payable to the Respondents as also the other sound recording labels.

It is for the aforesaid reason that the Copyright Board Order, 2010, has determined the license fee based on net advertisement earnings which is a more suitable approach towards determination of the statutory license fee rate, as also supported by evidence. Accordingly, the applicant seeks the determination of license fee for the grant of license under Section 31-D on the basis of percentage of net advertisement revenue.

34.26 It is submitted that a percentage of net advertisement revenue as a parameter for determining the license fee also acts to the advantage of both the Applicant and the Respondents as the said rate can be uniformly applied across all the category of cities in which the Applicant's FM radio station operates, without making any alterations to the license fee on the basis of category of the city. It is noteworthy that fixation of multiple rates as per different category of cities is arbitrary and cumbersome for calculation and payment of license fee by the Applicant and creates a scope for anomaly.

34.27 An indication of acceptance of (i) not only the *benchmark/criterion of advertising revenue to be used for the purpose of calculation of license fee*, but also (ii) a rate that is akin to 1%, is the fact that even the Government/licensor, while granting a license to the Applicant to permit broadcast from its radio stations, has fixed a rate basis gross revenue of the FM channel for a financial year.

34.28 The Applicant further submits, that the annual operating costs including fixed charges such as Wireless Operating License Fee, Prasar Bharti Tower Rental Fee, Operation and Maintenance of Common Transmission Infrastructure is 84% of the Applicant's gross revenue for financial year ending 2020. Also, the average annual operating cost including fixed cost such as Wireless Operating License Fee, Prasar Bharti Tower Rental Fee, Operation and Maintenance of Common Transmission Infrastructure in the last four financial years beginning 2016- 2017 till 2019- 2020, have been 77% – 84% of Applicant's gross revenue for each financial year, respectively. Further, EBITDA Margins and Profit before Tax Margins have seen constant decline in the last four financial years beginning 2016- 2017 till 2019- 2020 from 23% to 16% and 14% to 3% respectively.

34.29 It is submitted that over the past years, the radio industry has been adversely affected, with a slower growth rate, which has often dwindled over the years. The reduced growth rate and also the decline is owing to *inter-alia*, the following factors:

(i) The FM radio industry has been adversely affected due to the incursion by digital platforms which audio stream sound recordings from the Respondents' repertoire along with content from other music labels. With the increase in number of digital platforms with audio streaming facility which stream music including the Respondents' sound recordings, based on a non-subscription model, there has been a decline in the growth of radio industry. Data from the Indian Readership Survey (IRS) published by the Media Research Users Council (MRUC) shows that compared to 2012, radio listenership has grown by only 8% in 7 years till 2019. This means that radio listenership has grown by about 1% or so per annum. In the same time period, the Applicant's listenership has actually fallen by 16%. In the meanwhile, FM radio's competition – online digital platforms – have grown by leaps and bounds. Today, there are possibly more listeners who use online digital platforms than FM radio. In the meanwhile, the music labels have been earning huge amounts of license fee from online digital platforms. This fact – slowing growth of FM radio and rapid growth of online digital streaming – is demonstrated from a perusal of the public reports such as the KPMG in India's Media and Entertainment Report, 2019 (hereinafter referred to as "**KPMG Report, 2019**") as also in FICCI – Ernst & Young Report on Media & Entertainment, 2019 (hereinafter referred to as "**FICCI Report, 2019**"). The Applicant craves leave to rely upon and produce a copy of the KPMG Report on India's Media & Entertainment, 2019 and FICCI – Ernst & Young Report on Media & Entertainment, 2019 at the time of arguments and at the time of giving suggestions as provided under the Copyright Rules 2013.

(ii) It is submitted that the revenue contribution from audio streaming through digital platforms is at an estimated 78% of the overall music industry revenue as recorded for financial year ending 2019. Further, the projected growth and contribution to music industry revenue from audio streaming on digital platforms is expected to go up to 82% by 2024 as per the KPMG Report, 2019. It is noteworthy that the audio-streaming digital platforms are witnessing a massive increase in active user base with a growth of 60% for the year ending 2018. The increase in user base of the digital platforms which provide for non-subscription-based models, has adversely affected the radio usage and listenership as is evident from a perusal of the publicly available reports such as KPMG Report, 2019 and the FICCI Report, 2019.

(iii) At this juncture, it is noteworthy that while the recorded music industry, including the Respondents, has grown at a rate of 15.3% for year ending 2019, the radio industry has witnessed a muted growth at the rate of 6.17% as recorded in KPMG Report, 2019. It is noteworthy that the music industry's compounded annual growth rate for the years 2015 – 2019 has been at a rate of 13%. The increase in growth rate of the music industry has been on account of introduction of digital music platforms. Further, the strong growth rates are also evident from the leapfrogging ranks of Indian music industry in the world rankings from 19th in 2017 to 15th in 2018. Contrary to the flourishing music industry, the growth of the radio industry

has remained weak at a compounded annual growth rate of 6.68% for the years 2015- 2019.

(iv) Further to the above, a perusal of the Annual Report of Respondent No. 1 for the year ending 2019 reflects a growth rate at 21%. Contrary to this, there has been a decline in the Applicant's revenue by12.9% in the year ending 2019-2020. This further evidence the reduced growth rate of the Applicant as compared to the Respondents and the music industry. The Applicant craves leave of this Tribunal to produce necessary documents in support of this submission.

(v) The music industry's growth rate is expected to remain high in the near future as well. A perusal of the FICCI- Ernst & Young Report on Media & Entertainment Sector, 2020 (hereinafter referred to as "**FICCI Report, 2020**") shows that while the compounded annual growth rate of the music industry till the year ending 2022 is forecast at the rate of 10%, the growth of radio industry is only at a rate of 5 %. Applicant craves leave to produce a copy of the FICCI- Ernst & Young Report on Media & Entertainment Sector, 2020 at a later stage, shall be produced at the time of arguments and at the time of giving suggestions as provided under Chapter VIII of the Copyright Rules 2013**.** It is further noteworthy that in the year ending 2019-2020, while music industry has grown at a rate of 8.3% owing to increase in digital streaming of music content, the radio industry witnessed a decline in revenue by 7.5% on account of slowdown in economic activity, which negatively impacted the advertisement expenditure/ investments made by retail advertisers. It is submitted that in the entire segment of media and entertainment, radio industry has the least rate of growth in terms of revenue over the past years, which is a pertinent factor for consideration of this Tribunal while determining the license fee rates payable to the Respondents.

(vi) It is further submitted that owing to the current pandemic and the economic slowdown on account of Covid-19, the Applicant's revenue has been drastically affected with a decline of 71.9 %in the first quarter of the FY 2020-2021.It is noteworthy that on account of the pandemic and the lockdown, while radio listenership has temporarily increased because people have more time to consume media, the revenue has declined substantially. In the first quarter of FY2020-2021, the Applicant has incurred a huge loss of Rs 37 crores. In view of the drastic decline in Applicant's revenue, it is submitted that continuing the rate of 2% of net advertisement revenue will prove to be very difficult for the Applicant to bear. The Applicant thus seeks the license fee rate to be reduced to 1% of net advertising revenue.

(vii) That *de hors* the situation attributable to the pandemic, the advertisement volumes in large markets have decreased substantially, thus, reducing the overall growth rate of the industry. It is mentioned that pricing for radio advertisements has been under constant pressure due to a sluggish economy with a decrease in inventory utilization as is evident from a perusal of the KPMG Report, 2019. While the overall share of radio advertising is 8-9 % internationally, in India it has been a constant low at

around 3-4% which further proves the reduced advertisement revenues earned by the radio operators.

(viii) It is submitted that the persistent decline in radio advertising revenue is primarily attributable to the transition of advertisers/marketers to digital platforms as is evident from a perusal of the public reports attached along with the present application. It is submitted that the overall advertisement revenues earned by the radio industry has declined by 11% in the financial year ending 2020. This fact can be further corroborated from the FICCI Report, 2020. It is submitted that the fall in advertisement revenue, has directly affected the Applicant's revenue which is evident from the sharp decline in revenue as has been stated in the foregoing paragraphs.

(ix) The Applicant also submits that the rise of smartphones with evolving technology and lack of FM radio receiver in them is increasingly disrupting the radio industry. It is noteworthy that majority of the listeners of radio consume music through smartphones. With a massive rise in smart phone penetration and usage of 4G data, consumers of music are increasingly turning to music applications for music consumption, rather than FM radio. This is also evidenced by the notable drop in listenership for Applicant's radio stations from 38 million people as per Indian Readership Survey (IRS) of 2012 to 32 million in the latest IRS of 2019 (for same stations) published by Media Research Users Council India. In this regard, the Applicant draws attention of this Tribunal to the FICCI Report, 2019 which records 96% of radio users consuming music through smartphones. In view of this, the rise of newer models of smartphones without FM radio receivers has also adversely affected the listenership of FM radio and consequently resulted in the advertisers opting for digital platforms over FM radio.

34.30 It is submitted that broadcasting of content through FM radio stations aims to achieve a larger public interest by acting as a vehicle of social upliftment and education. Radio stations have been considered as enablers and information providers that not only create awareness among people but also assists in authentic information dissemination. A perusal of the Telecom Regulatory Authority of India's Recommendations on Phase III demonstrates that radio broadcasting is a powerful communication medium for the common masses. A copy of the Telecom Regulatory Authority of India's Recommendations on Phase III, 2008 is filed as **Annexure A- 11.**The importance of radio broadcasting through FM radio stations to ensure timely and authentic information dissemination is also noteworthy from a perusal for the letter dated March 23, 2020 issued by Ministry of Information and Broadcasting, to ensure operational continuity of print and electronic media in view of threat of Covid- 19 outbreak, a copy of which is also filed as **Annexure A -12**. In view of this larger public interest which the radio industry serves and the significant cost involved in terms of payment of annual one time entry fee and fixed charges as enumerated in the foregoing paragraphs as also the decline in growth of the Applicant's revenue, it is submitted that this Tribunal may fix the license fee at a reasonable

rate by considering the parameter of percentage of net advertisement revenue of the Applicant.

34.31 Lastly, the Applicant submits that in view of the fact there is no single window mechanism and a uniform reasonable rate for payment of license fee for use of copyrighted works and the fact that there exist multiple performing rights organisation/ representative bodies such as Respondent No.1, SIMCA, etc. for licensing sound recordings for broadcast on radio along with existence of independent labels and the increasing trend of music labels exiting performing rights organisations such as the exit of Respondent No. 2 to 4 from PPL as enunciated in the present case, the administrative cost of compliance, maintenance of music consumption logs, coordination cost incurred for payment of requisite license fee to the multiple performing rights organisation and the music labels also increases. Therefore, in order to reduce the cost incurred by the radio industry, which is already in a declining phase of growth and revenue, it is necessary that the statutory license rate is fixed at 1% of net advertisement revenue. Furthermore, this should be pro-rated to the actual time of consumption of music, in view of the fact that the Applicant has to incur separate costs towards payment of license fee to the Respondents herein which comprises of performance rights organisations such as Respondent No. 1 as well as music labels.

In view of the aforesaid, the Applicant humbly reiterates its submission that this Tribunal may determine the rate of license fee payable by the Applicant for grant of license to broadcast and communicate to the public, the sound recordings in the Respondents' repertoire at the rate of 1% of net advertisement revenue of the Applicant.

34.32 It is submitted that this Tribunal has the jurisdiction to adjudicate upon the present application. Vide amendment to Section 11 of the Act, the Copyright Board has been substituted by the present tribunal. This Tribunal which is established under Section 83 of Trademarks Act,1999, is also the Appellate Board under the Copyright Act. Accordingly, any application in respect of statutory license for broadcasting of literary and musical works and sound recordings has to be filed before IPAB. As per Section 31-D (3) of the Act, the present Tribunal alone is empowered to fix the manner and the rate of license fee which is required to be paid to the owner of copyright, for acquiring statutory license to broadcast literary and musical works and sound recordings of already published work.

34.33 Accordingly, the Applicant submits that this Tribunal is competent to determine the manner and rate of license fee which the Applicant ought to pay the Respondents to exploit rights in its Work and repertoire. The Applicant is desirous of broadcasting the sound recordings owned by the Respondents during the validity of the radio broadcast license as granted to it by the Ministry of Information and Broadcasting. In accordance with Section 31-D, the Applicant submits that it is willing to pay the Respondents, the license fee at the rate of 1% of the net advertising revenue, which is in accordance with and reflective of the international standards and the prevalent market conditions.

35. **Description of Parties – Sl.no. 3(Appeal no. SEC – 31 D)/1/2020/CR/ NZ)**

In the matter of

Rajasthan Patrika Private Limited ...Applicant/ Petitioner

VERSUS

Phonographic Performance Limited India ...Respondent No. 1
Saregama India Limited ...Respondent No. 2
Sony Music Entertainment India Pvt. Ltd. ...Respondent No. 3
Zee Entertainment Enterprises Limited ...Respondent No. 4
Super Cassettes Industries Private Ltd....Respondent No. 5
Yash Raj Films Private Limited ...Respondent No. 6
Tips Industries Limited ...Respondent No. 7
Eros International Films Private Limited ...Respondent No. 8
Times Music / Junglee Music ...Respondent No. 9

35.1. Most of the facts, documents, submissions and arguments of the above applicant remain the same {as in the case of Entertainment Network(India) Limited}, except it is additionally stated that the Applicant is a holder of FM licenses granted by the Ministry of Information and Broadcasting and operates a commercial radio network since 2006 under the brand name "95 FMTADKA", broadcasting over the radio frequency 95.0 MHzin Jaipur, Kota, Bikaner, Udaipur, Raipur, Jammu, Srinagar; the radio frequency 91.1 MHz in Bilaspur, Bareilly, Jhansi, Gorakhpur; the radio frequency 98.3 MHz in Jalgaon; the radio frequency 104.8 MHz in Solapur; the radio frequency 91.9 MHz in Muzaffarpur; the radio frequency 104.6 MHz in Aligarh; the radio frequency 94.5 MHZ in Agra and; the radio frequency 106.4 MHz in Ajmer and Prayagraj. The Applicant's network is currently the 7th largest radio network in India with 18 stations across 6 states.

a) Respondent No. 1, Phonographic Performance Limited India (**PPL**), is a performance rights organization licensing its members' sound recordings for communication to public in the areas of public performance and broadcast. PPL was registered as a Copyright Society for the purposes of Section 33 of the Act, prior to the notification of the Copyright Amendment Act, 2012 on 21 June 2012 (**Amendment**). After the Amendment, PPL was given time for a year to re-register itself as a Copyright Society under the amended Act. However, PPL has, after applying for re-registration, voluntarily abandoned/withdrawn its application for re-registration. Thus, the Applicant/Petitioner submits that, in view of the language of Section 33(1) of the Act, it is unclear as to whether or not PPL has the right to license sound recordings on behalf of its members, and therefore, the Applicant's right to challenge PPL's right to license its members' repertoire. Nevertheless, PPL currently, on its website claims to own and/or control a substantial portion of the music repertoire available in India including, rights over 356 music labels, with more than 3 million sound recordings. PPL claims to represent some of the largest music labels such as Times Music, Universal Music, Aditya Music and many more. It is submitted that, whether or not PPL has the right to administer and license the

sound recordings claimed to be part of its repertoire, the Applicant seeks determination of a statutory license fee, which is a determination, *in rem*.

b) Respondent No. 2 is one of the country's oldest and leading music company that owns the exclusive right to issue licenses for the public performance/ communication to the public (including broadcasting) of all works contained in its music repertoire, stretching across Film music, Carnatic, Hindustani classical, Devotional etc. in all prominent Indian languages. Respondent No. 2 has expanded its catalogue to become the largest in-perpetuity global owner of both sound recording and publishing copyrights of Indian music across 14 different languages. Respondent No. 2 is currently a member of PPL but has sent a communication to the Applicant indicating that its membership of PPL shall cease w.e.f. 01.10.2020.

c) Respondent No. 3 is a well-known music label in India. It is a wholly owned subsidiary of Sony Music Entertainment Inc., an incorporated company based out of New York, U.S.A. It is the first music label in India to be 100% foreign owned. Respondent No. 3 boasts of an extensive catalogue of Hindi / Bollywood soundtracks, Indie pop, regional music international music etc. Like Respondent No. 2, Respondent No. 3 is also currently a member of PPL however, Respondent No.1 has recently issued a communication to the Applicant indicating that the membership of both Respondent No. 2 and 3 with PPL shall cease w.e.f. 01.10.2020.

d) Respondent No. 4 operates under the brand name "Zee Music Company" and is one of the largest music labels in the country, acquiring the rights to over 50% of new Bollywood music year on year and releasing 1500+ new songs annually. Respondent No. 4 has marked its presence across all Indian languages, making it a pan India label with a catalogue strength of over 7000 songs in 2019 alone.

e) Respondent No. 5 popularly known as "T-Series", is one of the most popular music labels in the country and owns and controls rights in over 2,00,000 songs in various languages. Respondent No. 5, whose repertoire comprises of some of the most popular contemporary Hindi film music in the country, controls up to a 35% share of the Indian music market.

f) Respondent No. 6 is a leading music company that owns the exclusive right to issue licenses for the public performance/ communication to the public including broadcasting of all works contained in its repertoire.

g) Respondent No. 7 (**Tips**) is a public music and film production, promotion and distribution company and leading entertainment company in India and is also in the business of manufacturing and marketing of pre-recorded Audio Cassettes blank audio cassettes and replicated CDs. Respondent No. 7 has developed an extensive

repertoire which encompasses songs in various Indian languages and also includes devotional songs, Indian pop, ghazals, instrumentals, Indian folk etc.

h) Respondent No. 8 is a global Indian entertainment conglomerate that acquires, co-produces and distributes Indian films across all available formats. Respondent No. 8 has an extensive and growing music library comprised of over 3000 films of various languages, .

i) Respondent No. 9 is a media conglomerate that runs a music label named Times Music, a record label having a catalogue of more than 60000 tracks in all languages and genres, including EDM and folk music. In 2007, Respondent No. 9 launched its independent Hindi and regional film music label, *Junglee Music*, to capitalise on the popularity of commercial film music. Besides owning/controlling music relating to Hindi and regional films, Respondent No. 9 is also a music leader in the devotional and spiritual music genre.

35.2 In addition to the above, Respondent No. 1 vide email dated 28 August 2020, informed the Applicant that Respondent No. 3's assignment arrangement with PPL in respect of Private FM radio broadcasting licensing will stand terminated with effect from 01 October 2020. Therefore, Respondent No.3, though currently a member of PPL, its repertoire will be excluded from Respondent No. 1's repertoire for purposes of FM radio broadcasting with effect from 01 October 2020. Incidentally, the date of exit of Respondent No. 3 from Respondent No. 1 also coincides with the date of expiry of the CB Order.. The Applicant submits that the CB Order is binding on Respondent No. 3, in as much as, it is a currently a member of PPL and was represented before the Copyright Board, the Madras High Court and the Supreme Court when the CB Order was subjected to challenge. Accordingly, vide the present application, the Applicant also seeks determination of right, *in rem,* for grant of statutory license and payment of license fee/ rates and for communication to the public by way of broadcast of, inter alia, Respondent No. 3's copyrighted works/sound recordings.

35.3 It is submitted that a percentage of net advertisement revenue earned by a radio broadcaster has been approved by several of the relevant stakeholders in the industry. An indication of acceptance of (i) not only the *benchmark/criterion of advertising revenue to be used for the purpose of calculation of license fee*, but also (ii) a rate that is akin to 2%, is the fact that even the Government/licensor, while granting a license to the Applicant to permit broadcast from its radio stations, has fixed a rate of 4% of gross revenue of the FM channel for a financial year or at the rate of 2.5% of the One-Time Entry Fee for the city.

35.4 The Applicant / Petitioner seeks a determination by this Hon'ble Tribunal since the rate of license fee offered by Respondent No.1 is unreasonable, usurious, baseless and arbitrary which is apparent from a perusal of the rates are set out on Respondent No.1's website, at https://s3-ap-south-1.amazonaws.com/ppl-inida-prod/leadership%2F1596085121325-Radio+Tariif+for+website.pdf.A review of the said rates makes it abundantly clear that:

a. The voluntary license is being offered at alternative rates i.e. a higher rate of *Rs.2400 per needle hour*, or *20% of net advertising revenue* for Phase-I and Phase-II licensees and a lower, flat rate of *Rs.750 per needle hour*for Phase-III licensees in case the broadcast takes place in the 8 Metro cities identified therein, or *Rs.650 per needle hour* in case of any other city. The website also clarifies that the said flat fee rates are concessional "early-bird" rates, valid only till 31 March 2020, and are available only to those Phase-III licensees who have set up new stations.

b. The aforesaid rates are (i) unsupported by any study/evidence; (ii) unsupported by any reasonable basis for the classification of Phase-I and II licensees differently from "new" Phase-III licensees, since, after the Migration of Phase-I and II licensees, with effect from 01 April 2015, all licensees are Phase-III licensees; (iii) arbitrary and out of touch with market realities, since the flat fee amount fails to even take into consideration the standard or methodology that is prevalent in the industry i.e., a percentage of net advertising revenue, to calculate the license fee and also fails to consider the amount of usage and the amount of revenues earned by the relevant radio station; and (iv) additionally, the rate of 20% of that is sought to be used as a comparator to seek license fee based on net advertising revenue, is demonstrably arbitrary and baseless, especially given the findings in the CB Order.

The Applicant reiterates its submission that this Tribunal may determine the rate of license fee payable by the Applicant for grant of license to broadcast and communicate to the public, the sound recordings in the Respondents' repertoire at the rate of 2% of net advertisement revenue of the Applicant.

36. **<u>Description of parties – Sl.no. 4 (Appeal no. OP (SEC - 31D)/2/2020/CR/NZ)</u>**

In the matter of

HT MUSIC AND ENTERTAINMENT CO. LTD

…Applicant/Petitioner

VERSUS

Phonographic Performance Limited India	... Respondent No.1
Saregama India Limited	…Respondent No. 2
Tips Industries Limited	…Respondent No. 3
Lahari Music Private Limited	…Respondent No. 4
Zee Entertainment Enterprises Limited	…Respondent No. 5
Sony Music Entertainment Pvt. Ltd.	…Respondent No. 6

36.1 In addition to the stand taken by Entertainment Network(India) Ltd. in its petition serial no.4/2020, the case of HT Music and Entertainment Co. Ltd. is that the applicant by email dated August 7, 2020, though currently a member of PPL, informed the Applicant's associate entity Next Radio Limited, that it would be exiting Respondent No. 1' s membership with effect from September 30, 2020.

36.2 The Respondent No. 1 vide email dated August 28, 2020, informed the Applicant that Respondent No. 6's - Sony Music Entertainment Pvt. Ltd. assignment arrangement with PPL in respect of Private FM radio broadcasting licensing will stand terminated with effect from October 01, 2020. Therefore, Respondent No. 6, though currently a member of PPL, its repertoire will be excluded from Respondent No. 1's repertoire for purposes of FM radio broadcasting with effect from October 01, 2020.

36.3 Incidentally, the date of exit of Respondent No. 6 from Respondent No. 1 also coincides with the date of expiry of the CB Order. The Applicant submits that the CB Order is binding on Respondent No. 6, in as much as, it is a currently a member of PPL and was represented before the Copyright Board, the Madras High Court and the Supreme Court when the CB Order was subjected to challenge. Accordingly, vide the present application, the Applicant also seeks determination of right, *in rem,* for grant of statutory license and payment of license fee/ rates and for communication to the public by way of broadcast of, inter alia, Respondent No. 6's copyrighted works/sound recordings.

36.4 At present, there are multiple/too many entities/groups of entities with whom the Applicant has to negotiate with and execute contracts for the payment of music royalties, namely the Respondent No. 1, South Indian Music Companies Association (SIMCA), individual labels with Hindi/Bollywood music and scores of individual regional music labels within the country. It is noteworthy that presently, there is no single window collective licensing scheme for administration of rights of sound recordings in the music industry, despite the statutory mandate for single copyright society for each class of work under the Act. It is pertinent to note that as per the statutory regime, copyright owners of sound recordings, music and literary works are not mandatorily required to be members of collective licensing scheme/ society. Thus, individual music labels may attempt to remain independent of the copyright society/ collective licensing scheme such as that of Respondent No. 1 or SIMCA and may license their copyrighted works independently to the Applicant. This is evident from the conduct of certain labels such as Respondent No. 3 which exited Respondent No. 1 in 2015, and the conduct of Respondent Nos. 2 and 6 who will exit PPL with effect from October 01, 2020.

36.5 It is submitted that the Applicant seeks determination of the rate of royalty at a rate of 0.75% of net advertisement earnings of each FM radio station of the Applicant accruing from the radio business of the particular station with a pro-rated distribution to music providers on the basis of proportion of music provided.

36.6 The Applicant / Petitioner seeks a determination by this Tribunal since the rate of license fee offered by Respondent No.1 for the voluntary licenses offered by it as per the rate card is unreasonable, usurious, baseless and arbitrary which is apparent from a perusal of the rates as set out vide email dated August 09, 2020. By the said email, Respondent No. 1 has unilaterally proposed a new rate for voluntary license that it seeks to bring into effect post September 30, 2020. The proposed new rates are set out below:

i. A+ category City - Higher of 7% of Net Advertisement Revenue (**NAR**) or Per Needle Hour (**PNH**) Rs. 10,000

ii. A Category City - Higher of 7% of NAR or PNH Rs. 2,500

iii. B Category City- Higher of 7% of NAR or PNH Rs. 1,25

iv. C Category City- Higher of 7% of NAR or PNH Rs. 62

v. D Category- Higher of 7% of NAR or PNH Rs. 315

A copy of email dated August 09, 2020 as well as the attachment are also filed.

36.7 The Applicant further submits that:

i. the annual costs incurred for fixed charges such as Prasar Bharti Tower Rental Fee lie within the range of 8% – 11% of the Applicant's gross revenue, for Wireless Operating License Fee is INR 3.38 Lakhs for its Chennai in a year and for Operation and Maintenance of Common Transmission Infrastructure is 0.58% of the Applicant's gross revenue; and

ii. the fee/costs paid to Broadcast Engineering Consultants India Ltd. (BECIL) for usage of the Common Transmission Infrastructure are in the range of 1 – 1.25 lakh annually.

It is mentioned that payment of fees towards the fixed charges as stated herein are mandated by the Ministry of Information and Broadcasting under Phase III of the Policy Guidelines for expansion of FM Radio Broadcasting services through private agencies, and include the average annual fixed charges, which are mandatorily incurred by any private radio operator including the Applicant.

36.8 It is also submitted that, the radio industry has, over the past several years, been adversely affected with a staggered growth rate, which has often dwindled over the years. The reduced growth rate and also the decline is owing to,*inter-alia*, the following factors:

a) The FM radio industry has been adversely affected due to the influx of digital platforms which stream sound recordings from the Respondents repertoire along with content from other music labels. It is submitted that the revenue contribution from audio streaming through digital platforms is at an estimated 78% of the overall music industry revenue as recorded for financial year ending 2019. Further, the projected growth and contribution to music industry revenue from audio streaming on digital platforms is expected to go up to 82% by 2024 as per the KPMG Report, 2019. It is noteworthy that the audio-streaming digital platforms are witnessing a massive increase in active user base with a growth of 60% for the year ending 2018. The increase in user base of the digital platforms which provide for non-subscription-based models, has adversely affected the radio usage and listenership as is evident from a perusal of the publicly available reports such as KPMG Report,

2019 and the FICCI Report, 2019. A copy of the FICCI – Ernst & Young Report on Media & Entertainment, 2019 is filed and placed on record.

b) While the recorded music industry, including the Respondents herein, has grown at a rate of 10% for year ending 2019, the radio industry has recorded a growth rate of only 7.8%, as recorded in the FICCI – Ernst & Young Report on Media &Entertainment, 2019. It is also relevant to note that the Annual Report of Respondent No. 1 for the year ending 2019 reflects an increase of 21% in the license fee revenue earned by its members. As against the booming music industry (of which the Respondents are a part), there has been a constant decline in growth of the Applicant's revenue during the last three financial years, with the years 2018-19 and 2019 – 2020 being marked by steep decline to a negative growth rate of 10% and 18%, respectively. It is submitted that the reduced growth rate of the Applicant, as well as the entire radio industry, when compared to the continued growth of the Respondent and the music industry, is further evidence of the imbalance in the bargaining powers between a radio broadcaster and a music label. The Applicant craves leave of this Hon'ble Tribunal to produce necessary documents in support of this submission.

In fact, the growth rate of the music industry, when juxtaposed with the declining growth rate of the radio industry for the year ending 2020 provides even more alarming results. A perusal of the FICCI - Ernst &Young Report on Media & Entertainment Sector, 2020 shows that while the compounded annual growth rate of the music industry till the year ending 2022 is estimated at the rate of 10%, the growth of radio industry is only at a rate of 5%. A copy of the FICCI - Ernst & Young Report on Media & Entertainment Sector, 2020 is also placed on record. It is further noteworthy that in the year ending 2019 - 2020, while music industry has grown at a rate of 8.3% owing to increase in digital streaming of music content, the radio industry witnessed a decline in revenue by 7.5% on account of slowdown in economic activity, which negatively impacted the advertisement expenditure/ investments made by retail advertisers. It is submitted that in the entire segment of media and entertainment, radio industry has the least rate of growth in terms of revenue over the past years, which is a pertinent factor for consideration of this Tribunal while determining the license fee rates payable to the Respondents.

c) It is further submitted that owing to the current pandemic and the economic slowdown on account of COVID-19, the Applicant's revenue has been drastically affected with a decline of 90% in the first quarter of 2020-2021.

Company	Q1 Revenue (Rs in Lac)			Growth Rates	
	Q1-FY18-19	Q1-FY19-20	Q1-FY20-21	FY19 V 1	Q1 FY20-21 19
HTME	16	15	1	-9	-90

d) On the contrary, owing to the multiple avenues available to the members of Respondent No.1, to earn revenues, including from digital platforms, whose business has not been similarly impacted by the pandemic situation, has only grown. In view of the drastic decline in Applicant's revenue, it is submitted that this Tribunal should consider continuity of the rate of 2% of net advertisement revenue.

e) It is stated that *de hors* the situation attributable to the pandemic, the advertisement volumes in large markets have decreased substantially, thus, reducing the overall growth rate of the industry. This persistent decline in radio advertising revenue is primarily attributable to the transition of advertisers/marketers to digital platforms as is evident from a perusal of the FICCI – Ernst & Young Report on Media & Entertainment, 2019. It is submitted that the overall advertisement revenues earned by the radio industry has declined by 11% in the year ending 2020. This fact can be further corroborated from the FICCI – Ernst & Young Report on Media & Entertainment, 2020, a copy of which has been annexed herewith. It is submitted that the fall in advertisement revenue, has directly affected the Applicant's revenue which is evident from the sharp decline in revenue by 11% in the financial year ending 2020, as has been stated in the foregoing paragraphs.

f) The Applicant also submits that radio broadcasters such as the Applicant through their FM radio stations, serve a larger public interest by acting as a vehicle of social upliftment and education for the masses. A perusal of the Telecom Regulatory Authority of India's Recommendations on 3rd Phase of Private FM Radio Broadcasting demonstrates that radio broadcasting is a powerful communication medium for the common public. A copy of the Telecom Regulatory Authority of India's Recommendations on 3rd Phase of Private FM Radio Broadcasting dated 22 February 2008 is placed on record.

g) The role performed by the radio industry was even more pronounced during the lockdown occasioned by the COVID-19 pandemic, during which time 82% of the nation's population tuned into FM Radio for credible information. In view of this larger public interest which the radio industry serves and the significant cost involved in terms of payment of annual non-refundable one time entry fee and fixed charges as enumerated in the foregoing paragraphs as also the decline in growth of the Applicant's revenue, it is submitted that this Tribunal may fix the license fee at a reasonable rate by considering the parameter of percentage of net advertisement revenue of the Applicant.

36.9 Lastly, the Applicant submits that the radio industry is in a declining phase of growth and revenue, which has been further exacerbated by the present COVID-19 situation as well as the fixed costs elaborated above, including the administrative cost of compliance, maintenance of music consumption logs and coordination cost for payment of license fee

to the Respondents. Therefore, in order to reduce the cost incurred by the radio industry, it is necessary that the statutory license rate is fixed at 0.75% of net advertisement revenue. It is also humbly submitted that the same this should be pro-rated to the actual consumption of music, in view of the fact that the Applicant has to incur separate costs towards payment of license fee to the Respondents herein which includes performance rights organizations such as Respondent No. 1 as well as other music labels.

In view of the aforesaid, the Applicant humbly reiterates its submission that this Tribunal may determine 0.75% of net advertisement revenue of the Applicant as the rate of license fee payable by the latter to the Respondents for grant of license to broadcast and communicate to the public the sound recordings in the Respondents' repertoire.

36.10 The applicant has prayed that this Tribunal may pass an order declaring a statutory license rate in terms of Section 31-D of the Act.

37. **Description of parties - Sl.no.5(Appeal no. OP (SEC - 31D)/5/2020/CR/NZ)**

In the matter of

D B CORP LTD. **...Applicant**

Versus

1. Phonographic Performance Limited ...Respondent No.1
2. Tips Industries Ltd ...Respondent No.2
3. Saregama India Limited ...Respondent No.3
4. Sony Music Entertainment Pvt Ltd ...Respondent No.4
5. The Indian Performing Performance Rights Society Limited ...Respondent No.5

37.1. Common facts are stated as mentioned earlier, except that the Applicant, D B Corp Ltd., is a part of the Dainik Bhaskar Group. The Applicant owns and operates the FM radio station sunder the name "MY FM". Applicant is the holder of licenses for FM radio stations as granted by the Ministry of Information and Broadcasting and operates its radio stations since 2006. Presently, the Applicant operates 30 FM radio stations out of 7 states across India. Prior to operation and ownership by the Applicant, the FM radio stations MY FM were operated by Synergy Media Entertainment Limited (hereinafter referred to as "**SMEL**"), radio business of SMEL was later demerged into the Applicant Company in the year 2011. A copy of order of the High Court of Madhya Pradesh at Jabalpur, dated January 13, 2011in support of the demerger of radio business of SMEL with the Applicant company is filed as **AnnexureA-1**.

37.2 Respondent No. 1, Phonographic Performance Limited India (hereinafter referred to as "**PPL**" or "**Respondent No. 1**"), is a performance rights organization licensing its members' sound recordings for communication to public in the areas of public performance and broadcast.

a) Respondent No. 2, Tips Industries Limited, (hereinafter referred to as "**Tips"/ "Respondent No. 2"**) is a leading music company that claims to own the exclusive right to issue licenses for the public performance/ communication to the public including broadcasting of all works contained in its repertoire. It is listed on the National Stock Exchange of India Limited and the BSE Limited.

b) Respondent No. 3, Saregama India Ltd., (hereinafter referred to as "**Saregama"/ "Respondent No. 3"**) is a leading music company operating in India since 1902. The company is listed on the National Stock Exchange of India Limited, BSE Limited and Calcutta Stock Exchange. Respondent No. 3 claims to be is the owner of sound recordings of Indian music across 14 different languages.

c) Respondent No. 4, Sony Music Entertainment Pvt. Ltd., (hereinafter referred to as "**Sony**" / "**Respondent No. 4**") is a well know music label in India. It is a wholly owned subsidiary of Sony Music Entertainment Inc., an incorporated company based out of New York, U.S.A. It is the first music label in India to be 100% foreign owned. Respondent No. 4 boasts of an extensive catalogue of Hindi / Bollywood soundtracks, Indie pop, regional music international music etc.

37.3 In 2008, the present Applicant filed an application seeking issuance of a compulsory license under Section 31(1)(b) of the Act by the Copyright Board, since the terms upon which PPL offered to license its respective of sounds recordings were unreasonable. The Copyright Board vide judgment and order dated August 25, 2010 (hereinafter referred to "**Copyright Board Order 2010**") determined the license fee at 2% of net advertising earnings earned by each FM radio station, pro-rated to its use of the music from the repertoire in question. The Applicant relies upon the said judgment and order, pursuant to which the Registrar of Copyright proceeded to issue compulsory licenses to the Applicant herein, on September 03, 2010.

37.4 In the year 2010, Respondent No. 1 instituted a summary suit before the Bombay High Court against SMEL, the predecessor in interest of the present Applicant, for recovery of alleged pending dues on the basis of provision of maximum contingent liability taken by SMEL in its books of accounts for the financial year 2009-2010. The same was computed in terms of the Interim Order of the Copyright Board dated November 19, 2002 which was the only benchmark that existed at the time of making such provision for stating the outer limit of liability. It is noteworthy that these books of accounts were produced before the Hon'ble Madhya Pradesh High Court during the course of proceedings of de-merger of radio business of SMEL into D B Corp Limited. It is further pertinent to note that in view of the fact that the said case included several triable issues, the Hon'ble Court dismissed the summons for judgement of Respondent No.1/ PPL and granted leave to defend the suit to the Applicant herein. The suit is pending adjudication before the Hon'ble High Court.

37.5 In 2016, Respondent No.1 again instituted a suit before the City Civil Court, Mumbai, seeking perpetual injunction, *inter alia*, against the Applicant, from depositing payments into the bank account of PPL for broadcast of sound recordings belonging to PPL's repertoire

for the Applicant's licensed stations under Phase III stations across different cities in India and/or any new stations acquired by the Applicant without obtaining license from PPL. At the time of institution of the said suit, the Applicant paid license fees to PPL as per the rates fixed by the Copyright Board Order 2010. By order dated December 05, 2016, the Court rejected PPL's plea for grant of interim relief. Subsequently, PPL withdrew the suit, with prejudice, vide application dated April 06, 2018.

37.6 By email dated August 07, 2020 Respondent No. 3, though currently a member of PPL, informed the Applicant that its agreement with Respondent No. 1 for radio broadcasting rights for private FM radio stations would stand terminated with effect from September 30, 2020

37.7 The Respondent No. 1 vide email dated August 28, 2020, informed the Applicant that Respondent No. 3 and Respondent No. 4's assignment arrangement with PPL in respect of Private FM radio broadcasting will stand terminated with effect from October 01, 2020. Therefore, Respondent No.4, though currently a member of PPL, its repertoire will be excluded from Respondent No. 1's repertoire for purposes of FM radio broadcasting with effect from October 01, 2020. The date of exit of Respondent No. 4 from Respondent No. 1 again coincides with the date of expiry of the Copyright Board Order 2010. The Applicant submits that the Copyright Order 2010 is binding on Respondent No. 4, in as much as, it is a currently a member of PPL and was represented before the Copyright Board, the Madras High Court and the Supreme Court when the Copyright Board Order, 2010 was subjected to challenge. Accordingly, vide the present application, the Applicant also seeks determination of right, *in rem,* for grant of statutory license and payment of license fee/ rates and for communication to the public by way of broadcast of, inter alia, Respondent No. 4's copyrighted works/sound recordings.

37.8 The Applicant submits that it is on the basis of the Copyright Board Order 2010 that the Applicant has been carrying on its business with due compliance and has been regularly releasing payments of the requisite license fees to the music providers, including Respondents herein, along with the corresponding reports and requisite data as prescribed under the Copyright Board Order 2010. While the Applicant has released all payments as per fees determined by the Copyright Board Order 2010, Respondent No. 1, in the past, has issued unilateral agreements to the Applicant in respect of the Applicant's 13 newly acquired radio stations under the FM Phase III auctions conducted in the year 2015 in order to levy the exorbitant license fees on the Applicant since 2016, much later than the issuance of the Copyright Board Order 2010. Despite the Copyright Board Order 2010, Respondent No. 1 has attempted to pressurize the Applicant to pay the arbitrary and exorbitant license fees.

37.9 In addition to the above, a perusal of the Annual Report of Respondent No. 1 for the year ending 2019 reflects a growth rate at 21%. Contrary to this, there has been a constant decline in growth of the Applicant's revenue during the financial years 2014-2015 till 2017-2018, with a negative growth rate of 11 % in the year 2019-2020. This further evidences the

reduced growth rate of the Applicant as compared to the Respondents and the music industry. The Applicant craves leave of this Tribunal to produce necessary documents in support of this submission.

37.10 In view of the aforesaid, the Applicant reiterates its submission that this Tribunal may determine the rate of license fee payable by the Applicant for grant of license to broadcast and communicate to the public, the sound recordings in the Respondents' repertoire at the rate of 2% of net advertisement revenue of the Applicant.

38. **Description of parties – Sl.no.6 (Appeal no. OP (SEC - 31D)/6/2020/CR/NZ)**

In the matter of

NEXT RADIO LIMITED …Applicant

Versus

Phonographic Performance Limited …Respondent No.1
Saregama India Limited …Respondent No. 2
Tips Industries Limited …Respondent No. 3
Lahari Music Private Limited …Respondent No. 4
Zee Entertainment Enterprises Limited …Respondent No.5
Sony Music Entertainment Pvt. Ltd. …Respondent No. 6
The Indian Performing Rights Society Ltd. ... Respondent No.7

38.1. The main facts in the above matter are similar to the facts of other applicants, except it is stated that the Applicant is a holder of FM licenses granted by the Ministry of Information and Broadcasting and operates a commercial radio network since 2007 under the brand name "Radio One", broadcasting over the radio frequency 94.3 MHzin Delhi, Mumbai, Bengaluru, Kolkata, Chennai, Pune and 95 MHz in Ahmedabad. The Applicant's network is the only network broadcasting in English in all of India's three biggest cities: Mumbai, Delhi and Bangalore. The Applicant runs hybrid stations in Pune and Ahmadabad, playing both Hindi and English music, while its radio stations in Kolkata and Chennai play retro and regional songs, respectively. In September 2018, the Applicant launched a pioneering 'audience tracker', the first by any media company in the country, that tracks the consumption habits of its upscale audience across brands and categories.

a) Respondent No. 1, Phonographic Performance Limited India (**PPL**), is a performance rights organization licensing its members' sound recordings for communication to public in the areas of public performance and broadcast. PPL was registered as a Copyright Society for the purposes of Section 33 of the Act, prior to the notification of the Copyright Amendment Act, 2012 on 21 June 2012 (**Amendment**). After the Amendment, PPL was given time for a year to re-register itself as a Copyright Society under the amended Act. However, PPL has, after applying for re-registration, voluntarily abandoned/withdrawn its application for re-registration. Thus, the Applicant/Petitioner submits that, in view of the language of Section 33(1) of the Act, it is unclear as to whether or not PPL has the right to

license sound recordings on behalf of its members, and therefore, the Applicant's right to challenge PPL's right to license its members' repertoire. PPL currently, on its website claims to own and/or control a substantial portion of the music repertoire available in India including, rights over 356 music labels, with more than 3 million sound recordings. PPL claims to represent some of the largest music labels such as Times Music, Universal Music, Aditya Music and many more. Whether or not PPL has the right to administer and license the sound recordings claimed to be part of its repertoire, the Applicant seeks determination of a statutory license fee, which is a determination, *in rem*.

b) Respondent No. 2 is one of the country's oldest and leading music company that owns the exclusive right to issue licenses for the public performance/ communication to the public (including broadcasting) of all works contained in its music repertoire, stretching across Film music, Carnatic, Hindustani classical, Devotional etc. in all prominent Indian languages. Respondent No. 2 has expanded its catalogue to become the largest in-perpetuity global owner of both sound recording and publishing copyrights of Indian music across 14 different languages. Respondent No. 2 is currently a member of PPL but has sent a communication to the Applicant indicating that its membership of PPL shall cease w.e.f. 01.10.2020.

c) Respondent No. 3 is a leading music company that owns the exclusive right to issue licenses for the public performance/ communication to the public including broadcasting of more than 3500 songs contained in its repertoire. Respondent No. 3 was a member of PPL till 2015 and was bound by the CB Order. The Applicant submits that, though the Applicant currently has a voluntary license arrangement with Respondent No. 3, the Applicant seeks to make payment of license fee to Respondent No. 3 at the uniform rate determined by this Tribunal in these proceedings.

d) Respondent No. 4 is a major regional music provider and owner of the popular music label "*Lahari Music*". Respondent No. 4 owns and controls copyright in a large repertoire of musical content in Kannada, Tamil, Telugu languages. Respondent No. 5 operates under the brand name "Zee Music Company" and is one of the largest music labels in the country, acquiring the rights to over 50% of new Bollywood music year on year and releasing 1500+ new songs annually .Though the Applicant is currently not licensing or broadcasting any music from Respondent No. 4 & 5's catalogue, it seeks to do so in the future by paying license fee at a rate that is determined by this Tribunal.

e) Respondent No. 6 is a well-known music label in India. It is a wholly owned subsidiary of Sony Music Entertainment Inc., an incorporated company based out of New York, U.S.A. It is the first music label in India to be 100% foreign owned. Respondent No. 6 boasts of an extensive catalogue of Hindi / Bollywood soundtracks, Indie pop, regional music international music etc. Like Respondent No. 3, Respondent No. 6 is also currently a member of PPL however, Respondent

No.1 has issued a communication to the Applicant indicating that the membership of both Respondent No. 3 and 4 with PPL shall cease w.e.f. 01.10.2020.

38.2 By e-mail dated 07 August 2020, Respondent No. 2, though currently a member of PPL, informed the Applicant, that it would be exiting Respondent No. 1' s membership with effect from 30 September 2020. Incidentally, the date of exit of Respondent No. 2 from Respondent No. 1 coincides with the date of expiry of the CB Order. The Applicant submits that the CB Order is binding on Respondent No. 2, in as much as, it is a currently a member of PPL and was represented before the Copyright Board, the Madras High Court and the Supreme Court when the CB Order was subjected to challenge. Accordingly, vide the present application, the Applicant also seeks determination of right, *in rem,* for grant of statutory license and payment of license fee/ rates and for communication to the public by way of broadcast of, inter alia, Respondent No. 2's copyrighted works/sound recordings. The Applicant's associate responded to the aforesaid email on 28 August 2020.

38.3 In addition to the above, Respondent No. 1 vide email dated 28 August 2020, informed the Applicant that Respondent No. 6's assignment arrangement with PPL in respect of Private FM radio broadcasting licensing will stand terminated with effect from 01 October 2020. Therefore, Respondent No. 6, though currently a member of PPL, its repertoire will be excluded from Respondent No. 1's repertoire for purposes of FM radio broadcasting with effect from 01 October 2020. Incidentally, the date of exit of Respondent No. 6 from Respondent No. 1 also coincides with the date of expiry of the CB Order. The Applicant submits that the CB Order is binding on Respondent No. 6, in as much as, it is a currently a member of PPL and was represented before the Copyright Board, the Madras High Court and the Supreme Court when the CB Order was subjected to challenge. Accordingly, vide the present application, the Applicant also seeks determination of right, *in rem,* for grant of statutory license and payment of license fee/ rates and for communication to the public by way of broadcast of, inter alia, Respondent No. 6's copyrighted works/sound recordings.

38.4 It is mentioned that a percentage of net advertisement revenue earned by a radio broadcaster has been approved by several of the relevant stakeholders in the industry. An indication of acceptance of (i) not only the *benchmark/criterion of advertising revenue to be used for the purpose of calculation of license fee*, but also (ii) a rate that is akin to 2%, is the fact that even the Government/licensor, while granting a license to the Applicant to permit broadcast from its radio stations, has fixed a rate of 4% of gross revenue of the FM channel for a financial year or at the rate of 2.5% of the One-Time Entry Fee for the city.

38.5 The Applicant further submits that:

a) The annual costs incurred for fixed charges such as Prasar Bharti Tower Rental Fee lie within the range of 3% – 6% of the Applicant's gross revenue, for Wireless Operating License Fee is INR 3.38 Lakhs per radio station in a year and for Operation and Maintenance of Common Transmission Infrastructure is 0.37% of the Applicant's gross revenue; and

b) The fee/costs paid to Broadcast Engineering Consultants India Ltd. (BECIL) for usage of the Common Transmission Infrastructure in all cities (except Delhi and Kolkata) are in the range of 15 – 23 lakhs annually.

It is also stated that payment of fees towards the fixed charges as stated are mandated by the Ministry of Information and Broadcasting under Phase III of the Policy Guidelines for expansion of FM Radio Broadcasting services through private agencies, and include the average annual fixed charges, which are mandatorily incurred by any private radio operator including the Applicant.

38.6 It is prayed to pass an order/direction declaring the said rate to be an amount equivalent to 0.75% of the net advertising earnings of each radio station of the Applicant, accruing from the radio business only for that radio station based on a pro rata distribution of compensation to all music licensors including the Respondents herein, in proportion to the music/works provided by the respective music licensor and broadcast by the Applicant, including but not limited to the Respondents .

It is also prayed to pass an interim order directing the Applicant to pay an amount equivalent to 2% of the net advertisement earnings, as fixed by the CB Order, pending the determination of the license fee rate in the present proceedings , to protect the interest of the Respondents.

39. **Description of parties – Sl.no.7(Appeal no. OP (SEC - 31D)/7/2020/CR/NZ)**

In the matter of

DIGITAL RADIO (MUMBAI) BROADCASTING LTD. …Applicant

Versus

Phonographic Performance Limited …Respondent No.1
Saregama India Limited …Respondent No. 2
Zee Entertainment Enterprises Limited …Respondent No.3
The Indian Performing Rights Society Ltd. ... Respondent No.4

39.1 Most of the facts and legal issues are common with other applicants, except it is stated the Applicant, Digital Radio (Mumbai) Broadcasting Limited owns and operates two FM radio stations in Mumbai namely 'Red FM' at frequency 93.5 MHz and 'Magic FM' at frequency 106.4 MHz. Applicant is the holder of licenses for FM radio stations granted by the Ministry of Information and Broadcasting and is operating radio stations since the year 2002-2003.

a) Respondent No. 1, Phonographic Performance Limited India (hereinafter referred to as '**PPL**'), is an organization licensing its members' sound recordings for communication to public including broadcast. PPL was registered as a Copyright Society under Section 33, prior to the amendments to the Copyright Act, 1957 (hereinafter referred to as the **'Act'**) that came into effect on 21.06.2012.

Subsequently, PPL was provided with a year to re-register itself as a Copyright Society under the amended Act, however PPL applied that then abandoned its application for re-registration as a Copyright Society.

b) It is stated that while the Applicant was not a party to the proceedings before the Copyright Board, it has been paying an amount of INR 400/- per needle hour to PPL in terms of an interim order passed by the Hon'ble High Court of Calcutta dated 24.04.2002(hereinafter referred to as '**Calcutta High Court Order**') passed in ***Living Media (India) Limited & Ors. vs. Union of India & Ors. (WP 6314 (W) of 2002).***A copy of the Calcutta High Court Order is also filed.

39.2 It is submitted that despite multiple requests, PPL has refused to budge from its stand and continues to charge the Applicant at the interim rate prescribed by the Calcutta High Court Order i.e. INR 400/- per needle hour.

39.3 It is submitted that procedural obstructions and non/improper functioning of the Intellectual Property Appellate Board/Copyright 5 the year 2013 to 2019 restrained the Applicant from seeking determination/fixation of license fee at a rate equivalent to 2% of the net advertising revenue. It is also submitted that the Copyright Board Order is valid till September 30, 2020 as it was to stay in effect for a period of ten years and vide the present application/petition, the Applicant is seeking fixation of the license fee to enable Applicant to exercise its vested right under section 31 D of the Act.

39.4 Respondent No. 2, Saregama India Limited (hereinafter referred to as **'Saregama')** is one of the largest music labels of India, that claims to own the exclusive right to issue licenses for the communication to the public including broadcasting of the sound recordings contained in its repertoire.

39.5 It is submitted that the Saregama is a member of PPL and no separate agreement was required for using the repertoire of Saregama. However, vide email dated 07.08.2020, Saregama informed the Applicant of its decision to terminate its membership with PPL with effect from October 1, 2020. Vide the said email, it was further informed that in case the Applicant wishes to use the repertoire of Saregama after September 30, 2020, the Applicant will have to execute a separate license agreement with Saregama. Email dated 07.08.2020 is also filed.

39.6 Respondent No. 3, Zee Entertainment Enterprises Limited India (hereinafter referred to as "**ZEEL**"), is a leading music company and claims to own the exclusive rights to issue licenses for the communication to the public including broadcasting of the sound recordings contained in its repertoire.

39.7 Desirous of using the repertoire of ZEEL, the Applicant had entered into a license agreement with them on 09.05.2019 that was deemed effective from 01.04.2019. The

agreement was valid for one year and pertained to the use of sound recordings contained in the repertoire of ZEEL by the Applicant for an annual consideration of INR 20,00,000/- (Indian Rupees Twenty Lakhs only). This amount was determined by taking to consideration backward calculation of the anticipated pro-rate music use and then applying the pro-rated 2% formula, to the anticipated revenue during the term of the license.

39.8 It is also submitted that the license agreement between the Applicant and ZEEL expired on31.03.2020but owing to the Covid-19 pandemic, the same was extended for a period of 2 months i.e. till 31.05.2020 and after thatit could not be renewed owing to the exorbitant license fee demanded by ZEEL. The license agreement dated 09.05.2019 is filed**.**

39.9 It is submitted that vide the present application, the Applicant seeks fixation of license fee at a rate equivalent to 2% of the net advertising earnings of each radio station of the Applicant, accruing from the radio business only for that radio station based on a pro rata distribution of compensation to the Respondents and any other third party sound recording company whose music is broadcast by the Applicant herein, in proportion to the5

39.10 It is prayed that this Intellectual Property Appellate Board to pass an interim directing the Applicant to pay an amount equivalent to 2% of the net advertising revenue earnings of each radio station of the Applicant, accruing from the radio business only for that radio station based on a pro rata distribution of compensation to the Respondents herein, in proportion to the music/works provided by the Respondents and broadcast by the Applicant..

40. **Description of parties – Sl. No8 (Appeal no. OP (SEC - 31D)/8/2020/CR/NZ)**

In the matter of

SOUTH ASIA FM LIMITED ….. Applicant/ Petitioner

VERSUS

Phonographic Performance Limited … Respondent No.1
Saregama India Limited … Respondent No. 2
The Indian Performing Rights Society Ltd. ... Respondent No.3

40.1 Facts and legal issues are common as in other cases of the applicants. In addition, it is stated that the Applicant, South Asia FM Limited owns and operates the FM radio station at frequency 93.5 MHz under the name 'South Asia FM'. Applicant is the holder of licenses for FM radio stations granted by the Ministry of Information and Broadcasting and is operating radio stations since the year 2002-2003.

a) Respondent No. 1, Phonographic Performance Limited India (hereinafter referred to as '**PPL**'), is an organization licensing its members' sound recordings for communication to public including broadcast. PPL was registered as a Copyright Society under Section 33, prior to the amendments to the Copyright Act, 1957 (hereinafter referred to as the **'Act'**) that came into effect on 21.06.2012.

Subsequently, PPL was provided with a year to re-register itself as a Copyright Society under the amended Act, however PPL applied that then abandoned its application for re-registration as a Copyright Society.

The Applicant submits that it is unclear as to whether PPL still reserves the right under section 33 (1) of the Act to license sound recordings on behalf of its members. However, without prejudice to the Applicant's right to dispute the PPL's right to issue or grant licenses, it is noteworthy that PPL currently asserts that it owns and/or controls significant portion of the music repertoire available in India including rights over 356 music labels, with more than 3 million sound recordings. PPL claims to represent companies such as Times Music and Universal Music etc.

b) Respondent No. 2, Saregama India Limited (hereinafter referred to as **'Saregama')** is one of the largest music labels of India, that claims to own the exclusive right to issue licenses for the communication to the public including broadcasting of the sound recordings contained in its repertoire.

40.2 It is submitted that the Saregama is a member of PPL and no separate agreement was required for using the repertoire of Saregama. However, vide email dated 07.08.2020, Saregama informed the Applicant of its decision to terminate its membership with PPL with effect from October 1, 2020. Vide the said email, it was further informed that in case the Applicant wishes to use the repertoire of Saregama after September 30, 2020, the Applicant will have to execute a separate license agreement with Saregama.

It is also submitted that the Copyright Board Order is valid till September 30, 2020 as it was to stay in effect for a period of ten years.

40.3 By the present application, the Applicant seeks fixation of license fee at a rate equivalent to 2% of the net advertising earnings of each radio station of the Applicant, accruing from the radio business only for that radio station based on a pro rata distribution of compensation to the Respondents and any other third party sound recording company whose music is broadcast by the Applicant herein, in proportion to the music/works broadcast by the Applicant.

40.4. The applicant submits that the factors to be taken into consideration, while fixing the license fee for statutory license, are envisaged under Rule 31 (7) of the Copyright Rules 2013. It is also submitted that a perusal of the Copyright Board Order makes it abundantly clear that it is a well-reasoned order supported by documentary evidence that was appreciated by the Board. It is also reiterated that the said order was not altered/withdrawn or stayed, despite appeals up to the Hon'ble Supreme Court of India and has stood the test of time over the past ten years.

40.5 It is submitted that the sole reason as to why the Applicant is unwilling to obtain voluntary licenses is because of the exorbitant rate of license fee demanded by the Respondents. It is stated that till 01.08.2020, PPL's rate as advertised on its website was as under:

a) The voluntary license was being offered at different rates. For Phase-I and Phase-II licenses, the asking rate was*Rs.2400 per needle hour*, or *20% of net advertising revenue*. The asking rate for the Phase-III license was fixed at Rs.750 per needle hour in case the broadcast took place in the 8 Metro cities identified therein, or Rs.650 per needle hour in case of any other city. It was also mentioned on the website that the said flat fee rates were concessional "early-bird" rates, and were valid only till 31.3.2020, and were available only to those Phase-III licensees who had set up new stations.

b) There were following issues with such an offer:

i. the rate was unsupported by any study/evidence;

ii. there was no reasonable basis to classify Phase-I and II licensees differently from "new" Phase-III licensees, since, after the Migration of Phase-I and II licensees, with effect from 1.4.2015, all licensees are Phase-III licensees;

iii. the flat fee amount failed to take into consideration, even the standard or methodology that is prevalent, i.e., a percentage of net advertising revenue, to calculate the license fee. This also failed to consider the amount of usage and the amount of revenues earned by the relevant radio station;

iv. additionally, the rate of 20% of that was sought to be used as a comparator to seek license fee based on net advertising revenue, was demonstrably arbitrary and baseless, especially given the findings in the Copyright Board Order of 25.08.2010.

40.6 In any event, the Applicant submits that Copyright Board's order of August 25, 2010 fixing the license fee rate at 2% of net advertising earnings should be applied in the present case, on the following amongst other grounds:

(i) The business of both the Applicant and Respondents are intertwined and interlinked in such a way that the growth in the Applicant's business will benefit the Respondents. It is submitted that all over the world, it is recognized that apart from the revenue earned by music companies from licensing radio airplay, the music companies and performers benefit immensely from such airplay and it promotes music and helps sales of music by the music companies.

(ii) Unlike the aforementioned method, Respondents' method of fixed fee based on needle hour rate is arbitrary and impractical as it is not linked with the profit or loss made by the Applicant and is a mere imposition of rates without considering the needs of the radio industry. It is submitted that the Copyright Board relied on the same reasoning while determining the rate and method in the year 2010.

(iii) The rate equivalent to 2% of the net advertising revenue is in conformity with the global standards as the global average range lies between 1% to 5% of the net broadcasting revenue. In this regard, it is stated that (i) these rates have largely remained unchanged over the course of the last 10 years; and (ii) where the rates are higher than 2%, it is because of the fact, either that the licensees are operating in a developed economy or that the music owner/licensor also grants the right to the radio station to simulcast the content on the radio station's own website.

40.7. It is prayed that IPAB may pass an order/direction to fix an amount equivalent to 2% of the net advertising revenue (towards license fee) earnings of each radio station of the Applicant, accruing from the radio business only for that radio station based on a pro rata distribution of compensation to the Respondents herein, in proportion to the music/works provided by the Respondents and broadcast by the applicant.

41. **Description of parties – Sl. No. 9(Appeal no. OP (SEC - 31D)/9/2020/CR/NZ)**

In the matter of

Reliance Broadcast Network Limited ...Applicant

Versus

Super Cassettes Industries Private Limited ...Respondent No.1

The Indian Performing Rights Society Ltd. ... Respondent No.2

41.1 Apart from common facts and legal issues involved in other applicants' cases, it is stated that the Applicant, Reliance Broadcast Network Limited owns and operates the FM radio station with the frequency 92.7 MHz and under the name "BIG FM- Dhun badal ke toh dekho". Applicant is the holder of licenses for 58 FM radio stations granted by the Ministry of Information and Broadcasting and operates its radio stations since 2006.

41.2 The Respondent is Super Cassettes Industries Private Limited. It operates under the brand, T-Series, a music record label business as well as a film production company. It claims to own and control one of the biggest catalogues of Bollywood music and Indi-pop music. It is submitted that the Applicant and the Respondent entered into copyright license agreements on 25.03.2007 and 01.04.2009, respectively. The license agreements dated 25.03.2007 and 01.04.2009 are filed.

41.3 It is mentioned that at the time when the Applicant entered into agreements with the Respondent, some radio broadcasters had challenged the liability to pay separate license fee for musical works and accompanying lyrics, in addition to license fee for sound recordings. The challenge was mounted in respect of the claimed licensing right of the Indian Performing Rights Society. However, there was no determination of the said issue by the Courts of Law, even though matters were pending before the High Courts of Delhi & Bombay. Thus on the representation of the Respondent that such a dual license fee both for the sound recordings as well as for the underlying musical works and literary works is

payable, the Applicant was paying the Respondent, both sets of license fee, labelled as copyright license fee for sound recordings and performance license fee for underlying works.

41.4 It is stated that while the Applicant, in good faith, believed the representations of the Respondent that performance license fee was payable, however, the Applicant kept a watch on the proceedings before the Courts of Law.

41.5 The Applicant came across the judgment of the Hon'ble High Court of Bombay in *Music Broadcast Private Limited (MBPL) v. Indian Performing Right Society (IPRS)* as also a decision of the Hon'ble Delhi High Court in the case of IPRS vs. Aditya Pandey & Anr., both of which decisions held that the radio stations, while broadcasting any sound recordings were not liable to pay any license fee for underlying works and the only fee that was required to be paid was the license fee in respect of sound recordings to an owner of sound recordings.

41.6 Accordingly, the Applicant apprised the Respondent of the aforesaid orders vide a letter dated August 30, 2011 and requested the Respondent to either refund the excess amount charged under the head of performance license fee or to adjust the same in the future copyright licensee fee. Unfortunately, after several negotiations, the parties failed to reach an agreement and the Applicant filed a suit for declaration and permanent injunction against the Respondent before the Delhi High Court titled *'Reliance Broadcast Network Limited v. Super Cassettes Industries Private Limited',[CS (COMM) 1040 of 2016]* seeking declaration that pursuant to the aforementioned judgments and orders, the Applicant is under no liability to pay separate license fee for underlying works hence is entitled to a refund of the excess license fee paid to Respondent, or to adjustment against future license fee for sound recordings.

41.7 It is stated that the Respondent filed a counter suit for recovery of performance license fee against the Respondent before the Delhi High Court titled '*Super Cassettes Industries Private Limited v. Reliance Broadcast Network Limited'[CS (COMM) 1047 of 2016].*

41.8 It is stated that both the matters were clubbed together and are being heard collectively. It is further stated that the evidence has been concluded in both the matters and they are fixed for final hearing.

41.9 It is prayed that IPAB may pass an order/direction to fix an amount equivalent to 1% of the net advertising revenue (towards royalty / license fee) earnings of each radio station of the Applicant, accruing from the radio business only for that radio station based on a pro rata distribution of compensation to the Respondent herein, in proportion to the music/works provided by the Respondent and broadcast by the Applicant.

42. **Description of parties – Sl.no. 10 (Appeal no. OP (SEC - 31D)/1/2020/CR/WZ)**

In the matter of

HT Media Limited … Applicant

Versus

Phonographic Performance Ltd. & Ors.	…	Respondent no.1
Saregama India Limited	…	Respondent no.2
Tips Industries Limited	…	Respondent no.3
Zee Entertainment Enterprises Ltd.	…	Respondent no.4
Sony Music Entertainment Pvt Ltd.	…	Respondent no.5
The Indian Performing Society Ltd.	…	Respondent no.6

42.1 The facts and legal issues in the present case of the applicant are common, except that the applicant is a holder of FM licenses granted by the Ministry of Information and Broadcasting and operates a commercial radio network under the brand name "Fever FM", and Radio Nasha 107.2 FM, Delhi and 91.9 FM in Mumbai broadcasting over the radio frequencies qua fourteen radio stations at Delhi, Mumbai, Kolkata, Bangalore, Hyderabad, and various other places in India.

a) Respondent No. 1, Phonographic Performance Limited India (**PPL**), is a performance rights organization licensing its members' sound recordings for communication to public in the areas of public performance and broadcast. PPL was registered as a Copyright Society for the purposes of Section 33 of the Act, prior to the notification of the Copyright Amendment Act, 2012 on 21 June 2012 (**Amendment**). After the Amendment, PPL was given time for a year to re-register itself as a Copyright Society under the amended Act. However, PPL has, after applying for re-registration, voluntarily abandoned/withdrawn its application for re-registration. Thus, the Applicant/Petitioner submits that, in view of the language of Section 33(1) of the Act, it is unclear as to whether or not PPL has the right to license sound recordings on behalf of its members, and therefore, the Applicant's right to challenge PPL's right to license its members' repertoire. Nevertheless, PPL currently, on its website claims to own and/or control a substantial portion of the music repertoire available in India including, rights over 356 music labels, with more than 3 million sound recordings. PPL claims to represent some of the largest music labels such as Times Music, Universal Music, Aditya Music and many more. It is submitted that, whether or not PPL has the right to administer and license the sound recordings claimed to be part of its repertoire, the Applicant seeks determination of a statutory license fee, which is a determination, *in rem*. It is pertinent to note that the Applicant and PPL have always been at loggerheads, resulting in an infringement litigation filed by PPL against Applicant before Hon'ble High Court of Delhi in bearing no. CS (OS) 2749/2011 wherein vide order dated 30.11.2012, Hon'ble Court and in 2015 in Bombay High Court wherein in both the natters, Hon'ble Court were pleased to allow the Applicant to continue paying 2% of net advertisement revenue to PPL by way of a *pro tem* arrangement.

b) Respondent No. 2 is one of the country's oldest and leading music company that owns the exclusive right to issue licenses for the public performance/ communication to the public (including broadcasting) of all works contained in its music repertoire, stretching across Film music, Carnatic, Hindustani classical,

Devotional etc. in all prominent Indian languages. Respondent No. 2 has expanded its catalogue to become the largest in-perpetuity global owner of both sound recording and publishing copyrights of Indian music across 14 different languages. Respondent No. 2 is currently a member of PPL but has sent a communication to the Applicant indicating that its membership of PPL shall cease w.e.f. 01.10.2020.

c) Respondent No. 3 is a leading music company that owns the exclusive right to issue licenses for the public performance/ communication to the public including broadcasting of more than 3500 songs contained in its repertoire. Respondent No. 3 was a member of PPL till 2015 and was bound by the H.C Order. The Applicant submits that, though the Applicant currently has a voluntary license arrangement with Respondent No.3, the Applicant seeks to make payment of license fee to Respondent No.3 at the uniform rate determined by this Tribunal in these proceedings. The Respondent no. 3 has filed infringement proceeding in Bombay High Court which was listed on 18 September 2020. After hearing the parties, taking cognisance of the fact that IPAB is seized of Statutory License applications, Justice Shriram, adjourned the matter to 05 October 2020 for directions.

d) Respondent No. 4 operates under the brand name "Zee Music Company" and is one of the largest music labels in the country, acquiring the rights to over 50% of new Bollywood music year on year and releasing 1500+ new songs annually. Though the Applicant is currently not licensing or broadcasting any music from Respondent No. 4 catalogue, it seeks to do so in the future by paying license fee at a rate that is determined by this Tribunal.

e) Respondent No. 5 is a well-known music label in India. It is a wholly owned subsidiary of Sony Music Entertainment Inc., an incorporated company based out of New York, U.S.A. It is the first music label in India to be 100% foreign owned. Respondent No. 6 boasts of an extensive catalogue of Hindi / Bollywood soundtracks, Indie pop, regional music international music etc. Like Respondent No. 3, Respondent No. 5 is also currently a member of PPL however, Respondent No.1 has recently issued a communication indicating that the membership of both Respondent No. 3 and 4 with PPL shall cease w.e.f. 01.10.2020.

42.2 The Applicant and Respondent No.1 on behalf of its member, as "authorised representative" had, in fact, entered into LICENSE agreements dated 11.10.2006 wherein there was a clear stipulation that Applicant agreed to take license from Respondent No.1 on payment of license fee at the rates of Rs.1200/- per needle hour, Rs.720/- and Rs.300 per needle hour depending and varying with the time of day that music was played. It was further agreed between parties that payment at such rate would be subject to adjustments as per the final order that may be passed by appropriate authority/ Copyright Board. It was also agreed between parties that in case rates decided by Board would be less than at which

Applicant radio stations are paying, then Respondent would adjust the differences from further usages by Applicant radio stations.

42.3 In the said agreement, it was further agreed that agreement shall stand substituted with retrospective effect as soon as the final order of Copyright Board is passed with rates as determined by the Board. That soon thereafter, on 25.08.2010, Copyright Board pronounced judgment in the matters remanded back by Hon'ble Supreme Court and all other matters filed subsequently, after recording evidence and holding a detailed enquiry. The Board vide its judgment was pleased to fix the total pay-out for royalty to all stakeholders of music at 2% of the net advertising revenue, which is proportional to usage of Respondent music by respective radio station. Said agreement dated 11.10.2006 is also filed.

42.4 In view of terms of agreement, Applicant sent various letters/ representations to Respondent stating the terms which Applicant deemed reasonable. It was clearly specified that the rate stipulated in the voluntary license agreement between parties was at the rate of Rs.1,200/- Rs.720/- and Rs.300/- per needle hour depending and varying with the time of day that music was played and same was arrived at only because no consensus could be arrived at between parties at the time of execution of said agreement and said rates were chosen being the only rate available as a market standard, having been decided upon by Copyright Board in the erstwhile reported proceedings. It was further pointed out that this rate was to stand substituted by the rate which may be determined by this Board and that determination had in fact taken place.

42.5 It is stated that it was further requested by Applicant that Rs.80Lacs @ Rs.20Lacs per station which may be refunded so that Applicant may provide them with the bank guarantees in compliance of order passed by Board. However, there was no attempt on part of Respondent to renew the agreements with the substituted terms of payment and/ or grant a voluntary license in favour of the Applicant as per judgment dated 25.08.2010. In another attempt to reach out to Respondent, Applicant wrote yet another letter dated 01.11.2010 to Respondent. Applicant, along with letter dated 01.11.2010, also enclosed bank guarantees for each of its four radio stations as per the order of the Copyright Board and as per the understanding between parties. However, no response was forthcoming from Respondent despite the factum that agreement was reaching its end on 31.10.2010.

42.6 Further, with a view to wriggle out of its contractual obligations and in the furtherance of its mala fide intentions did not renew the voluntary license agreements and initiated CS (OS) 2749/2011 against the applicant before the Hon'ble High Court of Delhi.

42.7 In light of the breach of contract and acts of the respondent (PPL), the applicant had also filed a compulsory license application in 2010 bearing number F.No.3-12/2010-CRB(WZ) before the erstwhile Copyright Board, which is pending adjudication till now and has not

been listed by IPAB despite early hearing application filed by applicant on 21 August 2020. Said compulsory application/ petition is also placed on record.

42.8 Thereafter, the Hon'ble High Court of Delhi vide its detailed order dated 30.11.2012, in I.A. No.17604/2011 & I.A. No.20715-16/2011 in CS(OS) No.2749/2011, which was passed after a detailed hearing was pleased pass the following direction:-

> *"38. The interim directions are issued by directing the defendant to pay the license fee on the basis of 2% of the net advertisement earnings of each FM Radio station accruing from the radio business only within four weeks from today from the date of non-payment of royalty amount to the plaintiff upto date till the time the application seeking the compulsory licensing is disposed of and the defendant shall continue to pay the same."*

Pursuant to the HC Order, the Applicant has been making payments of license fees to the Respondent no. 1 at the rate of 2% of net advertising earnings as determined by the said Order.

42.9 In 2015-16, the Applicant in FM Phase-3 bidding for new frequencies was successful bidder and brought 10 new frequencies from Government of India/Ministry of Information and Broadcasting. The Applicant now operates 14 Radio Station in India.

42.10 The applicant has received a letter dated 27 August 2020 and 28 August 2020 from the respondent no. 1 stating that the copyright Board order dated 25.08.2010 is in force till only 30.09.2020 and the applicant should obtain a voluntary license from the respondent on the respondent's new tariff.

42.11 It is the case of the applicant in the instant petititon that the said contention of the respondent raised in letter of August 28, 2020 as far as the applicant is concerned is incorrect as the broadcast by the applicant of the respondent's musical repertoire is in terms of the Hon'ble High Court of Delhi's interim order dated 30.11.2012, which direction is not limited to 30.09.2020. However without prejudice to its contentions, and with an intent to avoid an issue with the respondent on the said account the applicant has filed the accompanying application seeking grant of a Statutory License in terms of section 31D. As the license agreement between the parties, provided that the rates which shall be fixed by the Copyright Board would apply to the said agreement, it is pertinent to mention to the order dated 25.08.2010 passed by the Copyright Board and the proceedings that have taken place thereafter.

42.12 By email dated August 7, 2020, Respondent No. 2, though currently a member of PPL, informed the Applicant's that it would be exiting Respondent No. 1' s membership with effect from September 30, 2020. Incidentally, the date of exit of Respondent No. 2 from Respondent No. 1 coincides with the date of expiry of the CB Order. The Applicant submits that the CB and H.C Order is binding on Respondent No. 2, in as much as, it is a currently a member of PPL and was represented before the Copyright Board, the Madras High Court and the Supreme Court when the CB Order was subjected to challenge and also

when Hon'ble High Court of Delhi passed an order against PPL in above said proceedings. Accordingly, vide the present application, the Applicant also seeks determination of right, *in rem,* for grant of statutory license and payment of license fee/ rates and for communication to the public by way of broadcast of, inter alia, Respondent No. 2's copyrighted works/sound recordings. The Applicant's responded to the aforesaid email on August 28, 2020

42.13 The Respondent No. 1 vide email dated August 28, 2020, informed the Applicant that Respondent No. 6's assignment arrangement with PPL in respect of Private FM radio broadcasting licensing will stand terminated with effect from October 01, 2020. Therefore, Respondent No. 5, though currently a member of PPL, its repertoire will be excluded from Respondent No. 1's repertoire for purposes of FM radio broadcasting with effect from October 01, 2020.

42.14 The Applicant further submits that:

i) The annual costs incurred for fixed charges such as Prasar Bharti Tower Rental Fee lie within the range of 2-4% of the Applicant's gross revenue, for Wireless Operating License Fee is INR 3.38 Lakhs for each of its fourteen Radio Stations in a year and for Operation and Maintenance of Common Transmission Infrastructure is 0.3% of the Applicant's gross revenue; and

ii) The fee/costs paid to Broadcast Engineering Consultants India Ltd. (BECIL) for usage of the Common Transmission Infrastructure are in the range of 20-25 lakhs annually.

42.15 It is mentioned by the applicant that payment of fees towards the fixed charges as stated herein are mandated by the Ministry of Information and Broadcasting under Phase III of the Policy Guidelines for expansion of FM Radio Broadcasting services through private agencies, and include the average annual fixed charges, which are mandatorily incurred by any private radio operator including the Applicant.

42.16 It is prayed by the petitioner that this Tribunal may pass an order declaring a statutory license rate in terms of Section 31-D of the Act and also prayed to pass an order/direction declaring the said rate to be an amount equivalent to 1% of the net advertising earnings of each radio station of the Applicant, accruing from the radio business only for that radio station based on a pro rata distribution of compensation to all music licensors including the Respondents herein, in proportion to the music/works provide d by the respective music licensor and broadcast by the Applicant, including but not limited to the Respondents and to pass an interim order directing the Applicant to pay an amount equivalent to 2% of the net advertisement earnings, as fixed by the CB Order, pending the determination of the license fee rate in the present proceedings, to protect the interest of the Respondents.

42.17 The applications have been filed by the Indian Performing Right Society Limited as Intervener seeking to intervene in the captioned matter under Section 31D of the Copyright Act, 1957 ("the Act") read with Rule 31 of the Copyright Rules, 2013 ("the Rules") for fixing royalties in relation to Radio Broadcast of Sound Recordings owned by the Respondent copyright owners in India.

42.18 It is stated that Section 31D allows for all "interested parties" to make submissions towards the fixation of a Statutory License/Royalty Rate in respect of the Broadcast or Performance of Sound Recordings or Literary or Musical Works or a Combination thereof. Further, Rule 31 of the Copyright Rules 2013 requires that this Tribunal issue a Notice for Public Hearing towards such fixation of Statutory License Royalty Rates. No Notice has been issued on such fixation in relation to FM Radio Broadcasting. The Petitioner, as an owner of rights i.e., Copyrights as assigned by its individual members and as the Body statutorily authorised to represent the Owners of the "Authors Royalty Right" constitutes and "interested person", and therefore they should be heard by this Tribunal on the prayer of interim rates as also on merits on the fixation of Rates under Section 31D.

43. **PPL (R-1)**

The facts pertaining to the respondent PPLare mentioned below:

43.1 PPL is a performance rights organization licensing its members' sound recordings as provided in Section 14(e)(iii) of the Copyright Act, 1956 (hereinafter referred to as the Act) - communication to public in the areas of – (a) on ground public performance and (b) radio broadcast of the repertoire assignedbytherespectivespecificmembers.PPLwasincorporatedin1941 and earlier known as Indian Phonographic Industry(IPI). ThatPPLstartedfunctioningasaCopyright society from 07.05.1996, administering its members' rights under Chapter VII oftheCopyright ActonthebasisofauthorizationsunderSection34(1)(a).The Copyright (Amendment) Act, 2012 under Section 33(3A), required re- registration for all Copyright Societies that were already registered under the previous regime. On 21.06.2014, PPL voluntarily ceased to be a Copyright society, but the existence as a company was continued carrying on its licensing business as an owner under Section 30 of the Act. That PPL has made an application under the statute of 2012 to be registered as a Copyright Society. The same is pending before the concerned authorities.

43.2 PPL owns and/or controls Public Performance rights of over 360 music labels. PPL represents some of the world's and India's best record labels. A list ofallthemembersunderPPL(asondate)isbeingfiledseparately.Themembers under the umbrella of PPL include music labels/companies across India with a substantial repertoire of sound recordings, in both film and non-film genresin Hindi, Bengali, Kannada, Telugu, Marathi, Panjabi, English, and other languages. Some of the said members of the PPL also hold exclusive rights in Indiaoverforeignsoundrecordingswhicharepublishedin India.After the order of the Copyright Board dated 25.08.2020, many members have left PPL to administer their

individual rights. A List of such members and the dates when they resigned is being filedseparately.

43.3 PPL does not enjoy any financial aid, assistance, grant, subsidy, loan, concession, investment, guarantee or shareholding of the Central or any State Government. PPL owns in sound recordings of intellectual property that have been created, acquired and accumulated over years.

43.4 A Tariff Scheme dated 01.08.2020 has been prepared by PPL, being the owner of the Copyright assets and an interested party under Rule 31 of the Copyright Rules, 2013 read with Section 31D of the Copyright Act.

43.5 It is submitted that the conduct of the Applicant(s) has been contrary to the provisions under law in as much as they have suppressed vital and material documents including their financials showcasing royalty being paid to music owners other than PPL. That the aforementioned documents are vital for proper adjudicationofthepresentproceedingsasthesame shallestablishbeyonddoubt the dominant position of the Radio Industry due to which it has been successful in exploiting the Music industry and PPLalike.

43.6 Theproducerinordertomonetizehisinvestmentsdirectsandassignsthe rights in the 'sound recordings' to the music companies. The music companies thus have all Copyright in the sound recordings including the literary work and musical work and also the rights over the sound recording as defined in Section 2(xx)oftheAct.Themusiccompanythusstepsintotheshoesofthe Authorand becomes the owner of Copyrights under thisAct.

43.7 The music company (i.e. the members) of PPL therefore, assigns some rights out of its cluster of rights in the sound recordings to PPL to administer and license the same.

43.8 PPL collective thus becomes the owner of the sound recordings of the aforementioned film producers and Music Companies by way of assignment, executedbytheproducersofsuchworks,underSection18oftheCopyrightAct 1957. That PPL has 350+ sound recording/film/non-film music and sound recording owners and/or producers, who voluntarily by way of assignment of ownership rights, pass such ownership of sound recordings and music work to PPL.

43.9 The"producer" while authorizing the rights in the film music passes all the rights to a collective like PPL thereby making it the rightful owner. That the respective owners/producers/musiccompanyhavingrightsinthesoundrecordingsand having granted assignments to PPL - make PPL rightful owner of the Copyright incommunicationtopublicintheareasof(a)ongroundpublicperformanceand (b) radiobroadcastoftherepertoireassignedbytherespectivespecificmembers.

43.10 The Copyright regime in India, before its latest amendment in 2012, did not have any guidelines to quantify a Copyright asset. An asset owner would portray a particularvalueonhis/herassetandthesamewouldthenbeuniversallyaccepted

bybuyersinthemarketthroughvoluntarylicensing intermsofSection30ofthe Copyright Act, 1957. Section 30 deals with licenses by ownership of property. As the value of these assets increased multifold with increase in demand due to technological advancements, Compulsory Licensing under Section 31 of the Copyright Act 1956, was introduced to put together a regime that regulates the pricingmechanism. Acompulsorylicense isavailableunderSection31(1)(b)of theCopyrightActiftheCopyrightownerunnecessarilyrefusestograntalicense to a broadcaster, or unreasonably refuses terms for a license proposed by the broadcaster which the broadcaster considers reasonable. The parameters which were to be considered by the Copyright Board in granting compulsory license are to be found in Rule 8 of the Copyright Rules, 2013. In the Copyright Rules, 1958 which were the predecessor to the Copyright Rules, 2013, there was no provision analogous to Rule 8 dealing with the parameters to be kept in mind by the Copyright Board in finalizing theterms.

43.11 TheCopyright (Amendment)Act,2012introducedaregimeofstatutorylicense forthefirsttimeinIndiainrespectoftelevisionandradiobroadcastingorliterary and musical works and sound recordings under Section 31D. Thus, there were now three categories oflicenses:

(i) Voluntary Licenses based on consensus between the owner and the licensee;
(ii) Compulsory License where the license was granted by the Copyright Board founded on a refusal by the owner to accept the terms offered by the proposed licensee/complainant;AND
(iii) Statutory License for broadcasting introduced by Act 27 of2012.

43.12 Priorto1993,AllIndiaRadio(hereinafterreferredtoas"AIR")hadamonopoly with no other radio broadcasting agency in the market. That in the year 1993, EntertainmentNetworkIndiaLtd.(ENIL)wasallottedtimeslotsontheAllIndia Radio, Mumbai and Delhi for Indian and Foreign songs. Pursuant to the above development,PPLissuedatariffrateofRs.1500/-perhourpertransmissionper channel to the radio broadcaster which was blatantly not agreed to by the Radio Industry. Consequently, PPL moved before the Hon'ble High Court of Kolkata. However, pending the aforementioned proceedings, a settlement was arrived at betweenthepartiesandarateofRs.200less20%(i.e.Rs.160/-)perneedlehour was agreed and the proceedings were disposed-off in view of thesettlement.

43.13 With evolving times, the entry of private players into radio began as an experimental arrangement. The evolution of the Radio Industry began in 1997, withTimesofIndia'sTimesFM(Bennett,ColemanandCompanyLimited) and Mid-Day Group's Radio Mid-Day having same presence in the radio industry. The first slots were allotted in Delhi and Mumbai and gradually expanded to other prominent markets. Eventually, the sale of these slots was stopped by the Indian government in 1998.

43.14 The Government of India, then opened Radio Broadcasting to private operators under the Phase I. In May 2000, the Ministry for Information and Broadcasting opened108frequenciesforauctionacross40cities.Thefirstprivateradiostation to operate was Radio City in Bangalore in 2001. Essentially, it turned out that those broadcasters with the requisite means stayed as they saw immense potential in the radio business which was evident by the overbidding. Even in this phase, the private FM radio industry witnessed modest growth despite of license fees and grew threefold until the year 2004.

43.15 Disputes arose between the Radio Broadcasters and the content holders with regardtotherateatwhichcontent licenseswererequiredtobetaken.Thisledto applicationsbeingfiledunderSection31oftheCopyright Act,1957(asitstood then) for determination of reasonable compensation. In 2002, valuation of Copyright was considered extensively by the Copyright Board.

43.16 In the earliest set of complaints filed by the radio broadcasters before the Copyright Board in 2001-02, the Board used a best judgment assessment to fix rates of royalty for each needle hour (i.e. the actual time in an hour when music isplayedonanFMradiostationafterdiscountingtheradiojockey'spresentation, advertisements etc.). The Copyright Board in its order dated 19.11.2002, held that the standard rate of payment for royalty during the prime-time broadcast shall be Rs.1,200/- per needle hour. The Board further held that the rate for normal hours and for night time (lean hours) shall be 60% and 25% of the standardrate,respectively.ThesameamountedtoanaveragerateofRs.660per needle hour.

43.17 Aggrieved by the aforesaid order, the radio broadcasters and PPL/Super Cassettes Industries Ltd. filed appeals before the High Court of Delhi and the Bombay High Court. These appeals culminated into two appellate orders reported as Super Cassettes Industries Ltd. v. Entertainment Network (India) Ltd. (2004) 29 PTC 8 (Del) and Phonographic Performance Ltd. v. Music Broadcast (P) Ltd. (2004) 29 PTC 282 (Bom).

43.18 The Copyright Board order of 2002 came to be set aside by the Hon’ble Bombay High Court, vide order dated 13.04.2004 in view of the fact that the Tariff was determined based on a best judgment assessment basis. The Division Bench of the Delhi High Court in Super Cassettes Industries Ltd. v. Entertainment Network (India) Ltd. (2004) 29 PTC 8 (Del) also set aside the aforenoted order of the Copyright Board on 30.06.2004, and remitted the case back to the Copyright Board directing it to reconsider the application for grant of compulsory license under Section 31 of the Act after giving adequate opportunity to the parties to adduce evidence.

43.19 The orders passed by both the Bombay High Court and the Delhi High Court cametobechallengedbeforetheSupremeCourt.Itispertinenttomentionherein that pending the disposal of Civil Appeal in the Supreme Court, the Radio Broadcasters and PPL entered into several agreements by virtue of which PPL was being paid in terms of the First Copyright Board order of 2002. It may also

bementionedthatthisrateasfixedbytheFirstCopyright BoardOrdercontinued till 2010 i.e. for a period of almost 8years.

43.20 The Supreme Court in Entertainment Network India Ltd. v. Super Cassettes Industries((2008)13SCC30)remandedthematterbacktotheCopyright Board in order to re-evaluate the method of assigning value to a Copyright asset after layingcertainbenchmark/guidelines.

43.21 PursuanttotheremandasdirectedbytheHon'bleSupremeCourt,theCopyright Board, by order dated 25.8.2010, while re-evaluating the valuation regime, laid down a set of terms and guidelines for granting the compulsory licenses. The Board contrary to the mandate of Section 31, placed heavy reliance on an interpretationthat skewed towards the radio broadcasters as opposed to balancing it out and giving due importance to the factors put forth by the Copyright asset owners. The Board directed the Registrar of Copyrights to grant licenses to the Radio broadcasters based on a revenue sharing, wherein, a "modest" rate of 2% of the net advertisement earnings of each FM radio station shall go to the Copyright music owner for a tenure of ten years which has expired on 30th September 2020.

43.22 PPLbeingaggrievedbytheaforesaidorderdated25.08.2010preferredanappeal before the Hon'ble Madras High Court in CMA Nos. 3293, 3382, 3385, 3387- 3390/2010. It may be mentioned that pending the Appeal, left with no other option and due to collective market pressure, PPL was constrained to enter into voluntary licensing agreements with music labels who were not a party to the Copyright Board proceedings and order dated 25.08.2010. The said Appeals are pending and are listed for final hearing and part arguments have already been heard. A copy of the Appeal is being filed separately.

43.23 In the meantime, the government auctioned licenses in the FM spectrum gradually through Phase II. Phase 2 (2005) of the FM license auctions resulted inthecoverageofcitieswithapopulationof3lakhandabove.InPhase3(2015) citiespopulatedby1lakhpeopleandaboveweretakenintoconsideration.Phase 2 auctions of FM spectrum licensing in 2005 introduced a number of reforms to the policy guidelines, including the modification of the prevailing exorbitant spectrum licensing system to a rational license fee structure. As per policy guidelines of FM licensing Phase 1, annual licenses were to be renewed at an increment of 15% on the existing license fee. For Phase 2, renewal of annual licensesmovedfromafixedlicenseregimetoarevenue-basedmodelof10%of One Time Entry Fees or 4% of Gross Revenue, whichever is higher. It is pertinent to note that barter transactions are also to be disclosed as per the agreement with GOPA. The new business model included only a percentage of the revenues to be paid as annual spectrum fees. This eventually saw many corporateplayerstoventureintotheFMbusinessevenastheexistingoneswere expanding. This is evidenced by a rise in the number of radio stations from 21 stations in Phase 1 to 245 stations in Phase 2. During this phase, the radio industry was a rapidly growing sector indicated by positive trends.

43.24 The introduction of Phase 3 (2015) was held online and in two batches, with regulationsthatfurtherexpandedgrowthopportunitiestothebenefitoftheradio industry in

India. The license fee was further lowered to 2.5% of Non- RefundableOne-TimeEntryFeesor4%ofGrossRevenue,whicheveris higher. The license period was extended from 10 to 15 years, permitted FDI in the private FM radio sector was increased from 20% in Phase 2 to 26% in Phase 3, which was ultimately raised to 49% under the government route in 2015. These significant changes were coupled with flexibility displayed by the government. Itispertinenttomention herein that several Radio companies illegally and in an arbitrary manner started paying PPL at 2% of the Net Advertisement Revenue inspite of the fact that the order of 25.08.2010 was and can be applied only to those who had filed applications under Section 31 and for the then existing radio stations. Some of the Radio Broadcasting stations have continued to play the repertoire of PPL even without paying.

43.25 The two phases and the reforms in the Radio broadcasting norms resulted in multiplebenefitstotheRadioBroadcastingindustry.Thisledtoexponentialand volumetric expansion of the Radio industry and reaped unparalleled monetary benefits to it. In view of the exponential growth in the market outreach and presence of FM Radio stations over a period of two decades, the Radio industry thatwasatanallegedinfancystageinthefirstphaseofitsevolutionhasemerged to be an economic powerhouse. Whereas, due to a meager 2% royalty regime that PPL was forced to adhere to under the Copyright Order dated 25.08.2010, numerous Music labels discontinued their membership with PPL so as to take advantage of the marked determined rate that was above 7% which was at par withtheNON-PPLMusicOwners.Theswitchfrom2%royaltyratetothehigher rate of 7.5%, proved to be more efficient since the share of non-PPL music content grew at a 6-7% rate much faster than PPL music content licensed at a meager 2% of net revenues. Thus, PPL experienced multifold losses and took a hard hit in being paid at an inadequate 2% royalty and also lost out on certain key music labels thatfurtherledtoadeclineinthePPLrepertoire.

43.26 theCopyrightregimethatfixedroyaltyrateat2%oftheNetAdvertisement revenue has now come to expire on 30th September 2020 in terms of the Copyright Board order of 2010. In view of the same and taking into due consideration the economic variables as laid down under Rules 31 of the Copyright Rules, 2013, prevalent market conditions, growth in the Radio sector at the expense of the Music Industry, various financial report by experts andthe publicly available Statement of Accounts of the Applicants/RadioBroadcasters,

PPLhasdevisedafair,justandreasonabletariffratedated01.08.2020.

43.27 PPL conducted a detailed scrutiny of the Radio Industry *vis-a-vis* the Music Industry for determining the tariff for Radio Broadcasting. PPL commissioned various experts such as Hari Bhakti and co. (Chartered Accountants)andindependentaccountingagencyforanunbiasedresearchofthe Music-radio Industry interface over the past two decades. It may be mentioned that the reasons why M/s Hari Bhakti and Co. was chosen was because of the fact that the same agency was appointed first as an independent agency by the Hon'ble Delhi High Court in Music

Broadcast Limited Vs. Axis Bank (CS(OS) 2119of2013)whereintheaspectofbarterdealwasseriouslycriticizedbyDelhi High Court. In their report, Hari Bhakti and Company brought to the attention of the Hon'ble Delhi Court the practice of barter deals and the adverse impact that it brings. The report detected the anomalies in the accounting practices that led to gross pilferage of royalty to Music industry including PPL. Furthermore, the observations made by Hari Bhakti and co. in the report (engaged independently by PPL), wherein it scrutinized the financials of the Music-radio Industry interface, infer beyond doubt that the Radio Industry has been on the rise since the past two decades and refute the applicant's contention that the Radio Sector is still at its initial and underdeveloped stage. The report enumerates the followingobservations:

a. During the year FY 2019-2020, the Applicant has paid license fees to the PPL at 2% of their Net Advertising Revenue. Whereas the rate of licensee fees by the Applicant to other Music labels stands at a mammoth 10% of their Net AdvertisingRevenue.

b. That the aforementioned royalty rate amounts to a meagre Rs. 145/- per needle hour. Whereas, the Applicant paid royalty to other music labels at the rate of Rs. 756/- Per Needle Hour. It is submitted that other music labels are getting paid 5 times more rate thanPPL.

c. DuringtheFY2018-2019,theApplicantpaidroyaltytoothermusiclabels at 7% of the net advertisement revenue and the effective Per NeedleHour ratetoPPLwasRs.231/-,whereas,theeffectiveratetoothermusiclabels stood at Rs. 770/- Per NeedleHour.

43.28 Additionally, Deloitte in association with Indian Music Industry(IMI) prepared another report titled "Economic impact of the recorded music industry inIndia". In addition to the above, Dr. Praveen Chakravarty (an eminent public intellectual, scholar and the Chairman of the Data Analytics department of the IndianNationalCongress)asengagedbytheIndianMusicIndustry(IMI)inhis report titled "Economic value of Music for FM Radio in India" states as hereunder:

"A decade later, the radio industry has grown three-fold in terms of advertising revenues and penetration, on the back of the highly subsidised music from PPL. Itisnowtimetorealignthemarketinawaythatismoreequitable,economically viable, and sustainable in thelong-run."

"FM radio industry is already experiencing dramatic changes from advertising ledrevenuemodeltonon-advertisingledrevenuemodelthroughevents,branded content etc. Non-advertising revenues now form nearly 20% of all revenues for radio companies, up from just 7% two years ago. It is unfair totie music owners to a royalty attached to a specific revenue line item such as net advertising revenues when the radio industry is going through rapid change in terms of where it derives its revenuesfrom."

43.29 Dr.Chakravarty,inhisreport,hasaffirmedthatthe7.5%royaltyrateisamarket determined rate currently and has proven to be efficient since the share of non- PPLmusiccontentata6-7%ratehasgrownmuchfasterthanPPLmusiccontent licensed at a meager 2% of net revenues. Thus, PPL has taken a hard hit due to the meager royalty rate of 2% that is being wrongly subjected to.

43.30 In another report titled "Royalties in Private Radio Industry of India" by Dr. Darshan Ashwin Trivedi (filmmaker, a media and entertainment industry business consultant and an adjunct faculty in the Media and Entertainment Management Area with MICA) it is suggested that the maximum rate of royalty should be 8% of the net revenue of the broadcaster.

43.31 In a recent interview on the drop of revenues in Covid-19, Mr. Prashant Pandey was quoted as "The good news is that with every month, the gap with last year is reducing. If this continues, we should see a good Q3, and hopefully some growth in Q4,". Furthermore, Asheesh Chatterjee, CFO, Big FM stated **"**The yearlookspromising.ThenationaladvertiserswhoflirtedwithdigitalandFTA channelshavenowrealisedthecontentintegration,highfrequency,longtenure, theatre of mind or surround that radio and digital offer is anything unlike its television and print counterpart (degree of customisation). They are back to radioinabigway.Peoplewhoareabletogivethemtherightlycuratedsolutions willseemoneycomingtheirway.Furthermore,VineetSinghHukmani,MDand CEO, Radio One was quoted "2019 has excellent prospects and radio will gain tremendously from elections and cricket. While we cannot project a figure for specific activities, the annualised growth should be in the vicinity of 14-16 per cent, almost double the growth of 2018." The growth will be in mid-teens in both volume and pricing." The aforementioned interviews, comments andother relevant newspaper articles are filedseparately.

43.32 As per various year's FICCI reports, from 2010-2019, the Radio Industry has experiencedgrowthat astaggeringcompoundedannualgrowthrate(hereinafter referredtoas**"CAGR"**)of12%.Onthecontrary,theMusicIndustryhasgrown at a meager CAGR of 5.7%. That the Radio Industry which is a derivative company of the Music Industry and survives on 80% input of music has today grown larger than the Music companies. A table below demonstrates the clear differenceinthegrowthofRadioandMusicIndustry.ItisevidentthattheRadio Industryhasgrown3timesfrom2010whereasMusicIndustryis stillstruggling to double itsrevenue.

43.33 Over the years the profits made by the Radio Industry by not paying fair and proportionate royalty to PPL, have been strategically invested by them in acquiring more FM Stations. That the acquisitionoftheFMstationsaredonebytheRadioBroadcastersin2methods. ThattheRadioIndustrywouldnothave acquired radio stations if it were a loss making industry. As the basic fundamentals of Economics put forth, one invests more in those

schemes that bring him/her the required profits. Thus, the radio Broadcasters have continued toacquireanincreasednumberofFMstationstoincreasetheirprofitsmultifold at the expense of the Music Industry which is subjected to meagre royalty rates. That several Applications filed by the Radio Broadcasters are all falsely premised on the fact that the Radio Industry is on a decline and the Music Industry has experienced a spur of monetary growth. After acquiringphase3stations,RadioIndustryhasgrownataCAGRof14%during 2015 to 2018.Whereas Music Industry has grown only at 6%CAGR.

43.34 Based on the aforementioned reports by experts, detailed understanding of the market and in-depth examination of the financials of the Radio Sector as available in the public domain, a New Tariff has been arrived at that was duly intimatedtoRadiobroadcasters(Applicantsherein)inthefirstandsecondweeks of August 2020. ThatPPL'sTariffratedated01.08.2020hasbeenpreparedintermsofRule31(7) and 31(8) of the Copyright Rules, 2013. That the Respondent has adopted a fair approach with a 'hybrid model' that amalgamates an - either/or - approach between 'per needle hour rate' (PNH) and 'percentage of net advertisement revenue' (NAR), whichever is higher, in order to arrive at an appropriate rate of royalty to the Music Copyrightowners. Tariff Scheme dated 01.08.2020 formulated by PPL is fair, just and reasonable for allstakeholders.

43.35 At the outset, it is pointed that Radio broadcasters neither create music content nor do they hire any creator to produce new content. In fact, music royalty is the only Input Cost for a Radio broadcaster i.e. the tariff that is paid under the Commercial Agreement between the broadcasters and the music Copyright owner. The conventional input costs such as that for production and distribution do not come under the input cost that accrues to the Radio broadcasters who just have to cherry pick the best available option to bank on for increased listenership. On the other hand, the major cost of operation and productionofmusicthataccruesto amusicownersuchasPPLhasrisensharply over the past two decades. That the increasing cost of film music acquisition, creationandproductionofmusicandcostsofmarketingandpromotionofsound recording content have added to the woes of the music labels. That with the greater outreach and wide scope of music and sound recordings, thecost of acquiring music rights of new films has been very high that have in turn led to an increase of input cost for PPL.

43.36 The input cost for a certain work/content that accrues to a music label includes, but, is not limited to acquisition, creation, production, distribution, marketingincludingpromotionofcontent.Further,withtheadventofdigitalage people have now moved onto the readily available options of a plethora of FM channels and internet webcasting that has in-turn led to growth in Listenership of Radio broadcasters. The cost borne by the Copyright owners has increased tremendously keeping in mind that there is almost no revenue from the traditional market that once existed during the first two phases ofevolution.

43.37 In the cases of many big banner Bollywood productions these huge costs of acquisition paid by music labels provide added profit to the makers even before the film goes on floors. In view of the above it is submitted that the cost of acquisition of sound recordings for music labels has effectively increased without a proportionate rise in the music industryrevenues.

43.38 It is submitted that the cost of acquisition and / or creation of content is phenomenally high in various other media sectors like television, mobile industry etc., whereas, the Radio Industry has to only make a payment at 2% of the Net Advertisement revenue for acquiring music. Such 2% is applied not on entire Net Advertising Revenue but only on portion of such revenue calculated in proportion to market share of PPL. Accordingly, royalties earned by PPL in the FY 2019-2020 were 0.75% of the total Net Advertisement revenue of the Applicant(s).

43.39 WhileconsideringtheMobileRadioindustry,thetypicalpricingtotheconsumer is Rs. 49 to 99/- per month for 1-2 months and the royalty to music companies is 25%. In IVR/Music dedication, the royalty rate for music is fixed at 25% of the end-user price, subject to certain minimum rate per minute. In DTH music subscription, the royalty rate for music is fixed at 30% of the end-user price or the revenue earned by the DTH operator. The most popular telecom music product viz Caller Ring Back tone was earning23.25% of the total revenue (including both rental download fee) for PPL under its agreement for the period starting 01.04.2016 to 21.03.2017.

43.40 In view of the above, it is evident that companies spend crores and crores of money in acquisition and production in the media sector. On the other hand, the ApplicantandtheradioBroadcastersingeneral,beingplayersofasolelyprofit- oriented industry, incur no losses whatsoever and only invest in acquiringmusic from the Music Labels. Despite the aforenoted position, the applicants in the present case, are not willing to pay even a reasonable rate. It is further derived here that, like other media industry who are paying anywhere between 39% to 79% on content acquisition, Radio Industry can pay the license fee of 7% of the NetAdvertisingRevenueortheappropriateneedlehourratewhicheverishigher.

43.41 It is significant to note that the Royalty paid towards Music acquisition is the lowest out of all the variable costs to the Applicant in last 5 years. That the employee cost, admin and other cost adds to 60-65 % of Total Income during 2015-2020. It is submitted that the Applicant cannot for the purpose of satisfying the ever-increasing employee, admin and other cost pray for a lower license fee. The entire business in the Radio Sector runs on music but the license fee payment made by Radio Broadcaster is the lowest.

43.42 The cost of music should be construed as input cost and not otherwise. It isadmitted that for commencement / operation of a radio station license from the Government against the fees as mandated is most critical and vital to avail. Admittedly, the availability of music as a content is equally critical and importantastheradio programmingridesheavilyonusageofmusicofaround70-80%asinputcontent.Itisthereforesubmittedthatthereneedstobeequitywhile

fixationofmusicroyaltywithoutlosingsightthatGovernmentlicensefeeisat4%ofthe grossadvertisingrevenuewheretheGovernmenthasspecificallymandatedthatallbarter transaction needs to be included in the revenue. It will be therefore not be unreasonable for PPL to expect royalty from Radio stations not less than 4% of thegrossadvertisingrevenuepaidtothegovt.Itissubmittedthatmusicisaraw material that is enjoyed and exploited by the Radio Broadcasters with no risks involved. It is a well-established principle of Economics that the input cost of any industry can never be lower than other cost such license fees paid to the government. In view of the above, it is submitted that the Advertising Value needstobeon"Gross"basiswhichmandatesthattheradionetworkhavetoalso include value of Barter deals which unfortunately are not being taken while calculating royalty to PPL on Net Advertising Revenue. That the Radio Broadcastersareexploitingtheentireroyaltyregimeaspertheirownwhimsand fancies so as to gather an increased profit share that is based on the repertoire Music labels and PPLalike.

43.43 The variables such as cost of content creation, cost of content acquisition, the nature of the music industry, fair return for creative work, technological contribution, risks borne by the Copyright owner, the proposed retail price of a work/product, prevailing standards of royalties for similar works have been taken into due consideration by PPL while fixing and determining its Tariff scheme.

43.44 Fixing of 2% royalty rate by the Copyright Board is ex-facie unreasonable. The Hon'ble Board was required to fix a reasonable tariff yet while arriving at the royalty rate of 2% of the net advertisement revenue, the Board placed heavy reliance on variables and inferred reasoning that were heavily skewedtowards the Radio Sector and favoured the Applicants. The Board took into account irrelevant considerations as hereunder:

a. Revenue Sharing model: Directed the Registrar of Copyrights to grant licenses to the Radio broadcasters based on a revenue sharing, wherein, 2% of the net advertisement earnings of each FM radio station shall go to the Copyrightmusic owner and completely overlooked the per needle hourmodel.
b. The revenue earned by PPL and the revenue earning capacity of PPL through various other streams ofrevenue.
c. The Copyright Board overlooked the materials and documents placed on record by the PPL of the huge industry numbers and profit that the Radio sector is experiencing.
d. The royalty/tariff rates under various other jurisdictions were taken into consideration contrary to the observations of the Hon'ble Supreme Court and Bombay HighCourt.
e. The Board took into account losses made by the private FM radio broadcasting industry and the promotion of music by the FMradio.

f. The Board observed that the radio broadcasters should be given licenses with economicallyfeasibleratesandoverlookedthevariousfactorsandvariablesthat the music industry encounters whilst developing a certain musicproduct.

g. A "modest" tariff rate of 2% of the net advertisement revenue protecting the radio FM industry was arrived at as the Radio industry was touted to be at an infant and nascentstage.

h. The Radio Industry was labeled to fall under the "Public Interest" variable wherein it furthers the government's objective of making way for a society that promotes content and work by artistes from all walks oflife.

43.45 It is a well-known fact that profit sharing and revenue generation are purely economically driven aspects and that the interests of both parties i.e. the radio broadcastersandtheMusicCopyrightowners,shouldbetakenintoconsideration while arriving at an appropriate tariff rate. Music is essential for the survival of the Radio Industry. Music occupies approximately 80% of the broadcasted content on radio and is evidently the pioneer product that is fully exploited by the Radio Industry that increases their listenership and results in immense monetarybenefits.

43.46 Broadcasters are clearly withholding the facts including their accounts, revenues and have continued to exploit andtakeundueadvantageof the situation by giving the impression as to decline in the industry trend when factual position is otherwise. Thatgrantingtheroyaltyratesof1%and/or2% assuggestedbytheApplicantandotherRadioBroadcasterswillslowlywipeout the existence of PPL. It is pertinent to note that members as on date are withdrawing their Radio Rights from PPL as the same is being subjected to heavybiasattheexpenseoftheRadioBroadcastersthathasledtoasharpdecline in revenues for the Music Owners. It is thus crucial that the Board, should adopt a fair and just approach based on the principle of natural justice and determine a reasonable royalty rates that is just and fair to the MusicIndustry.

43.47 That since Phase II - there are precisely 366 operational private FM Radio stations in 104 cities with operational 33 Private FM Radio broadcaster as compared to 356 private FM Radio Stations in 98 cities withoperational 33 FM Radio broadcasters in the previous quarter. That the Radio Industry which was at an infancy stage at INR 10 billion in 2010 has grown exponentially with a compounded annual growth rate (hereinafter referred to as "CAGR") of 12% and had crossed Music Industry in terms of revenue by 2010 itself. It is further submitted that such a landslide increase can only happen given that there is some kind of profitability involved in doing so. Radio Broadcasting is definitelyacommerciallydrivensectorandhence it hasseensuchahugeturnout as it does provide a substantial rate of return to its investors.

43.48 The measures undertaken in the second and third phase of the evolution of the Radio Industry brought profitability to the Radio industry by considerably reducing their capital and operation costs. FM companies that hold multiple frequencies in the same city encouraged shared infrastructure and services. It is further submitted that

networking of channels across India, which was not permitted in previous Phases, now allowed a Radio broadcaster to broadcast the same content within a Radio Broadcasting company's ownnetwork across the country that in turn led to a large cut in costs for Radio broadcasters as they are no longer required to create new and distinct content for each city.

43.49 Further, after the Phase 3 auctions, the Radio industry saw a monumental surge of 66% in the number of stations to 407, as compared to 243 stations in 2 and the total FM coverage expanded from 85 to over 100 cities in India. This spurt ingrowthofFMchannelsandcoveragehas beenaccompaniedbyasteady growth in radio ad inventory. It is imperative to mention herein that music has majorly fuelled the private FM Radio industry since its dawn in India and has driven the industry forward, serving as its backbone over the years.

43.50 The incomeofPPLfromRadioroyaltywasRs.24.47Crin2011,Rs.15.12 Cr in 2015, Rs. 23.59 Cr in 2019 and Rs. 24.25 Cr in 2020. That PPL as a collectivehasnotgrownatall,letaloneproportionallytotheradiosector,in spite of rapid increase in the number of operating radio stations post2015.

43.51 PPL has two main sources of Licensing. The first being Radio Industry licensing and the second being licensing for on ground Public Performance i.e. events and background music. Prior to the year 2017, PPL also licensed for Mobile telephony but the members withdrew these rights. The following table shows revenue earned by PPL in the lastdecade:

Year	**PPL's Radio Revenue (Rs. incrores)**
2010-2011	24.47
2011-2012	26.29
2012-2013	13.98
2013-2014	18.83
2014-2015	15.12
2015-2016	18.31
2016-2017	18.27
2017-2018	19.78
2018-2019	23.59
2019-2020	24.25

43.52 As stated hereinabove, the Radio Industry (including the Applicant herein) has grown multifold in the last two decades, whereas, PPL that represents around 360+ music labels for radio Licensing is at a stagnant stage since last 10 years. Below is the revenue of ENIL for the last 10years:

ENIL Revenue	**Total Income**	**CAGR %**

2010-2011	283.56	6.9%
2011-2012	312.95	
2012-2013	355.36	
2013-2014	407.17	
2014-2015	470.65	
2015-2016	533.71	
2016-2017	575.37	
2017-2018	545.91	
2018-2019	635.41	
2019-2020	553.35	

43.53 Keeping in view the aforementioned circumstances, PPL has adopted a 'hybrid model'thatamalgamatesan-either/or-approachbetween'perneedlehourrate' (PNH) and 'percentage of net advertisement revenue' (NAR), whichever is higher,inordertoarriveat anappropriate rateofroyaltytotheMusic Copyright owners. The hybrid model acts as a perfect model across all cities and stations as it allows the Music industry to gain the best possible rate out of the two approaches (whichever ishigher).

43.54 It also provides the much needed "Safety Net" to PPL as it avoids pilferage of royalty losses to PPL due to Radio companies not accounting value of barter deals. The aspect of barter deal was seriously criticised by Delhi High Court in the case of Music Broadcast Limited Vs. Axis Bank (CS(OS) 2119 of 2013) when it appointed Haribhakti & company which in their report had brought to the attention of the Court the practice of barter deals & its adverse impact. The PNHmodelalsoprotectsPPLfromtheCross-Mediatransactionsorthedecision of the radio network to keep using the music content even though there is zero or paltry advertisingrevenue.

43.55 PPL should be placed on a similar standing to that of the other similarly placed players in the music industry. It is submitted that PPL should be placed at parity with other music asset owners, in terms of royalty, taking the 7-8% bracket NAR as abenchmark.

43.56 The Applicant (ENIL) has paid Non-PPL Companies at more than 7%. During FY19-20thisfigurewas10%oftherevenueearnedbyRadio.TheRespondent's usage on ENIL (Applicant) in terms of hours was 38% in FY 19-20, but the effectiveRoyaltywasonly10%ofthetotalroyaltypayoutofENIL,ontheother hand, Non PPL (other Music labels) companies contentwas used to the extent of62%andtheeffectiveroyaltypaidtothemwas90%.AverageRoyaltyrateto the industry (PPL + Non PPL) was 6.94% in FY 19-20. Similarly, DB Corp (Applicant)haspaidNonPPLCompaniesat7%inFY19-20.DuringFY19-20, PPLusageofDBCorpwas45%,however,theroyaltyshare isameagre18%of totalRoyaltypaid.Whereas,NonPPLusageonDBCorpwas55%andtheshare in Royalty payout was a staggering 82%.

43.57 PPL'sTariffratedated01.08.2020thathasbeenpreparedintermsofRule31(7) and31(8)oftheCopyrightRules,2013isnotonlyjustandfair butisalsobased on factual numbers that show staggering profits accruing to the Radioindustry.

43.58 The detailed illustration of the royalty rate as prepared by PPL is asfollows:

44	FY 18-19	ENIL	DB Corp
	PPL usage (Hrs)	1,24,659	62,392
	PPL Royalty (Rs.)	2,88,46,768	1,38,35,935
	AVG PPL PNH	231	222
	Non PPL usage (Hrs)	2,51,569	70,599
	N PPL Royalty (Rs.)	19,32,53,232	6,25,64,065
	AVG N PPL PNH	768	886
	PPL : NPPL ratio	1 : 3.32	1 : 4
Cate.	**ENIL 18-19**	PPL PNH (Rs.)	N PPL PNH (Rs.)
			(PPL x 3.32)
A+	Mumbai	3,300	10,955
A	Pune	890	2,956
B	Chandigarh	394	1,308
C	Nasik	171	568
D	Shimla	44	148
Cate.	**DB Corp 18-19**	PPL PNH	N PPL PNH
			(PPL x 4)
A	Ahmedabad	935	3,742
B	Indore	670	2,681
C	Nashik	170	679
D	Hissar	63	251

ENIL	FY 15-16	FY 16-17	FY 17-18	FY 18-19	FY 19-20
Total Income	**533.71**	**575.37**	**545.91**	**635.41**	**553.35**

Expenses					
Royalty	14.00	19.50	19.43	22.21	24.81
License Fees to Govt	26.18	33.37	34.69	36.41	35.61
Employee Cost	93.53	105.37	118.54	126.18	134.83
Admin & Other Exp	215.52	271.63	247.81	295.88	221.83
Int /Fin. Cost	0.04	13.56	4.72	3.97	18.39
Depreciation	36.27	53.60	63.45	67.10	99.06
Total Expense	**385.54**	**497.03**	**488.64**	**551.75**	**534.53**
% of Expenses to Radio Income					
Royalty	3%	3%	4%	3%	4%
License Fees to Govt	5%	6%	6%	6%	6%
Employee Cost	18%	18%	22%	20%	24%
Admin & Other Exp	40%	47%	45%	47%	40%
Int /Fin. Cost	0%	2%	1%	1%	3%
Depreciation	7%	9%	12%	11%	18%

Itis submittedthattheratesarenotonerousbuthave beencategorizedasperthe cities, the lowest being Rs. 315. The weighted average rate for all 362 stations togetherarrivesRs.1838/-only.Itissubmittedthatinthelargerinterestsofboth the FM radio industry and the music industry a 'hybrid model' of pricing with a percentage royalty in the NAR and an affordable 'pay per use' model shall providetherightincentivestructureforthelonger-termdevelopmentofboththe industries.

43.59 PPL submits that the International rates selectively suggested by the Applicant are inapplicable and are irrelevant due to various factors in view of the observations and directions of the Hon'ble Supreme Court in*Entertainment Network India Ltd. v. Super Cassettes Industries,* wherein, it was held that international royalty rates cannot be used as comparators since circumstances, structure and functioning of the sound recording companies and the radio industry in other countries are vastly different.

43.60 It is submitted that the Copyright Board order dated 25.08.2010 was not an order in rem. That the said order was specifically qua the Applicants/Radio Broadcasters who had filed Applications for compulsory licensing in the year 2002 and 2008 under the previous Copyright regime and the same was categorically applicable to only those Applicants/FM Stations. It is further submitted that the Registrar of Copyright issued the 2% royalty rate with regards to the compulsory license applications for only those Radio Broadcastersasmentionedintheorder.Itisfurtherpertinenttomentionherein

thattheHon'bleDelhiHighCourt,vide itsorderdated11.05.2011inLPANo. 448/2011 established beyond doubt that the 2010 order of Copyright Board is not an order in rem as the Hon'ble Court directed only the Appellant as well as the parties therein to move an application of compulsory license. It is submitted that the fact that the Hon'ble Delhi High Court and thereafter the Hon'ble Supreme Court did not bind Super Cassettes Industries Ltd. with the terms of the order dated 25.08.2010 clearly shows that the said order was not an order in rem but was to be applied only to parties who were Applicants before the Copyright Board.

43.61 The order passed by theHon'bleCalcuttaHighCourt inPhonographicPerformanceLtd.v.TVToday was not referred to by the Petitioners Inthe aforementioned matter theHon'ble High Court had held that the Agreement between parties shall stand good and has categorically stated that the Copyright Board order of 2010shall not be applicable to the Radio Broadcasters that were not a party to the Copyright Boardproceedings.

43.62 The market conditions prevalent in the year 2010 and the dynamics of the Music- radio Industry interface has drastically undergone a change. That the same requires a new and versatile Copyright regime to come into existence which takes into due consideration the present-day financials of the Music and radio Industry and is independent of the olderregime. Therefore, the Copyright Board order of the year 2010 cannot be a rationale for a new tariff scheme.

43.63 The Sound recordings owned by Music Companies are not public goods. It is submitted that the sound recordings as owned by the Music labels/owners are intellectual property rights that continue to draw significant capital investments by the music companies in terms of cost of acquisition, maintenance, promotion and distribution. That so as to achieve the objective of larger public interest, a Radio broadcaster shall have to not only play front- line Bollywood Music but also enable Ghazals, folk, Indi-pop, regional, devotional, local content, local artiste and every other genre of music that one could think of on their platform. However, All India radio is the only radio broadcaster that confines with the aforementioned scheme. It is submittedthat the Applicant is a private FM Station and belongs to a commercially driven radio Sector that has the sole aim to earn huge profits out of the same. The Applicant(s) herein only wishes to conduct a lucrative business by earning substantial profits. None of the Private FM stations are educational platforms, traditional occupational oriented or work solely for women and child upliftmentetc.Itissubmittedthattheactivitiesofthe Applicantsarenotinthe interest of public.

43.64 ThattheprocedureadoptedbytheApplicant hereinto determineafair royalty rate is vague and non-transparent in so far as the Applicant (and Radio Broadcasters in general) have shied away from maintaining records of mapping their financials that putforth:

(i) a clear statement of the amount paid as commission to advertising agencies;

(ii) records of the time period for which music owned by a particular Music label wasplayed;

(iii) the account for pro rata usage of music work/sound recording of each Copyrightowner;

(iv) the accounts of barter deals with advertisers, Cross media advertisement rates and the revenue collectedtherefrom;

43.65 The Applicant's reliance on the ongoing COVID surroundings is wrong and denied. It is submitted that the Radio Industry/Applicants cannot use the ongoing pandemic conditions to be of any hindrance to the Sector as the same is temporary and shall only sustain for a short period of time. However, the multipleearningsthattheApplicantshavepocketedoverthepasttwodecades cannot be ignored by the Applicants in the garb of the current pandemic situation.

43.66 The Board should therefore approach its rate-setting task by applying a fairratesettingstandardandareasonableapproachthatshallstandvalidina freely negotiated market.. Furthermore, the Radio Sector revenue should be calculated in its entirety including any barter mechanism or individual agreements that might be in place between a Music Owner and a Radio Broadcaster. The Board should determine a royalty rate that is in tandem with the actual economicvalue of a Copyright asset/work.

44. **<u>Few facts of Saregama India Limited(Respondent)</u>**

Saregama India Limited is now not forming part of PPL. It has left as member in September, 2020. It had entered into separate voluntary license with radio companies. The royalty paid by radio companies to non-PPL music companies are different. The radio industry has matured from its infancy and is no more a nascent industry. It has undergone change in the last ten years.

(a) The Phase-I revenue of radio industry in the year 2001 is Rs. 74 crores; whereas, the revenue of the radio industry in the year 2019 is Rs. 3,100 crores.

(b) Listenership grew from 10% of the population in the year 2010 to 65% over the years.

(c) The number of FM radio stations grew from 242 in the year 2010 to 381 in the year 2019.

44.1 In comparison to radio companies, music companies have experienced only 1/3 growth. The compound annual growth rate of Radio Company is 11-12% whereas, for the music company it is only6%. The revenue of Radio Company for the year 2018 is 31.3 billion whereas the revenue of Music Company is 10.68 billion. It is stated that the sound recording of the music companies is the backbone for the business of radio company and the music companies provide 65% of radio companies airplay time with its sound recordings. The high cost of acquiring the sound recordings, talent cost and changed business practices needs to be reconsidered while fixing the royalty.The 2% royalty on net advertisement revenue fixed by the Copyright Board in the year 2010 would be against the provision of Section 31D where the statutory license regime has envisaged under Section 31-D of the Copyright Act, 1957, is different from the then compulsory license

enunciated under Section 31(1)(b) of the Copyright Act, 1957. Creating a balance between the rights of broadcasters and the owners of the Copyright, is essential under Section 31-D. The factors to be considered while fixing royalty under Section 31-D, are laid down under Rule 31(7) of the Copyright Rules, 2013.

44.2 The applicants have failed to substantiate the rate of royalty it is paying to sound recording companies. The royalty paid by radio companies to non-PPL members are much higher than the 2% of net advertisement revenue. Advertisement revenue of the radio companies have grown three times in a decade. 40% of the advertisers were exclusive "radio only" advertisers, since radio offers specific geography, based targeting of customers for brands.

44.3 As per the study published by Nielsen, radio is the second most accessed medium of entertainment, with the majority of the users belonging to the age group of 26-45. The revenue of the radio industry for the year 2018 is much higher than the revenue of the music industry. The radio company has not disclosed its gross revenue of advertising and the total amount it had paid to various music companies. The radio company refuse to pay higher royalty on the ground it is promoting social welfare activities. On the contrary, from the fact that is available in public domain, pan masals companies are among the top ten advertisers in radio.The COVID-19 pandemic has increased the public engagement with radio. Even amidst pandemic, the advertisement volumes of the radio companies aroused to 162% during the months of June & July 2020. COVID-19 pandemic is not only affecting the radio companies but the entire economy as a whole.

44.4 The cost of acquisition of film songs is rising since the year 2010. The advent of digital media has affected this Respondent more than the Petitioner as there have been no sales of cassettes or CDs and people have moved on to the readily available options of FM channels and Internet services. Higher royalties paid by radio companies to selective music companies had enhanced economic resources at their disposal to acquire cost-intensive sound recordings, thereby creating an imbalance in the market place. After the Copyright Board order, the radio companied played 70% of PPL music; however, in the year 2009, the percentage has come to 35.

44.5 The claim of radio companies that it is the main platform for popularizing the music/sound recordings is not sustainable anymore as new platforms as that of social media have emerged to popularize the songs.The tariff suggested by this Respondent has taken into account the time slot in which the broadcast takes place and as well as the different rates for the different nature of the use of work. This Respondent's proposed tariff is based on the gross advertisement revenue earned by the radio companies, which is similar to the terms and conditions included in the grant of permission agreement (GOPA) between the Ministry of Information and Broadcasting and the radio broadcaster.

44.6 The international royalty rate cannot be a bench mark to decide the royalty rate in India. The rates-setting standards vary considerably from one country to another and the circumstances of each country's also differ. In the countries like U.S.A., Denmark, France,

etc., the royalty rates are higher than the rates proposed by the Petitioner before this Board. Therefore, international standards cannot be a relevant criteria under Rule 31(7) of the Copyright Rules, 2013.

44.7 The sources of revenue for the radio companies are not limited to advertisement alone. The revenue models have changed owing to innovation and new industry developments. The non-advertising revenue nearly forms 20% of the revenue of the radio companies. The methodology used by the radio companies to arrive at NAR is questionable and open to manipulations.

44.8 It is advisable to have to per needle hour measurement in the place to measure the use of sound recordings on a 'pay-as-per-use' model. Needle hour is internationally accepted as a term denoting the actual time for which music is played during an hour excluding the advertisements, promotional and the presentation time taken by the radio jockey. Needle per hour method gives the radio companies flexibility as to how much of the individual music company's sound recordings they wish to play and pay for it as per use on various radio stations.

44.9 Keeping in view the differences in the listenership and the amount of revenue is being earned by radio stations in different cities, the Respondent proposed different rates of royalty for different cities. The advertising rates vary widely across markets under vey dynamic. As per Mr. Praveen Chakravarthy Report, the advertising rates for Mumbai were ten times higher than the advertising rates for Lucknow. The Respondent's proposal of royalty is a hybrid model that amalgamates the two models viz., 'per needle hour rate' (PNR) and 'percentage of gross advertisement revenue' (GAR). The objective of the model is to create a mutually balanced situation where the radio companies and the music companies work together to develop the smaller markets, and when they start generating large revenues, both parties end up sharing gains. The categorization of cities has been arrived on the basis of listenership.The growth of radio companies is at the cost the economic interests of the music companies. Therefore, the IPAB has to course-correct the imbalance which costs economic dis-advantage to music companies.

44.10 Fixation of multiple rates as per different category of cities is cumbersome for calculation. The rates fixed by PPL commensurate with the payments being made under voluntary license by radio companies. Therefore, it is wrong to state that the PPL's tariff rate of March 2020 is fifteen times higher than its previous rate.

44.11 There exists a symbiotic relationship between the airplay of music and the advertisement revenue earned by the Petitioner, as the popularity of the repertoire of the music companies has a major role to play in increasing the revenue of the Petitioner.

44.12 The annual operating cost and the fixed charges of the Petitioner are not relevant factors to determine the license fee under Section 31-D of the Copyright Act, 1957.

44.13 The increase in active under base of digital platform does not lead to any adverse effect on the radio usage and listenership.

44.14 The COVID-19 crises has increased the public's engagement with radio. The listenership has increased by 23% to 51 Million. The advertisement volume of the radio companies arose to 162% in June and July 2020.

44.15 The radio stations are no more acting as vehicle of social upliftment and education and it has moved to entertainment.

44.16 Sound recording is not a commodity but an intellectual property right which has drawn significant capital investments by the music company in terms of acquisition cost, maintenance, storage and distribution. Such capital investment in sound recording needs to be recouped by the music companies in the digital environment infested with piracy at global scale. Therefore, their royalty has to be fixed at a reasonable rate balancing the interest of music companies and that of the radio companies.

44.17 The broadcasting organisations are not subjected to expensive and monopolistic negotiations with the owners of the Copyrighted works.

44.18 The Respondent prayers for the fixation of statutory rate of royalty on the basis of gross advertisement revenue instead of net advertisement revenue in conjunction with per needle hour. Separate royalty rates to be fixed to be paid to be Indian Performing Rights Society (IPRS) with regard to the underlying literary and musical works.

45. **The case of Sony Music Entertainment Private Limited (Respondent) is that**

Sony Music Entertainment Private Limited in short Sony Music is a renowned music label carries on the business of purchasing, assigning, sub-licensing and distributing music across all modes and mediums in various genres including but not limited to Bollywood, Punjabi, South and International. Sony Music is the owner of various sound recordings and the underlying works embodied therein.

45.1 The petition filed by the broadcasters is frivolous, mis-conceived, vexatious, not-maintainable and has been filed with *mala fide* and ulterior motives.

45.2 The music companies have suffered immense losses at the hands of radio broadcasters. The radio industries have grown to be a behemoth with Rs.2,750 crores, almost twice the size of the music industry.

45.3 The Petitioner has filed the petition after a delay of more than seven years. The Petitioner has not filed documents to substantiate any of the factors mentioned in Rule 31 of the Copyright Rules, 2013.

45.4 The Petitioner has not provided details of its accounts, gross revenue, contracts with parties whose advertisements were broadcasted by the Petitioner on its radio channels. The Petitioner has deliberately suppressed the material facts.

45.5 The factors considered by the Copyright Board for determining the royalty should not be the ground for determining the royalty by IPAB in the instant proceedings. The rate of royalty for the license under Section 31-D ought to be determined in accordance with the provisions of the Act. The factors considered by the Copyright Board in the year 2010 are no longer relevant.

45.6 Broadcast of the music by the Petitioner is not in the public interest but for private business.

45.7 There is no provision in the Act or Rules, where the Petitioner is entitled to demand or claim a particular rate of royalty in correspondence to its revenue. The international rate of royalty in other countries is a totally irrelevant factor in the present proceeding. The reasons being it includes different works, different market conditions, different licensing

regime etc,. The provisions of the Copyright Act and the policy behind it in other jurisdictions cannot be imposed on the music company especially when the provisions of the Copyright Act are distinct and different from other jurisdictions.

45.8 Sony Music was a member of PPL and it ceased to be member from 30/09/2020. PPL is no longer a registered Copyright society.

45.9 Sony Music has never denied to its Copyrighted material to any of the radio broadcasters. However, the radio broadcasters are not interested in any good faith negotiations. The radio broadcaster has failed to comply with the provisions envisaged under Section 31-D of the Act and the Rule 29 of the Copyright Rules, 2013.

45.10 Radio broadcasters are engaged in several barter deals in respect of advertisement revenue, thereby defeating the due entitlement of Sony Music. The broadcasters are entering into licenses with other music owners and are paying them a royalty at a rate higher than 2%, thereby unfairly affecting Sony Music.

45.11 Sony Music's repertoire is different from that of other music c companies. As per Section 31-D(2) the royalty has to be fixed in respect of each work. Therefore, a composite petition for more than one owner of Copyright work is not maintainable. The rate of royalty cannot be fixed *in rem.*

45.12 The Petitioner has not brought-forth the details as its consumption of Sony Music's content throughout the day.

45.13 The blanket rate is causing immense loss and prejudice to Sony Music and the Petitioner has enriched itself over the past decade at the expense of Sony Music.

45.14 Sony Music is constantly engage in creating new content. Since the new content is generally played in the peak and prime hours, Sony Music is unduly prejudiced if a single rate is made applicable throughout the day. Therefore, a higher needle hour rate is to be imposed when the broadcast is done during prime time and low rate during lean light hours. Since the broadcasters are maintaining rate cards for advertisement based on time slot, it would not be difficult separate royalty rates for different slots.

45.15 As per Rule 29(2) of the Copyright Rules, 2013, the notice issued thereunder shall be in respect of works belonging to one owner only. The scheme of the act read with Rules contemplates separate application in respect of each owner giving importance to the class and nature of work. Further, Rule 29(4)(e) & (f) mandates the Petitioner to give consideration to name, address and nationality of the owner of the Copyright in such works as also the authors in principle performers of such works. In view of the same, all works cannot be lumped into the same foray. Due considerations are to be given to different kinds of works the value of the works and the market demand for the works.

45.16 The frequency of new songs played is much higher than the old songs. The rate charged in respect of PPL repertoire cannot be received for Sony Music, as it is constantly engaging in creating new content. Since the year 2010, the Times of India and the broadcaster is maintaining music charts and these charts consists of list of songs that are repeatedly played by the broadcasters, and more so during prime time, w which has high listenership. The repeated playing of sound recordings by the broadcasters is detrimental to the interests of the music company as a saturation it reached in respect of those particular sound recordings. The repeated playing of songs deters the masses from

purchasing music from the music companies and hampers its business. The rate of royalty ought to depend on such repeated playing and popularity of the sound recordings. The newer works should get higher royalty compared to older works.

45.17 The broadcasters play full songs instead of shortened radio versions thereby significantly deterring the masses from accessing music through paid model. The charges for playing the entire song must be higher than the charges applicable for playing radio edits. As per 29(4)(j) of the Copyright Rules, 2013, duration and period have to be given due consideration. Section 29(g) of the said Rules requires the Petitioner to mention alterations. The fixation of rates to be limited to linear broadcast feed alone. IPAB has no jurisdiction to determine the royalty for online radio feed. Since the present determination is only for sound recordings and not in respect of underlying works, the same cannot be determined in the instant proceedings.

45.18 The prevailing standards of royalty are the rates agreed upon between the parties under normal market conditions and that they are not unjustly imposed on the radio broadcasters. All India Radio (AIR) pays royalty at the rate of Rs. 750/- needle per hour for FM Metros and Rs. 650/- needle per hour for FM non-Metros, and this rate should be considered the bare minimum threshold for determining royalty rates in the present proceedings.

45.19 The pro-term determination of tariff at 2% of net advertisement revenue cannot be considered as a determination *in rem.*

45.20 The Copyright Board order dated 25/08/2010 is based on the premise that *"the radio industry in India is in a very nascent stage and is suffering heavy financial losses"*. However, the said finding is not applicable during the current times. Now the radio industry is not in nascent stage and is not suffering any financial loss. It has grown into a powerful and robust sector. The radio industry has grown at a rate of 11.90% CAGR, *vis-à-vis*, the music industry has grown at a rate of 7.87% CAGR. The rate fixed in 2010 can be no stretch of imagination be taken as a "prevailing standard for royalty".

45.21 PPL has engaged independent Chartered Accountants 'Haribhakti & Co. LLP' to provide a report on differences in royalty pay outs by radio broadcasters to PPL and Non-PPL Music Companies. From the Haribhakti Report, it could be seen the utilization of PPL members' content between the years 2011 and 2020 was 45.23%; whereas, the utilization of non-PPL music companies contents is 54.76% as regards ENIL. The ENIL paid non-PPL companies Rs. 114.41 crores, whereas it had paid Rs. 31.03 crores to PPL. For the year 2019-20, the utilization of PPL members' content was 37.95% to non-PPL companies' 62.05%. Non-PPL companies were paid nine times the royalty paid to PPL. There is a great disparity between the royalty paid to PPL member and a non-PPL company. The same is the position with DB Corp Ltd., as per Haribhakti Report. The peculiar situation discriminated the Sony Music for being part of PPL.

45.22 The revenue sharing model has caused grave loss, and injury to the music companies. The payment made by radio broadcasters viz., ENIL and DB Corp Ltd., if converted to needle per hour, reflects that it is much lower than the rate voluntarily agreed between ENIL and PPL in the year 1993; is lower than the rate fixed by the Hon'ble Calcutta High

Court by way of interim measure in the year 2001; and is lower than the rate fixed by the Copyright Board on 19/11/2002. However, even after 27 years, the radio broadcasters wants to subject the music companies to a lower rate than agreed in the year 1993. The radio broadcasters do engage in barter deeds in respect of advertising revenue. Radio broadcasters had manipulated the accounts and abused the judicial proceedings. Even All India Radio (AIR) is paying royalty at a higher rate than the private FM radio broadcasters. Revenue sharing model is not a factor listed in the Copyright Rules, 2013.

45.23 The radio broadcaster has deliberately and intentionally concealed and suppressed material and vital fact such as Grant of Permission Agreement (GOPA) between the Ministry of Information and Broadcasting and the broadcaster with the sole intention to mislead and misrepresent the Board so as to *mala fide* and dishonestly obtain reliefs. Thus, the broadcaster has failed to establish and prove its entitlement under Section 31(1)(b) as a broadcasting organisation.

45.24 The advent of digital media has affected the music company more than the radio industry as there has been no sales of cassettes or CDs, as people have moved on to the readily available options of FM channels and Internet services. The cost of music creation has also risen exponentially with the improvements in recording technology and high-definition equipment. The radio broadcasters do not create sound recordings but simply exploit them, and therefore they do not suffer risks involved in the generation of music. The radio broadcasters cherry-pick the best available music and relays it.

45.25 As per FICCI – KPMG Indian Media and Entertainment Report, 2019, radio industry is estimated to grow at a CAGR growth of approximately 10% over the next four years and the expected industry size to be of Rs. 44.5 billion by the Financial Year 2024.

45.26 Sound recording owners are the backbone of private radio channels, with musical content accounting for almost 70-80% of radio airplay time.

45.27 It is erroneous to state that the radio broadcasters are struggling. The revenues earned by many broadcasters over the past few years belie the said contention. Dun & Bradstreet Information Services India Private Limited, a leading information services company's report has substantiated the aforesaid fact.

45.28 The latest report of Dr. Megha Patnaik, Indian Statistical Institute, Delhi dated 19/09/2019 titled *"Towards fair compensation for music in private radio in India"* has opined that the relative size of radio industry is more than twice the magnitude of the music industry. the overall revenue of the radio industry for the year 2018 was 31.3 billion; whereas the music industry recorded a generation of Rs. 10.68 billion.

45.29 The advent of mobile phone has not adversely affected the radio industry. As per Prasanth Pandey, CEO of ENIL that radio listenership has grown from 104 million in 2017 to 105 million in 2019 and the listenership on mobile phones has grown from 99 million to 113 million.

45.30 Territorial coverage should be considered while determining the royalty. The territories should be classified into Tier-1, Tier-2 and Tier-3 cities, based on the population the cities. While determining royalty, the lack of consideration given to different territories has let do peculiar situations and absurd anomalies.

45.31 Global rates are not a considerable factor under the Copyright Rules for determining the rate of royalty for each work. Radio broadcasters have not furnished the comparison between the radio industry in other countries with India so as to convey that the licensing regime is similar. The Petitioner is guilty of picking and choosing countries which favour its costs while suppressing data from several countries which are inconvenient to it.

45.32 The tariff to be determined by IPAB has to be revised annually and has to be objective in nature keeping in mind the nature of work, the territory involved, the technologies utilized, consumer appetite etc,.

45.33 The determination of royalty at 'reasonable rates' cannot mean that it should be un-reasonable to right owners. The music company cannot be blamed for COVID-19 pandemic or the advent of digital media. The aspect of fixation of rates cannot be violated of Article 300A of the Constitution of India.

45.34 Sony Music thus propose different rates for different time slots. The rates should be 20% premium on the base price for prime time and discounted at 15% on the base price during nigh time and that other time, it should be charged at base price. Sony Music also propose customized royalty rates per hour considering three time slots; three Tier cities and the time line of work released. Considering the said factors, Sony Music propose for the determination of fair royalty.

46. **The case of Zee Entertainment Enterprises Limited(Respondent)**

The Copyright Board order dated 25/08/2020 was passed under the compulsory licensing provision enunciated under Section 31(1)(b) of the Copyright Act, 1957, as opposed to the present petition made under Section 31-D of the Copyright Act, 1957.

46.1 The Copyright Board order dated 25/08/2020 is valid till 30/09/2020. Previously, the Government of India had restricted radio broadcasters from airing news and current affairs. However, the introduction of Phase-III policy in radio broadcasting, now the radio broadcasters are permitted to broadcast information pertaining to sports, traffic, weather, cultural events, festivals, coverage relating to examinations, carrier counseling, employment opportunities, public announcements relating to civic amenities etc.

46.2 Radio broadcasters are profit driven commercial ventures and there has been an exponential growth in their profit. As per KPMG Media & Entertainment Reports, the radio companies have flourishing business since 2010.

46.3 The sale of music in physical format like CDs is almost nil. The music industry is struggling to stop piracy. Despite accessibility to TV, digital streaming platforms, mobile phones etc., radio has remained an effective broadcast platform. Unlike electronic and print media, radio is 'free to air' medium.

46.4 Radio broadcasters have multiple source of income. They get revenue through live music award events, sport events, youth events, plays/product demonstrations etc. Beyond advertisements, FM radio is enabling growth through advertiser-funded/sponsored programmes, concerts, podcasts etc. For the Financial Year 2018-19, the radio industry has earned revenue of Rs. 28 billion in comparison to Rs. 10 billion earned by it in the Financial Year 2009-2010.

46.5 There is a constant decline of revenue to the music industry. The revenue for radio industry is almost the double to the revenue to the music industry. This has been documented in various industrial reports including KPMG – FICCI Indian Media and Entertainment Report, 2016 and KPMG India's Media and Entertainment Report, 2019. Radio operators also earned revenue through barter deals and through digital platforms where audio-visual IP asserts have been created based on the popularity of iconic shows or popular RJs on radio stations. Therefore, there is no justification that the statutory royalty to be based only or advertisement revenue.

46.6 FM radio is seem to be a chorused source of entertainment and remains one of the favorite especially amongst listeners across various age groups. Music remains the core of the programming for the private radio channels. Music is the dominant form of content in FM radios.

46.7 The advertisement revenues are no longer relevant as they were so for the radio companies in the year 2010. Royalty rate based on overall revenues will be cleaner, more efficient and eliminates breeding of distressed and the need to "peek into books". As per Praveen Chakravarthy's Report the share of royalty paid to PPL and non-PPL music companies is about 5% of overall revenues. PPL music companies get a fixed royalty of 2% of net advertising revenues which translates to less than 1% of gross revenues. If total royalty revenues paid by FM radio companies to both PPL and non-PPL: music companies id 5% of gross revenues and PPL music has 35% share with less than 1% of gross revenue royalty rate, then it can be inferred that royalty paid for non-PPL music content by radio companies is around 6-7%. Hence, a 7.5% of gross revenues as royalty for all music content will be a fair, equitable and non-distortive revenue. Such a rate will provide an opportunity for the fair growth of both the industries.

46.8 The share of music content on FM radio between PPL and non-PPL has completely reversed in the last decade from 70/30 to 35/65. The total royalty revenues paid by radio companies for music content reveals that the independently negotiated rates by non-PPL members is significantly higher than the 2% of net advertising revenue fixed by the Copyright Board.

46.9 Zee Entertainment Enterprises Limited was never a member of PPL and has independent voluntary arrangement with radio broadcasters since 2014, and the radio broadcasters are paying lump sum license fees commensurating to the requirements of both the parties.

46.10 The legislative intent behind the introduction of Section 31-D is to ensure public access to sound recordings by way of statutory licensing on the one hand and ensure remuneration to the Copyright owners on the other hand. Despite increased accessibility to mobile phones etc., radio has remained an effective broadcast platform with a power to unite millions.

46.11 The reliance placed on the Report titled *'Paradigm Shift: Why Radio Must Adapt to the Rise of the Digital'* is misplaced and mis-conceived because the said Report deals with conditions and factors exist in foreign jurisdictions and does not consider the fact prevailing in India.

46.12 The fixed cost of radio broadcasters were determined more than a decade ago and have not been revised. On the other hand, the rate charged by radio broadcasters for advertising on its radio stations has increased over the years. As a result of this, the

broadcasters revenue and expenses have widened, thereby making the radio business a profitable one. The said fact is evident from the increasing number of radio stations over the years.

46.13 The music companies are also private entities struggling to sustain their businesses and they cannot be compelled to aid and assist the radio companies to boost its revenue at the cost of their own.

46.14 The Respondent thus prays for fixation of rate of statutory license for radio broadcasting at 7.5% of gross revenue generated by each radio station of the Petitioner. The said order has to be revised annually. Further the rates determined is to be limited to traditional mode of radio broadcasting and not through any other mode/medium/platform.

47. **The case of Super Cassettes Industries Private Limited(Respondent)**

It is a leading music label and film production company in India popularly known as "T-Series" . It is in the business of production and acquisition of Copyrighted works that include sound recording of songs, literary works or lyrics, musical works, cinematograph films amongst others. Super Cassettes is presently the Copyright owner of around 2,00,000 songs in more than a dozen of Indian languages including that of Hindi, Punjabi, Bengali, Telugu, Marathi etc.

47.1 It invests large amount of money in producing/creating/acquiring music content. It pays money to music composers, lyricists, singers, sound arrangers, sound operators and various other technicians involved in music production.

47.2 Super Cassettes license its music catalogue by way of negotiated contract with various music users such as radio broadcasters, television broadcasters, film broadcasters, digital platform etc. It has voluntary licensing agreement with most of the radio broadcasters under the said agreements. Super Cassettes receive lump sum fee on the basis of needle per hour from broadcasters for the communication of sound recording to public.

47.3 Most of the radio broadcasters have decided not to pay license fee for the underlying literary and musical work, in some cases an alternative of bank guarantees have been furnished to Super Cassettes for it to be encashed after the Court decides on the issue.

47.4 Voluntary Licensing Agreement maintains a balance between providing access to music upto the public on the one hand and ensures the music owners to be adequately compensated on the other hand. At no point of time, Super Cassettes received or accepted royalties at the rate of 2% of net advertising revenue as fixed by the Copyright Boarder vide its order dated 25/08/2010. The said order was held to be in applicable for Super Cassettes by virtue of the Single Judge order of the Hon'ble Delhi High Court.

47.5 If the radio broadcasters have any reservations in relation to the negotiation of rates with music owners, they can exercise the option of compulsory license under Section 31 of the Copyright Act, 1957 read with Rules 6 to 9 of Copyright Rules, 2013. The said provision adequately safeguards the interest of radio broadcasters.

47.6 The constitutional validity of Section 31-D of the Copyright Act, 1957 is challenged before the Hon'ble Supreme Court in the case of M/s. Lahari Recording Company Vs. Union of India in WP(Civil) No. 667/2018 and before the Calcutta High Court in the case

of M/s. Eskay Video Pvt. Ltd. & Anr. Vs. Union of India & Ors. in WP 92/2015. The said cases are pending. In view of it the IPAB is not to pass any order fixing royalty under Section 31-D read with Rule 31 of the Copyright Rules, 2013.

47.7 It is manifested under the stature determining the royalty, the following factors as that of intended time slot for broadcast of the works including different rates for different time slots including repeat broadcast, different rates for different classes of works, nature of uses of works, proposed duration of use of the works etc., are to be considered.

47.8 Royalties payable to Copyright owners should be fixed at needle per hour rates for communication to the public by way of radio broadcasts of sound recordings as well as literary and musical works. The needle [power essentially means the royalty rate is calculated at each aggregate of sixty minute of actual broadcast of sound recordings, excluding commercials, advertisements, voice overs, anchor time etc. Thus the calculation is based on the actual time the music is aired to the public on FM radio stations and thereby there is a rational nexus between the royalties payable and the music being aired on FM stations.

47.9 Considering the large investment made by Copyright owners in creating music, it is only fair that any payments made by any users of music are made on the basis of the actual use of content and not otherwise. The basic principle of valuation of any intellectual property is a fair and equitable return to the Copyright owner. The assessment of what is fair and equitable return should be based on the investments made and costs incurred by the Copyright owner in creating music content along with the exploitation of music on the relevant medium and not on extraneous factors having no relation to the same. A radio broadcaster may elect differential pricing models for advertisement slots on the basis of frequency, the city in question and its listenership numbers, time of the day, other business considerations etc., all of which have no relation to the actual costs of the Copyright owner in making music content and the actual music plays on the radio stations. Thus, a royalty rate based on advertisement revenues will essentially allow the radio broadcasters to impose the burden of their losses or industry fluctuation upon the music industry and thereby, unreasonably fetter the actual monetary valuation to which the music owners are entitled.

47.10 Majority of FM radio broadcasters are in fact arms of established business conglomerates which have media divisions which regularly enter into music usage based payment arrangements with the Respondent in relation to other modes and mediums such as digital platforms, OTT music streaming platforms, television, films etc. The payment of royalties on the basis of actual music usage is an accepted music licensing practice. Both music and radio industries are consumer driven industries and therefore needle per hour rate of royalty would ensure that these industries better serve their consumer's interests.

47.11 A royalty rate based on advertising revenue does not have any co-relation with actual music played on the radio stations and thus arbitrary by its very nature.

47.12 The advertising revenue of FM radio stations are within the exclusive knowledge and control of radio broadcasters. These revenues may subject to mischief or revisions by radio companies. It is practically impossible for the Copyright owner to ascertain the authenticity of advertising revenues of radio broadcasters.

47.13 Advertising revenues depend on factors like, market share, time of the day, city in question etc. Advertisement significantly reduces at off hours of the day and thereby the revenues also significantly reduced. Decline in advertising revenue means loss in the royalty payouts to the music companies.

47.14 Advertising on radio often involves barter deals for which consideration received by the radio companies may not be in the form of money but in the form of gifts, promotion opportunities for the media house etc. These barter deals amounts to almost 30-40% of over all deals done with advertisers. In the case of barter deals, actual advertising revenues may be higher than what it is actually reported in the books of accounts. Thus, the royalty payouts based on advertising revenues may be significantly undervalued.

47.15 Advertising revenue for a radio channel can drop due to several factors *viz.*, poor curation of content, sub-par understanding of consumer tastes, Radio Jockeys etc., which are within the control of broadcasters alone. The said factors cannot be attributed to music companies, however, they have to suffer a fall in revenue.

47.16 Music for the radio industry is a finished product and it derives the fruits of the finished product by communicating it to crores of listeners in India and at a meager compensation to the Copyright owners. Radio industry does no investments towards creating music content. However, radio broadcast devotes 70-80% of average airtime to recorded music.

47.17 As an alternative to needle per hour rates, the royalty rates can be based on gross revenues earned by FM radio stations. Gross revenues earned by radio companies can be ascertained by Copyright owners through publically accessible statement of accounts. The net advertisement revenue is treated as the basis for royalty, the radio companies in order to avoid paying more royalty, may classify the revenues under the heads other than advertising.

47.18 The net advertising revenues are no more the sole revenue source for radio companies. The radio companies earn revenues from numerous other activities using the music such as producing native videos for clients, planning digital media for clients, integrating them inside original content, providing sponsorship opportunities for podcast, creating multimedia solution etc. Non-advertising revenues now form nearly 20% of all revenues for radio companies. Radio companies derive commercial gains by exploiting music and therefore, it is un-justified to tie music companies to a royalty based on advertising revenues.

47.19 The share of royalty paid by radio companies to PPL and non-PPL music combined is about 5% of overall revenues. PPL's share of music is only 35% of the overall FM radio music share, which is payable at the fixed royalty rate of 2% of net advertising revenue which translates to less than 1% of gross revenues. By this, it could be inferred that the royalty paid for non-PPL music content is around 6-7% of gross revenues. This clearly seems to be the negotiated market rate between non-PPL music companies and radio companies. In view of which, the Respondent proposes 7.5% of gross revenues as royalty rates for sound recordings and literary works and musical works.

47.20 The Respondent suggests needle per hour rate in respect of sound recording for different slots of time -prime time (1200), non-prime time (720) and lean time (300). The Respondent also suggests needle per hour rate for literary and musical works for different slots of time -prime time (1200), non-prime time (720) and lean time (300). Since needle per hour rate of Rs. 660/- was agreed basis the economic conditions in the year 2002, the IPAB should take into account the increase in rate due to inflation since year 2002. Alternatively, if the IPAB fixes the royalty rate based on revenue models, then it is requested to fix a separate royalty rate of 7.5% of gross revenue based on pro-rata usage of sound recording or needle per hour, whichever is higher. Similarly, for literary works and musical works, the royalty rate of 7.5% of gross revenue based on pro-rata usage of literary works and musical works or needle per hour, whichever is higher. The royalty rates thus fixed should be subjected to periodic reviews once in a year, or otherwise, as contemplated under Rule 31(9) of the Copyright Rules, 2013.

47.21 The "prevailing standards of royalties" required to be considered under Rule 31(7)(d) of the Copyright Rules, 2013 are voluntary licensing rates, and not the rates fixed by the Copyright Board's order dated 25/08/2010. The Copyright Board's order is 10 years old. The factors taken into account by the Copyright Board in the year 2010 are now obsolete. The Copyright Board's order was in relation to music owners who were members of PPL at the time; however, the Respondent was not a member of PPL. The Respondent was not a party to the said litigation and was not bound by the said order. Majority of the music companies have left the membership of PPL and have entered into voluntary licensing deals with the radio operators. PPL at present has 35% of the market share of music played whereas non-PPL members have the 65% market share and they are not bound by Copyright Board order. The said order was passed under the compulsory license scheme, whereas the present proceedings are under statutory license scheme.

47.22 The creation and acquisition of music lies at the core of revenue generation across the various verticals of entertainment and media industry, and imposition of flat royalty rate based on net advertising revenues will have a cascading effect. The annual payout of royalty to music owners is a paltry Rs. 75 crores – which is a deeply disturbing fact given that Rs. 3,100 crores radio industry is almost three times the music industry. The radio companies are able to drive up their valuation on the back of licensing of music from Copyright owners. Being so, it is patently unjust for the radio industry to derive maximization of value using Copyrighted works of music owners while refusing to pay fair and equitable money for the usage of such music.

47.23 The radio industry's contribution to music development and growth is negligible and therefore the rate of royalty based on advertisement revenue is no longer fair and justified instead, rate of royalty based on needle per hour are in the alternative the rate based on percentage of gross revenue is a more sound royalty distribution model.

47.24 Music industry has grown on its own strength whereas the radio industry is supported by government as well as by its parent media companies. Most of the radio broadcasters belong to prominent media houses. The limitations imposed by the Government under GOPA (Grant of Permission Agreement), is only in respect of news and current affairs. Nothing restricts FM radio broadcasters to produce content under any other team such as

general entertainment, talk shows, stand-up comedy, edutainment etc. 2% royalty rate has dis-incentivized radio broadcasters to invest in necessary technology and personal to deliver quality content. Now, the radio companies have the advantage of valuable foreign investment after the Government had permitted 49% FDI in that sector. In the given fact and circumstances, the radio broadcasters plea to fix a flat royalty rate of 1% of net advertisement revenue is egregious.

47.25 The radio broadcasting companies claim of economic depression is not borne out by records (or) ground realities (or) the activities of radio broadcasters themselves.

47.26 There has been an increase in radio stations in Phase-III of FM radio expansion i.e. up to 385 stations. The radio listenership had increased manifold across the country including rural and urban areas. The advertisement revenue of FM broadcasters had steadily increased in the last decade from 717 crores in the Financial Year 2009-2010 to 2381.51 crores in the year 2019. The policy guidelines under Phase-III of FM radio broadcasting expansion have allowed the radio industry to build its profitability by substantially reducing the capital and operating costs. FM radio broadcasters have spent considerable amount to acquire new FM stations in Phase-III. Private FM radio broadcasters have spent Rs. 11,45,47,87,026 to acquire 245 stations in Phase-II of FM radio expansion. In Phase-III for fewer frequencies in Tier-I Metro cities, the radio companies have spent more than Rs. 12,56,15,72,264 for 102 stations. It is to be noted that during Phase-III auction only the stations which were considered commercially viable were bid for by the FM radio industry. Government of India had also amended the statutory policies benefitting the radio broadcasters.

47.27 On account of media ownership de-regulation, radio broadcasting companies are increasingly being consolidated to seek scale benefits. Reliance Broadcast Network Limited has now entered into an arrangement with Music Broadcast Limited for selling 40 of its radio stations for an approximate value of Rs. One thousand and fifty crores. Most the radio deals valuations are achieved on the back of profitable music licensing deals with music owners. However, the radio industry is refusing to pay fair and equitable monies for usage of such music. Most of the radio companies are owned by behemoths with cross ownership in television, print, digital etc., thus the re-structuring are profitable for them. The re-structuring also highlights the steady financial status of the radio companies.

47.28 FICCI Ernst & Young Report on Media and Entertainment Sector 2019 and FICCI-Ernst and Young Report on Media and Entertainment Sector March 2020, bears testimony to the steady financial status of radio broadcasting companies. Thus the argument of radio companies that they are going through an economic slump has to be rejected.

47.29 The KPMG Report on Media and Entertainment Sector 2019-2020 indicates that Indian private FM radio operators are looking to expand and their geographic foot prints in foreign countries.

47.30 There is no rational or basis to the arguments of FM radio stations that they have suffered on account of tough competitions from digital platforms. Radio is adding new listenership and it has seen 53% increase in engagement year on year from 2018. The well-known media conglomerates who own and operate radio stations have significant presence in

music streaming websites or Apps. ENIL is owned by Bennett Coleman Group, which controls the Gaana music streaming service. Digital platform incentivizes economic investments in the radio arm of many of these media conglomerates. Radio industry had entered into various advertisements, promotions and marketing tie-ups are deals with music streaming websites and Apps. Publically available data suggests that the radio industry intends to collaborate and co-habit with digital platforms. Hence it is baseless and without merit to claim that radio industry has suffered economically on competition from digital music streaming platforms.

47.31 The radio broadcasters contention of that its business growth will benefit the music company's growth and such is the trend world-wide has no factual or historical basis. FICCI Report, 2020 indicates that radio is responsible for 24.7% of music listening time in India; however, it only returns 2.9% of total label revenue generated by the entertainment and media industry. the Copyright Board's order of 2010 has enabled the radio industry to exploit the Copyright owner at the rate of 2% of net advertisement revenue, and this has steadily declined the music industry. The music companies made substantial recovery in the last two years owing to the revenue offered by digital media. Thus the argument 'one will benefit the other' does not hold good.

47.32 Relying upon global standards to determine the rate of royalty in the present proceeding is incorrect as the status of each of the stake holders, the laws governing their operations and the factual history for each is peculiar to India.

47.33 The imposition of flat royalty rate is based on the net advertising revenues is impervious to market economics and will dis-incentivize investments by all stake holders in the entertainment and media industry, ultimately harming the end-listeners.

47.34 An adequately high statutory rate provides bargaining power to the radio broadcasters to voluntarily negotiate lower than the prescribed rates with the mid-sized/smaller music companies with diverse music catalogues in return ensuring that their content is communicated to the public on the FM radio stations. It is crucial that the royalty model to be determined statutorily must be sensitive to free market requirements and benefits; else the same will simply be an exercise in subsidizing the private FM radio at the cost of imposing a financial burden upon Copyright owners.

47.35 The imposition of flat royalty rate based on net advertising revenue discounts the enormous investments made by the music industry to produce and/or acquire music rights, especially rights in film music which due to the unique cultural matrix of Indians is an indispensable part of their music appetite. Super Cassettes owns and controls one of the biggest catalogues of Bollywood and Indi-pop music. However, this has come at a steep cost, per album. The cost of acquisition of music rights in the films viz., i) 3 Idiots, ii) Ravan and iii) Ra One was over 10 crores each. In such a vicious circle of entrenched consumer taste and rising acquisition costs, imposition of flat royalty rate based on net advertising revenue would be in utter dis-regard to the letter and spirit of Rule 31 of the Copyright Rules, 2013.

47.36 The music companies traditionally had earned its revenue from the sale of physical units of music recordings such as records, cassettes and CDs. However, due to piracy and availability of alternate platforms for consumption of music and shift in consumption pattern from ownership to experience the physical sales have seen a continuous decline. Added to this, the sentiment which is unique to the Indian customer base that 'music should be free' it price sensitive, and had made the consumer reluctant to spent money on music.

47.37 The decrease in advertisement revenue is not an event experienced by the radio industry alone. As per the FICCI – Ernst and Young Report on Media and Entertainment Sector 2019 and FICCI – Ernst Young Report on Media and Entertainment Sector March 2020, it is clearly set out that the droop in advertising was due to demonetization and implementation of GST, the effects of which were felt across all industries in the media and entertainment sector. The recent fluctuation in advertising revenues on radio once again support the fact that any royalty rate based on advertisement revenues is inherently flawed as it may be adversely impacted due to extraneous reasons which have no relation what so ever with either the volume of music being aired on the radio stations or the Copyright owners of the music.

47.38 Section 31-D of the Copyright Act, 1957 is ex-proprietary provision which has the effect of expropriating the exclusive rights enjoyed by a Copyright owner. Being of such a nature, it becomes all the more necessary that such a provision is applied in accordance with due process and keeping in mind the interests of the Copyright owner as balanced against the public interest to access music by way of radio broadcast. Thus, giving prominence to the commercial interests of radio broadcasters in fixing royalty rates under the said provision would not only be prejudicial to the Copyright owner but would also skew the balance heavily in favour of the radio broadcasters contrary to the letter and spirit of the said provision.

47.39 The fair value of Copyright works cannot be based on loss or profit of the radio broadcasters which is wholly unrelated to the Copyright owner and reliance on such extraneous and irrelevant factors to make payments to music owners for their Copyrighted works is totally out of sync with basic principles of economics and market functioning.

47.40 The wave of COVID-19 pandemic hit the music industry at multiple levels shutting down several schemes of revenue. In the wake of the lock-down and stringent social distancing norms, live events ended overnight bringing an end to all licensing opportunities for the music industry. Ordinarily, music industry recoups its investments in its content by providing licenses for award shows, competitions, music festivals etc., however, due to the pandemic, the said licensing opportunities could no longer be availed. Adding to this uncertainty, the main source for film music has been turned off on account of postponement of theatre releases and closure of cinema halls. All ongoing and fresh shooting of films have been put on hold. Even the few film shootings that ate now taking place are inevitably incurring increased costs on account of massive logistical re-

configuration and resultant delays at every stage in order to comply with stringent social distancing codes.

47.41 As per FICCI – Ernst and Young Report on Media and Entertainment Sector 2019, the ;primary place for listeners to listen radio in India are Cars. As per the said report of the year 2020, 75% of its Respondents heard music when relaxing at home, while 62% heard it in the Car. Thus, the claim of radio broadcasters that radio is the sole source of entertainment and means of social upliftment for the underprivileged strata of society is speculative and backed by any concrete evidence. In any case, the broadcast of public service messages ought not to be affected by the availability or un-availability of premium content at rock bottom prices.

47.42 The Respondent suggests needle per hour rate in respect of sound recording for different slots of time -prime time (1200), non-prime time (720) and lean time (300). The Respondent also suggests needle per hour rate for literary and musical works for different slots of time -prime time (1200), non-prime time (720) and lean time (300). Alternatively, if the IPAB fixes the royalty rate based on revenue models, then it is requested to fix a separate royalty rate of 7.5% of gross revenue based on pro-rata usage of sound recording or needle per hour, whichever is higher. Similarly, for literary works and musical works, the royalty rate of 7.5% of gross revenue based on pro-rata usage of literary works and musical works or needle per hour, whichever is higher.

48. **<u>The case of Tips Industries Limited (Respondent)</u>**

The petition filed by the radio broadcasting company is mis-conceived and lacks *bonafide*. The provisions relating to statutory license of the Copyright Act, 1957 and the Rules thereto are the subject matter of challenge before the Hon'ble Supreme Court and the Hon'ble High Court of Calcutta through Writ Petitions. IPAB has to be defer the determination of statutory license until the adjudication of the aforesaid constitutional challenges.

48.1 Tips Industries Limited, hereinafter referred to as 'Tips' is engaged in the business of production and exploitation of films and music. Tips have invested and continuous to invest significant amount of money, time and effort in developing and publishing sound recordings, music videos and the underlying literary and musical works and further license these works to generate revenues there from. Tips is one of the oldest music labels in India and is one of the fastest growing in the country. It acquires, distributes, exploits and broadcast content such as songs/sound recording, audio visual songs/music videos and the underlying literary and musical works embodied therein, across various modes and mediums. Tips owns and controls Copyright in diverse repertoire consisting of more than 28,000 sound recordings. Tips became the member of PPL with effect from 01/10/1988 and as such, it had authorized PPL to grant licenses for the exploitation of its content for communication to the public. Tips withdrew from the membership of PPL with effect from 01/07/2015.

48.2 Prior to the termination of PPL's mandate by Tips, the radio broadcasters were paying royalty as per the Copyright Board Order dated 25/08/2010. Tips was complying the said Copyright Board order until it was the member of PPL. After Tips left the PPL, it did not

comply to said Copyright Order on the footing Tips was no more the member of PPL since 01/07/2015, and thereafter there was no privacy of contract between Tips and PPL, ergo Tips is not bound by the Copyright Board's order.

48.3 The radio broadcasters seeking to impose unreasonable license terms on Tips. There is no material placed by the radio broadcasters that substantiate its fanciful and frivolous claims. Voluntary licensing ought to be considered as a primary option.

48.4 There are over 1,100 operational radio stations in India, with 385 private FM radio stations operated by approximately 33 private FM radio broadcasters, across 106 cities in India. Radio is seen to be a cherished source of entertainment and remains one of the favourite options available to consumers, cutting across various age groups. Music remains the core of programming for the private radio channels.

48.5 The radio industry in India has been valued at Rs. 3,000 crores in the Financial Year 2018-2019. The revenue forecast for the radio industry has been placed at over Rs. 3,500 crores. Until the year 2000, All India Radio (AIR) was the only broadcaster in India. Then, FM radio broadcasting was open to private agencies through auctioning of licenses in three Phases. Phase-III of FM radio privatisation expanded the growth opportunities to benefit the radio industry in India. The license fee was lowered to 2.5% (non-refundable one-time entry fees) or 4% of gross revenue, whichever is higher. The license period was extended from 10-15 years. The foreign direct investment in radio sector was increased to 49%. Networking of channels across India was permitted in the Phase-III policy of privatisation. This enables the broadcaster to broadcast the same content within its own network across the country thereby reducing the costs as broadcasters were not required to create new and distinct content for each city. These measures brought profitability to the radio industry by considerably reducing their capital and operating costs.

48.6 Even with the rise of digital platforms, radio is still a prevalent choice of media. COVID-19 lockdown has shown increase in the radio engagement. The radio listenership over the previous decade has increased by 23% to 51 million.

48.7 The contents of music companies serve as the backbone of radio industry. Out of every operation hour of FM broadcast, approximately 50 minutes thereof, consists of music and talk time. However, license fee for the use of sound recordings amounts to only 1.65% of global commercial radio industry revenues. The flow of music to radio is estimated to contribute revenues of Rs. 2,170 crores, which is almost twice the size of recorded music.

48.8 For music companies, the physical record sales revenue is decreasing and they are heavily dependent on revenue earned from licensing music. The gestation period for recovering the investment/earning the profits. The royalty earned from licensing plays a crucial role in maintaining the expenditure and the quality of music production. Ergo, IPAB has to allow market forces to determine the royalty rates, else, if statutory determination is made, it would keep the music companies in a dis-advantageous position.

48.9 The total FM royalties earned by Tips under the 2010 Copyright order has steadily declined from Rs. 1.02 crores in the Financial Year 2010-2011 to approximately Rs. 69

lakhs in the Financial Year 2014-2015. After Tips withdrawing its mandate from PPL, the royalties attempted to be paid by ENIL and Music Broadcast, total a meager Rs. 1.74 crores for the period of August 2015 to September 2020. The Copyright Board's order of 2010 had the effect of subsidizing the private radio industry at the cost of recorded music industry in India. The 2010 order had forced the content owners to accept below – market prices. The radio industry has grown at an average growth rate of 23% in the last ten years. Such being the case, if the royalty rates are lowered below those stipulated in the 2010 order, music companies would face irrecoverable losses and their existence becomes questionable. Reduction of royalty rates would indirectly impact the creation/generation of music content.

48.10 Radio broadcasters apart from earning revenue through advertisement, also earns revenue from non-syndication, events, Radio Jockey segments, music festivals etc. it is estimated that the non-traditional revenue streams account to 7-8% of total revenues earned by radio industry.

48.11 The contention of radio broadcasters that its advertisement revenue is declining is unfounded. TAM AdeX Radio Advertisement Report for the period June-August 2020 demonstrates that the average advertising volume per day has surged 4.8 times from April 2020 to August 2020. The radio broadcasters have diversified their contents and apart from broadcasting music, they have introduced content relating to sports and non-music category genres like crime, horror and sitcom.

48.12 Radio industry is consolidating by acquisitions and mergers of other radio channels, thereby expanding into new territories and achieving profitability. In these circumstances, the claim of the radio broadcasters seeking for lower rate of license fee is not in *sync* with the trends of the industry.

48.13 Radio broadcasters enter into barter deals, which amount to 30-40% of the overall deals done with brands. Major radio players in India are owned by conglomerates with interests in media and entertainment business. In many of the cases, the impact of barter deals has a bearing on the radio networks profit and loss account. If royalties payable to music companies are based on advertising revenue only, the money that broadcasters earn from advertisers as a result of this, barter deals does not get accounted for. This impacts the royalty payable towards the use of music.

48.14 Operating expenses of radio companies as a percentage of its revenue over the years is between 45% to 77%; while the employees' costs are in the range of 16% to 24%; whereas the proportion of royalties as a payout has remained flat at 3% to 4% of the total revenues. This indicates the low value attributed to music as an input into the private radio broadcasting industry.

48.15 Unlike other industries, in the entertainment and media sector, that have adopted to newer technologies, and invested in music growth and development, the radio industries' contribution to music development is very low. The music industry had taken the 2010 Copyright Board order as granted and has remained economically dis-incentivised.

48.16 In Phase-III auction, radio broadcasters had spent substantial amount of money for acquiring single radio frequency units. This indicates that the radio industry is in a financially sound position. In case of certain FM satins, no broadcasters have put forth a

bid on the ground that the prices reserved for the bids was not commercially viable. It shows that the broadcasters have considered the stations which are commercially viable.

48.17 The music companies' financial fortune has declined in the past decade. It has recovered marginally in the last two years and solely from digital revenues. The traditional revenue source for music company is from the sales of physical units of music recordings such as records, cassettes and CDs. However, due to piracy and the availability of alternate platforms for consumption of music, the physical sales have declined by over 40%.

48.18 The radio and digital platforms cannot be compared, as to avail digital platforms, a listener has to incur costs for net connectivity/mobile connectivity; whereas, radio is a 'free-to-air' medium and not subscription based.

48.19 Radio royalties' payout systems across territories are very intricate and market specific. Determination of such royalties depends on multiple factors such as market size, radio listenership, local legislation determining the manner and mode of payments etc. These factors make the radio industry of each country unique and thereby make it impossible to propose a generic straight jacket formula for fixing the royalty. Therefore, means and methods of determining radio royalties should be specific to the complexities and needs of stake holder environment of the music industry.

48.20 FM radio is the still preferred mode of music consumption for listeners across the country. In addition to existing users, radio is also adding significant number of new users to its listenership base. The radio listenership has increased by 53% during the year 2018. In view of which, it is incorrect to state that digital platforms are cutting into radio markets. Radio broadcasters are operated by well-known media houses. One such media house is Bennett Coleman Group and its radio arm is ENIL. ENIL operates various internet radio channels like "Retro Bollywood", "Filmi Mirchi", "Mirchi 90s" and the like which are streamed on the Gaana music streaming service. The Growth of digital platforms incentivizes the economic investments of the radio arm of many media houses. Therefore, digital platform is a boon and not a bane for radio broadcasters. Radio broadcasters have also entered into various advertisements, promotions and marketing tie-ups with music streaming websites and this has benefited them. The authorized personnel of many broadcasting companies have testified the future of radio industry as the fastest growing traditional medium and that radio industry will witness a double digit growth.

48.21 One of the challenges that the music companies face is in determining the accuracy of royalty payments made by radio broadcasters. Radio broadcasters are required to provide the logs of music tracks being played on the radio stations, on the basis of which the royalty payments are verified by the music companies/PPL. However, this system is besieged by fundamental problems. In the Haribhakti report, it was reported that the radio broadcaster has set out that log files are time limited i.e., they are over written by the system after a month and that the log of previous months are difficult to obtain. In view of which, reconciling the logs from time to time is not possible. It is evident that the radio broadcasters are attempting to subvert their obligations in law by contenting that the logs, which form the basis of their royalty payments are not readily available.

48.22 The IPAB while determining the royalty for the grant of statutory license shall take into consideration the factors adumbrated under Rules 31(7) and (8) of the Copyright Rules, 2013. The radio broadcaster has not placed any materials on record that would deal with the factors enumerated in the Rules mentioned hereinabove.

48.23 The royalties payable to Copyright owners should be fixed at Needle Per Hour (NPH) rates for communication to the public by way of radio broadcasts of sound recordings as well as literary works and musical works. The calculation is based on actual time that the music is aired to the public on the FM radio stations and thereby there is a rational nexus between the royalties payable and the music being aired on the FM stations. There exists a reasoned basis for using the needle per hour methodology, on account of the fact that the same deals with both the interest of radio broadcasters and content owners by employing a pay-for-play approach.

48.24 The NPH methodology will enable the content owners to better recoup their investments in the publishing, creation and acquisition of content which will consequently facilitate newer, latest music releases being made available on radio stations. NPH method would ensure a fair and proportionate return for the music industry. Small and mid-sized music companies would be more willing to negotiate with the radio broadcasters in case they have the protection of NPH rate determining methodology.

48.25 Using advertising revenues as a metric for royalties in respect of music played on FM radio is inherently flawed. The advertising revenues earned by FM radio station are within the exclusive knowledge and control of the radio broadcasters, and thus they may be subject to mischief or revisions by the radio broadcasters. It is practically impossible for the Copyright owners to independently ascertain or authenticate the figures cited as advertising revenues by the radio broadcasters.

48.26 The advertising revenues vary depending upon the market share/position of the radio broadcasters. Advertising revenue for a radio channel can also drop owing to poor curation of content both music and non-music, sub-par understanding of consumer taste, Radio Jockeys etc. A decline in revenue owing to the said factors will put the music company to loss, for reasons that have no connection with the music companies or the actual music played on the radio stations.

48.27 The music companies are required to strategically balance its investments by monetizing the rights of tent-poll films at a greater rate to either set off its tremendous acquisition cost or set off previous losses or to set off risk of investing in the music production of an un-known artist or acquisition of music of a relatively smaller or independent label. The music companies can recoup costs and take creative risks, develop new talent, introduce fresh genres of music and invest in technologies only in a free market. The imposition of flat royalty will upend the market forces and disincentives music owners from carrying out the aforesaid activities.

48.28 An adequately high statutory rate provides bargaining powers to the radio broadcasters to voluntarily negotiate lower than the prescribed rates with independent music companies *in*

lieu of ensuring that their content is communicated to the public on the FM radio stations. This will ensure more diverse contents available to FM radio stations.

48.29 As an alternate to NPH methodology, the royalty based on gross revenue earned by FM radio stations, can be considered. Gross revenues earned by FM radio companies can be ascertained by the Copyright owners through the publically accessible statement of accounts and records. Revenues from other activities in where radio companies utilize music will also be included in the gross revenue. Non-advertising revenue now forms nearly 20% of all revenues for radio companies.

48.30 The share of royalty paid by radio companies to PPL and non-PPL music combined is about 5% of overall revenues. PPL's share of music is only 35% of the overall FM radio music share, which is payable at the fixed royalty rate of 2% of net advertising revenue which translates to less than 1% of gross revenues. By this, it could be inferred that the royalty paid for non-PPL music content is around 6-7% of gross revenues. This clearly seems to be the negotiated market rate between non-PPL music companies and radio companies. In view of which, the Respondent proposes 10% of gross revenues as royalty rates for sound recordings and literary works and musical works.

48.31 The Respondent suggests needle per hour rate in respect of sound recording and literary and musical works for different slots of time -prime time (1200), non-prime time (720) and lean time (300). Since needle per hour rate of Rs. 660/- was agreed basis the economic conditions in the year 2002, the IPAB should take into account the increase in rate due to inflation since year 2002. Alternatively, if the IPAB fixes the royalty rate based on revenue models, then it is requested to fix a separate royalty rate of 10% of gross revenue based on pro-rata usage of sound recording and literary and musical works or needle per hour, whichever is higher. The royalty rates thus fixed should be subjected to periodic reviews once in a year, or otherwise, as contemplated under Rule 31(9) of the Copyright Rules, 2013.

48.32 The IPAB should consider the following factors while determining the royalty rates as a term of statutory license:-

(a) Royalty negotiations should take place between radio broadcasters and content owners to decide fair value of royalty under free market practices.
(b) The 2010 Copyright Board order cannot be used as a basis to determine the royalty.
(c) The royalty rate should consider the potential of radio network to earn revenue, the investments made by content owners and current market practices.
(d) While considering the revenue of radio stations, the value or barter deals and other revenues generated from music must be considered.
(e) Radio broadcasters have to be transparent in sharing their airplay logs.
(f) Royalty rates should not be completely fixed based on international practices; and it has to be re-interpreted from Indian market conditions.

49. **<u>The case of Eros International Media Limited (Respondent)</u>**

Eros International Media Limited, in short 'Eros', is in the business of production and acquisition of songs and films either by directly producing such Copyrighted content under contract-of-service entered into with various artists, lyricists, composers etc., by entering into assignments agreements in respect of the aforesaid Copyrighted content and acquiring the Copyrights therein subsequently. Then, Eros exploits its Copyright content by way of entering into voluntary agreements, which are negotiated and executed on terms mutually agreeable to both parties. The repertoire of Eros consists of highly successful and acclaimed film and non-film music.

49.1 Eros spent vast sums of money in generating or acquiring music content and this expenditure is borne by repeatedly to acquire/create new music content in order to ensure their portfolio contains a diverse range of music. The commercial realities of the music industry as well as the regulatory framework for the grant of statutory license has undergone a sea-change after the passing of the order, dated 25/08/2010 by the Copyright Board.

49.2 The costs for creating and acquiring music rights have seen an exponential rise. The new technologies driven by internet and applications are throwing unprecedented challenges to the music companies. Streaming services and digital downloads coupled with piracy has made physical music sales by way of CDs, Cassettes etc., redundant.

49.3 While determining the royalty, the territorial coverage, details of time slots, duration, period of programme, the class of work, the nature of work etc., are to be considered. The combined reading of the Rules 31(7) and 31(8) indicate that while fixing the royalty, a balanced approach must be adopted to arrive at a fair, reasonable and competitive compensation to the music owners and ensuring communication of music/Copyrighted work to the public. The determination should be done on competitive market value principles using Needle Per Hour (NPH) method. For this, the value of the Copyrighted work must be ascertained. As the earnings from the repertoire is uncertain, it is necessary to consider the cost of the acquisition of music by the music companies. The said cost should include both the direct and the indirect expenses.

49.4 The Copyright Board order dated 25/08/2010 had stipulated a flat percentage of net advertisement revenue as the royalty. This has given an unfair advantage to the broadcasters. The said order has made the radio broadcasters immune from the risk associated with the music business. Under the net revenue sharing model, a song played on two different FM stations in the same city would generate different revenues to the music-right holder. Though FM radio constitutes 21.7% of music listening time across radio the return is just 2.9% of the total revenue.

49.5 The Needle Per Hour method is adequately sensitive to the commercial interest of the Copyright owners as well as it is a conventionally accepted basis of paying for music as per usage. The royalties for sound recordings and underlying works have to be proportional to the broadcast time of the same.

49.6 The broadcasters face no risk for the main component of their business, as they simply cherry-pick the content (hit song) and play it on the radio. Whereas, the music owner pays the consequences of the song not gaining the desired level of popularity and may not recoup its investments for the creation and acquisition of music. NPH rate, being based on actual music played on FM radio stations, would ensure a diverse range of content being made available on radio. In that process, the radio industry would be incentivised to negotiate commercially beneficial rates with mid-sized, small, independent companies including companies providing different genres of music such as regional, folk, devotional, spiritual etc.

49.7 Eros suggests the royalty rate based on Needle Per Hour model, as follows:-

(a) Needle Per Hour rates allow separate rates for time slots.

(b) Needle Per Hour rates should be higher for premium songs. The songs which are released not more than three years to the date of airplay fall into the category of premium.

(c) Penal rates for playing a premium song or a newly released song beyond 4-5 times a day. In the West, the songs that are shortened (radio edits) are broadcasted; however in India, full length songs are broadcasted thus causing a level saturation amongst the listeners, who then will refrain from buying/downloading the said song, thereby causing loss to the music company.

49.8 As per Rule 31(9) of the Copyright Act, 1957, the IPAB has to review and revise the royalty rates once every year so as to remain sensitive to the needs and interests of the market. The rest of the substances are common with other respondents.

49.9 Radio broadcasters are liable to pay artists and composers for the underlying works. This is enshrined under provisos 3 and 4 of Section 18 of the Copyright Act, 1957. The amounts collected for the utilization of the underlying works must be shared equally with the authors/composers. In India, the radio companies are attempting to avoid paying royalty for the underlying works. The Copyright Board order of the year 2010 also does not deal with this issue and related only to the royalty for sound recordings.

49.10 The voluntary licensing terms between the music owners and the radio broadcasters depicts the 'prevailing standards' in the fixation of royalty. The Copyright Board order states that the royalty rate should ideally be determined by taking a recent, voluntary license for comparable subject matter as a bench mark. As on 2019, most music companies had left PPL and negotiated voluntary licenses with radio companies. 65% of the music played on FM radio was licensed through voluntary agreements. As such, voluntary licenses are the present norm for radio companies and the market rates must be decided on the basis of such arrangements.

49.11 Music for the radio industry is a finished product and unlike the music industry, which invests in creating and promoting music content, radio as an industry simply derives the fruits of the pre-prepared product by communicating to the public. 70-80% of the average airtime in a radio broadcast is devoted to recorded music. The radio industry should invest 12-14% of its revenue for producing music, however, no such investments are made. Whereas Television invests more than 20% of its revenue in creating or producing its content.

49.12 The main source of music industry is film music. Film music has been turned off on account of postponement of theatre releases and closure of cinema halls. Even the new film shootings that are taking place are incurring increased costs on account of massive logistical reconfiguration and resultant delays at every stage in order to comply strict social distancing codes. Music consumption pattern in India is film centric. The increased costs will be passed on the music industry by the film industry to set off its budgetary extensions. Music owners have no choice but to cope up the hiked amounts to acquire premium contents from film producers.

49.13 Digital media has helped the radio industry. Mobile handsets are used to access music. According to estimates, over 900 million Mobile devises have built-in FM receivers. Radio is still the prevalent choice of media. An average Indian radio listener spends 2.4 hours per week listening to music. Radio has seen 53% increase in engagement year on year from 2018. Radio companies are benefitting from technological advancements as they are now able to provide radio on the internet as well. Radio jockey's payment talent is developed and used across other media platforms such a Television, social media, digital broadcast, local events, concerts, cinema, print media etc. The publically available data suggests that the radio industry intends to collaborate and co-habit with digital platforms. As per FICCI-Ernst and Young Report on Media and Entertainment Sector March 2020, a number of radio broadcasting companies have stated that the future of radio industry as the fastest growing traditional medium and that radio industry will witness a double digit growth.

49.14 Radio broadcasters are purely profit driven and their 'Public Interest' narrative is false. Private radio channels cannot be compared to All India Radio (AIR) which has a nationwide presence and audience. Radio companies admittedly had placed bids for cities/towns wherein they are likely to generate greater advertising revenues. Radio listeners often complaint about excessive advertisements on radio. As a radio station matures, its music content decreases while its advertisement content increases.

49.15 Music Broadcast Limited's (MBL), a radio broadcaster and one of the Petitioners in the batch of cases, has its profits increased consistently since the year 2010. Its annual profit for the year 2017-18 is Rs. 5,171.70 lakhs and the annual profit for the year 2018-19 is Rs. 6,161.83 lakhs. MBL did not bid for frequencies forming part of the 2nd batch of Phase-III, as these were for cities with lower population and spending power, whereas it has obtained channels in the 1st batch of Phase-III, as these related to cities like Patna, Kanpur and Jamshedpur – all these cities with greater population and higher spending power. Thus MBL has radio channels in cities where advertisers are likely to pay greater amounts for advertisement slots. MBL has presence in 39 cities, 11 of which are through networking stations which saves for its infrastructure costs. Acquisition of Reliance Broadcast Limited will give MBL control of 82% of FM foot-print within India. The present royalty determination exercise must be conducted in view of the fact that the private radio industry is on the cusp of being monopolized and thus, lower royalty will be only for the benefit of one broadcaster.

49.16 Foreign royalty rates are not good comparators for fixation of royalties across the world. Since the circumstances, structure and functioning of radio and music industry as well as

the consumer based are vastly different. The regulatory and rights environment under which the private radio industry operates is drastically different across the markets. The means and methods of determining royalties are specific to the complexities and needs of stake holder environment of the music industry in the respective countries. The peculiarity of Indian radio industry is that there are no radio edits in India and the popular music primarily comprises of content from Bollywood film industry. The creation of songs require greater investments as elite authors, composers, singers and musicians need to be hired to meet the specific requirements and team of the film songs.

50. **Lahari Music Private Limited (Respondent)**

It is submitted that Lahari Music Private Limited has been wrongly impleaded in the present proceedings as it is Lahari Recording Company, a partnership firm which is engaged in the business of in the business of acquiring, producing and distributing sound recordings as well as the underlying literary and musical works embodied therein. Lahari Recording Company is the owner of copyright in the sound recordings, literary works and musical works in its repertoire (since both have common management, for easy of reference they are referred to as "**Lahari Music")**. Another important consideration which may be taken note of by this Appellate Board is that Lahari Music is a regional music company which acquires and distributes regional music in languages such as Tamil, Kannada and Telugu etc.

The contention of other respondents almost remain the same.

51. **Radio Companies plea in a nutshell**

The Board has been invested with power under Section-11 & 31D of the Copyrigh Act, 1957 to determine the royalty/license fee.

(i) The order dated 25/08/2010 passed by the Copyright Board is an order *in rem*. The Copyright Board order dated 25/08/2010 passed against PPL is binding on its members even though they have left PPL at various point of time.

(ii) The reasoning given in the Copyright Board in its order, dated 25/08/2010 is fully justified. Radio broadcasters seek for the determination of license fee not exceeding 2% on the net advertising revenue. Some broadcasters insist for a license fee at the rate of 0.75% or 1% on the net advertising revenue.

(iii) Determination of license fee on the net advertisement revenue would be the correct methodology compared with needle per hour method. The global standard of the rate of royalty is between 1-5% on the net advertisement revenue. Even the Government of India while issuing license for broadcast to a radio station charges fee at the rate of 4% of gross revenue of the FM Channel for a Financial Year or at the rate of 2.5% of the one-time entry fee for the city, whichever is higher.

(iv) Radio stations are not subscription based and they are 'free to air' medium. Music is the only content that the radio broadcasters can air. The main source of income for the radio operators are through revenues earned from advertisement. Loss of advertisement means loss of revenue to radio stations.

(v) The influx of digital platform has greatly hampered the business of radio industry. The arrival of Smartphones, 4G technology and musical Apps has diverted the listeners of radio to digital platform. The latest Smartphone instruments do not have radio receivers in them thereby restricting the access of radio stations to mobile users. Whereas, the digital platform had increased the revenues of the music companies.

(vi) Radio companies are performing social obligations and are the only medium of entertainment of masses and economically weaker sections of the society. Radio stations have performed great service and worked as a propagation tool during COVID lockdown. The radio companies are in doldrums as there was/is economic slowdown coupled with COVID-19 pandemic. The radio industry is facing losses and its growth is dwindling over the years.

(vii)The recent tariff rates fixed by PPL are unreasonable, exorbitant, usurious, baseless and arbitrary and have been fixed without any evidence or study.

Music Companies/PPL/IPRS plea in a nutshell

(a) The parties should negotiate the rate of royalty in a free market

(b) Section 31-D of the Copyright Act, 1957 and the rules thereto are under challenge before the Supreme Court and the Calcutta high Court. Therefore, until the disposal of the relevant proceedings the IPAB should not entertain Petitions u/s 31D of the Copyright Act, 1957.

(c) A composite petition for more than one owner of copyright work is not maintainable.

(d) The Copyright Board order, dated 25/08/2010 does not hold good any more. The ground reality has drastically changed in the last 10 years. Radio industry is no more in nascent stage.

(e) The royalty should not be fixed on net advertising revenue. Advertising revenue can drop solely due to the broadcaster because of poor curation of content both music and non-music, sub-par understanding of consumer taste, radio jockeys etc. Alternatively, royalty should be based on the gross revenue of radio companies.

(f) The royalty should be based on needle per hour (NPH). Needle per hour rates should be higher for premium songs. Higher needle per hour rate is to be imposed when the broadcast is done during prime time and low rate during lean light hours.

(g) Music contribution by non-PPL members is higher than PPL. Only 35% of PPL's repertoire is used by the radio companies. The remaining 65% repertoire is that of non-PPL members. Many music companies have entered into voluntary arrangements with radio companies. Radio companies are paying royalty at the rate of 6 -7% on their net advertising revenue to music companies that are not the members of PPL.

(h) Alternatively, the royalty should be calculated based on gross revenue earned by the radio companies. Even the Government of India while issuing license to a radio broadcaster charges fee at the rate of 4% on gross revenue of the FM Channel for a Financial Year or at the rate of 2.5% of the one-time entry fee for the city, whichever is higher.

(i) Radio companies are not incurring losses. Government is helping radio companies. Their cost of running the radio business has drastically come down. It is not investing monies in the creation of music. The listenership of radio is increasing. Number of radio stations has increased. Radio companies enter into mergers and consolidate their network. The broadcasters now are entitled to use the same network and operate different channels. FDI in radio sector has been increased to 49%.

(j) Radio companies are owned by big media conglomerates. They indulge in barter deals. Their records and statement of accounts are not transparent. It is difficult to verify their log books.

(k) The radio companies have other sources of income. 20% of their revenue generated is from non-music category. Radio companies generate income from non-music source, like event managements, sports sponsorship, etc.

(l) The loss of revenue for radio industry is owing to demonetization and the implementation of GST.

(m) The royalty rates of other jurisdictions cannot be a comparator for fixing the royalty rates in India. The markets are different. The tastes of listeners are different. Laws and regulations differ from country to country.

(n) The radio company refuse to pay higher royalty on the ground it is promoting social welfare activities. On the contrary, from the fact that is available in public domain, pan masala companies are among the top ten advertisers in radio. Radio companies are driven by profits. They have bid only in the places where there is potential for revenue.

(o) Digital platform is not affecting the radio industry, in fact it supports it

(p) Radio companies are not playing radio edits. By repeatedly playing a song, saturation is reached, which affects the physical sale of the song.

(q) Music companies are facing difficulties. It is not supported by Government. The main content for radio is music. Music is prepared and created by music companies. The cost of acquisition of music is high. It has to recoup the investment for creation of music else creativity would be hampered. Market rate royalty will help the music companies to involve and attract new talents. Music industry revenue has decreased owing to piracy and loss of physical sales.

(r) COVID crisis has not only affected the radio industry but also the other industries in the media and entertainment sector. COVID lockdown has increased the cost of music production. The music tastes of Indians are different when compared with other countries. Indian listeners are Bollywood-centric. Nearly 50% of the songs consumed are from Bollywood songs; 30% from regional languages; and 20% is that of International music.

(s) There should be two licenses and two royalties. One for the exploitation of the sound recording and another for the exploitation of the underlying works.

<u>Issues for consideration</u>

We have gone through the pleadings of the parties, suggestions, personal oral hearing of the parties from the public and documents placed on record. Parties have also filed written-submissions from time to time in support of their arguments.We shall now discuss and decide the relevant issues involved in the present matters.

(i) Is there a difference in fixation of Royalty under section 31D for a statutory license from fixation under section 31 for a compulsory license
   a. Is the fixation of Royalty u/s 31D is an order in rem
   b. Is the IPAB has jurisdiction to fix the Royalty u/s31 D
   c. Is the Royaltyneed to be fixed for single party or single work u/s 31D or for a class of works?
   d. Is IPRS a necessary party to the proceedings u/s 31D?

(ii) What methodology would be correct for determination of the royalty? Is it a revenue sharing method or needle per hour method or a hybrid model?

   a. Whether Music Companies business is affected by 2% royalty fixed by Copyright Board on the basis of the net advertising revenue earned by the radio broadcasters?
   b. Is the fixation of royalty based on net advertising revenue tenable ?
   c. Is the fixation of the rate of royalty on the basis of radio broadcasters' gross revenue justified?
   d. Does radio broadcaster derive income from other sources making NAR problematic?

e. Is the music companies' contention in respect of masking of NAR by way of barter deals justifying NPH?

f. Is the fixation of royalty to be based on needle per hour is more in compliance with statutory rules?

(iii) Is IPRS entitled for royalty? If so, from whom? What is the interpretation of proviso 3 and 4 of Section 18 to the Copyright Act, 1957?

a. Have the 2012 amendments brought in some relief to the author/composers in the form of revenue sharing?
b. Whether two licenses are to be taken under Sec 31D for Soundrecordings?
c. Whether two royalties need to be paid under Sec 31D, one for Sound recordings and another for underlying literary and musical work?

(iv) What should be rate of royalty/licensee fee to be determined for broadcasting the copyright content (sound recording) of the music companies' by private FM radio companies?

a. Whether radio companies' losses for the past few years need to be considered?

b. Are radio companies justified in refusing to pay higher royalties on the ground it is promoting social welfare activities.

c. Can foreign royalty rates be a comparator, or can it be adopted in India?

(v) Should there be different rates for different slots of time; and different rates for different places in the country?

(vi) Should there be higher rates for premium songs. Should the radio companies be penalized for not playing radio edits and for repeated playing of songs leading to saturation?

(vii) Any special consideration is necessary owing to COVID-19 crisis. Does radio industry is affected by COVID lockdown to be considered?

Firstly we shall consider the contention of the counsel for IPRS who has filed the intervention applications, suggestions as well as well the written submissions. The same is opposed on behalf of all Broadcasters. We have gone through their pleadings and written arguments. The music companies on the other hand have argued that they have no objections if independent royalty be fixed as per scheme of the Act. The prayer is strongly opposed on behalf of all the broadcasters.

52. Hearing in the above said issue has been conducted two times in the month of November, 2020 as well as on 28.12.2020. Parties have also filed the suggestions, written

submissions and have made the oral arguments. It is pertinent to mention that even prior to 28.12.2020, all the parties have also dealt with the said issue in their pleadings/suggestions/replies as well as written synopsis filed before 28.12.2020.

53. **Case of the IPRS**

As per Section 31 D of the Copyright Act, 1957, read with Rule 31 of the Copyright Rules, 2013, on receipt of the application, a public notice is to be issued of IPAB's intention to fix royalties for communication to the public of literary or musical works and sound recordings under a Statutory License as per section 31D and suggestions are to be invited for determining the same.

Rule 31 clearly obligates the IPAB to fix royalties for communication to the public of literary or musical works and sound recordings under section 31D, as follows:

(i) The Board shall immediately after its constitution either suomotu or on receipt of a request from any interested person, give public notice of its intention to fix royalties for communication to the public of literary or musical works and sound recordings under section 31D and may invite suggestions for determining the same. Such notice shall be given separately for radio and television broadcasting.

(ii) The notice under sub-rule (1) shall be published by the Board in the Official Gazette and shall be re- published in two daily newspapers having circulation in the major part of the country and shall be posted on the website of the Copyright Office and the Board.

(iii) Any owner of copyright or any broadcasting organization or any other interested person may within thirty days from the date of publication of public notice under sub-rule (1) shall give suggestions with adequate evidence as to the rate of royalties to be fixed including different rates for different works and different formats.

(iv) The Board shall, after giving an opportunity being heard to the persons who made relevant suggestions under sub-rule (3), consider such suggestions, as it deems fit.

(v) The Board shall within a period of two months from the last date of receipt of suggestions, determine separate rates of royalty to be paid to the owners of literary or musical work and sound recordings for radio and television broadcasting respectively."

53.1 Rules 31 does not say that the IPAB can fix royalty determination between Sound Recordings and Literary and Musical Works i.e., two separate hearings in respect of these Works are not envisaged.

53.2 Sub-Rule (1) of Rule 31 requires the IPAB to determine royalties for communication to the public of Literary or Musical works and Sound Recordings for Radio cannot determine on separate hearing except IPAB is to have different hearings to determine

royalty is when the IPAB is to determine royalty rates for radio and television. As per Sub-Rule (1) of Rule 31, the IPAB can either *suomoto* or on a request from any "interested person" give public notice of its intention to fix royalties for communication to the public of literary or musical works and sound recordings under 31D.Sub-Rule (3) of Rule 31 further mandates that within a period of 30 days from date of publication of the Notice – Any owner of copyright, or any broadcasting organisation or *any "interested person" shall give suggestions with adequate evidence as to the rate of royalties to befixed including different rates for different works* and different formats. Rule (5) of Rule 31 of the Copyright Rules 2013 is clear that the IPAB is required to determine *"separate rates of royalty to be paid to owners of literary and musical works and sound recordings for radio and television broadcasting respectively"*. Sub Rule (7) is additionally even more clear that while determining royalty, the IPAB is required to take into consideration *"different rates for different classes of works"*.

53.3 If we read the provisions and rules in meaningful manner, it appears to us that Section 31D envisages proceedings essentially being "proceedings *in rem*", where the IPAB is required to fix royalty rates for Literary Works, Musical Works AND Sound Recordings for all Broadcasting Organisations or Owners of Rights whether or not they file submissions before the Board. The only requirement is to issue public notice. This limited rate setting exercise will also result in an Order which will not be enforceable in the absence of a rate for Literary and Musical Works.

53.4 The Author and Music Composer's entitlement and share of royalty arising from the utilisation of the Literary Works and Musical Works included in Sound Recordings is mandated by 3rd and 4th Proviso to Section 18 and Sections 19(9), 19(10). All thatthe IPAB is to fix what is payable for Literary and Musical Works. Once this rate is fixed by the IPAB, Authors and Music Composers will, by virtue of Section 18 3rd and 4th proviso and Sections 19(9) and 19(10), would be entitled to share of these royalties. In view of the mandate of Section 18 3rd and 4th Provisos, Section 19(8), Section 19(9), Section 19(10) and Section 33(1) 2nd Proviso, wherein a Copyright Society like IPRS, can collect royalties for the utilisation of such works. Therefore, IPRS is necessary party . The applications are accepted as it is entitled to receive the royalties as per amended provisions.

In the present cases the Applications filed by the Radio Broadcasters only seeking licensing for limited to sound recordings as suggested by broadcasters during arguments. They are the main prayers.

We found after reading the prayer of few applications under Section 31D of the Copyright Act, 1957 by a few Radio broadcasters seek the relief of fixation of rate of statutory royalties in respect of *"…all music licensors across India including Respondents herein in proportion to Sound Recordings/ Works utilised from the repertoire of the respective music licensors, including not limited to the respondents herein…"* and further other Petitions had sought the fixation of rate of statutory royalties in respect of, "*all music licensors across India including the Respondents herein, in proportion to the music/works utilised from the repertoire of the respective music licensor, including but not limited to the respondents herein…"*. It is apparent that they are aware

that royalty pertaining to underlying works are to be fixed. Even otherwise IPRS i.e., the applicant seeks leave to rely upon the applications filed by the radio broadcasters and is not reproducing the same for sake of brevity.

Previous conduct of the main Radio broadcasters speak for itself where admittedly they were paying the royalty of underlying works also.

53.5 Many IPRS members, including Owners of Copyrights, have executed Deeds of Assignment as5signing their Communication to the Public and/or Public Performing Rights and Mechanical Rights (i.e., Reproduction Right) in respect of their literary and/or musical works, including such literary and musical works in favour of IPRS. The details of Royalty paid to IPRS's members from F.Y. 2017-2018 to F.Y. 2020-2021 (Till November) has been filed.

53.6 The monetary benefits as a special Right to receive Royalty ("*RTR*"), mandated to authors, under the 3rd and 4th proviso to Section 18 of the Copyright Act, 1957, is an un-waivable right, that can only be assigned to a Copyright Society or to legal heirs of the Author and not to music companies or film producers.

53.7 In view of the above, no doubt IPRS being the owner of copyright in literary and musical works, as assigned by its individual members, as well as the body statutorily authorized to represent the Owners of the "Authors Royalty Right" constitutes an "interested person" for fixation of royalty in case of radio broadcast.

53.8 No doubt prior to 2012 amendment in the case of *Indian Performing Right Society ltd. v. Eastern India Motion Picture Association &Ors*; *[IPRS v. EIMPA]* AIR 1977 SC 1443 the Supreme Court deemed that rights of the author/composer could be defeated under S.17 proviso (b) or (c). Before the amendments to the Copyright Act, 1957 ["Act"] in 2012 when commissioning or employing the authors/composers a film producer would be the first owner of copyright in the literary and musical works incorporated in the cinematograph film/sound recording. It is come on record that before the Copyright (Amendment) Act, 2012 ["Amending Act"] was enacted there was no statutory requirement for royalty to be payable as a for underlying works i.e. the literary and musical works which vest in the Authors.

53.9 The interim order of the Ld. Single Judge of the High Court of Delhi in *Indian Performing Right Society Limited vs. Aditya Pandey &A nr*. on July 28, 2011 [2011 SCC Online Del 3110] had held that once a license is obtained from the owner of the sound recording for communicating the sound recording to the public no separate authorisation from the owner of underlying literary and musical is required. The abovementioned order, on appeal was upheld by the Hon'ble Division Bench of the Delhi High Court vide its order dated May 8, 2012 in *Indian Performing Right Society Limited vs. AdityaPandey&Anr* [2012 SCC OnLine Del 2645]

Thereafter, the amendments to theCopyright Act, 1957 came into effect from June 21, 2012.

The Supreme Court vide its judgement dated September 20, 2016 had taken of the amendments made to the Copyright Act, 1957 in 2012, including the insertion to S. 19

(10). The Apex Court also held that all observations, findings and views expressed by the Delhi High Court in the original and appellate proceedings would "have no legal effect". [*International Confederation of Authors and Composers vs. Aditya Pandey & Ors*., [(2017) 11 SCC 437]

53.10 Copyright (Amendment) Bill, 2010 – Originally proposed Section 18 and 19 amendments

When amendments were originally proposed vide the Copyright (Amendment) Bill 2010, there was no Right to Royalty proposed for Literary and Musical Works when these works were being exploited as part of /incorporated in a Sound Recording or a Cinematograph Film:

Clause 6:

> *"Provided also 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 utilisation of such work in any form other than as part of the cinematograph film or sound recording except to the legal heirs or to a copyright society for collection and distribution and any agreement to the contrary shall be void."*

53.11 Roll back of proposed amendments 18 and 19 vide 2010 Bill provisions by Parliamentary Standing Committee and reasons for change in 2012 Amendment Bill

(a). The 2010 Bill provisions namely amendments proposed to Section 18 and 19 were objected to on the ground that when Literary and Musical Works were exploited as part of Film or Sound recording no royalties would flow to Artists/ Creators.

(b). The Standing Committee of Parliament took note of such criticism and introduced the current 3rd and 4th Provisos to Section 18 and new Section 19(9) and Section 19(10) to ensure that the authors of works get their due in the form of equal share of royalties when the works they assign to be incorporated in a sound recording or cinematograph film are utilised in any manner with the only exception of cinematograph film being communicated to the public in a cinema hall.

(c). The intent of the legislature, behind the amendments to the Act in 2012 was to ensure the RTR was due and payable to the authors when their Literary and Musical Works are utilised in any form as a part of sound recording as well as cinematograph film [except in cinema halls]. The Standing Committee had also observed in this regard that "*If producer enjoys synchronization right, authors/composers should enjoy performing rights. The footnote of the judgment also states that the twin rights can co-exist, each fulfilling itself in its delectable distinctiveness.*"

(d). The Standing Committee had also outlined the mischief that they intended to address by mentioning that "*When the films songs are performed separately and independently through TV /Radio, restaurants, airlines, auditoriums or public functions etc.*

film, producer becomes the first owner and authors/music composers lose economic benefits of exploitation of their works to music companies who become ultimate owners of these works."

Hence, the intent of the legislature, rules out any doubt which might remain regarding underlying literary and musical works into a sound recording when a song is communicated to the public by way of broadcast on radio. In fact, the Standing Committee specifically addresses the point of safeguarding the rights of the authors of literary and musical works when a sound recording is being broadcast through radio. In fact the Standing Committee had taken note of the footnote in the *IPRS v. EIMPA* judgement and Justice Krishna Aiyar's suggestion therein to the legislature to recognise the rights of the authors and music composers who are usually left out in the cold and exploited.

53.12 In *Kalpana Mehta &Ors.* v. *Union of India &Ors.* [(2018) 7 SCC 1], the Constitution Bench of the Hon'ble Supreme Court held that a Parliamentary Standing Committee Report constitutes an external aid to statutory interpretation, to throw light on legislative history, on the policy problem sought to be addressed by a statute etc. In other words, it could be used to give context to the interpretation of statute that was deliberated upon before the Committee. A copy of the said judgement is being filed with the present note.

53.13 THE POST-2012 CHANGE IN OWNERSHIP/ FIRST OWNERSHIP – 17 PROVISO

(a). Unlike the position prior to June 21st, 2012, where the Film Producer commissioning the making of a Cinematograph Film was presumed to be the first owner of the Film and its underlying works (i.e., Literary and Musical Works), the 2012 Amendment to the Copyright Act, 1957 has reversed this position by inserting a new proviso to Section 17. Accordingly, now after the 2012 amendments to Section 17 of the Act, the commissioning or employment of Author of Works namely literary, musical, artistic or dramatic works incorporated in cinematograph films does not affect in any way the rights of the Author in such literary, musical, artistic or dramatic works. This means that under the Act, the Author of such Works remains the First Owner with the erstwhile presumption no longer applicable. Accordingly, now specific Assignment Deeds are required to be executed with Authors of literary, musical, artistic or dramatic works incorporated in Films as per the mandate of Section 19 of the Act.

(b) Section 17 of the Act also lays down that subject to the provisions of the Act, the first owner of a work is the Author of that work. The provisos (b), (c), (cc), (d), (dd) to Section 17 provide for the exceptions to the said mandate of Section 17. It is here pertinent to draw attention to the proviso inserted by Copyright (Amendment) Act, 2012 which provides that the proviso (b) and (c) to Section 17 shall not affect the ownership of the author of literary and musical works incorporated in a cinematograph work.

(c) The Hon'ble High Court of Calcutta vide an interim order dated 12th October 2018 in *The Indian Performing Right Society Ltd. versus Vodafone Idea Ltd. (CS No. 210 of 2018)* has observed the change in law and recognized IPRS's rights.

(d) Calcutta High Court has also recognized change in first ownership under Section 17 of the Act in the case of *Saregama India Ltd vs. New Digital Media* [2018 (73) PTC 329 (Cal)] wherein, the court stated as follows:

"98. It is for the 1977 judgment, all producers who commissioned authors to create musical or literary works for their films would be the first owners of copyright in those works unless there was evidence of a contract to the contrary. The Hon'ble Supreme Court judgment, in fact, gave composers and lyricists the right to retain ownership of copyright in their works by specifying ownership rights in their contracts.

99. The Government in 2010 introduced the Copyright Amendment Bill in Parliament, the Amendment Bill sought to insert the following proviso to Section 17:-

"Provided that in case of any work incorporated in a cinematograph work, nothing contained in Clauses (b) and (c) shall affect the right of the author in the work referred to in Clause (a) of sub-section (1) of Section 13."

100.The "works" referred in Section 13(1)(a) are "original literary, dramatic, musical and artistic works". The Parliament Standing Committee, to which the Amendment Bill was referred, endorsed this particular amendment thus:-

"The Committee also takes note of the fact that 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 Indian Performing Rights Society v. Eastern India Motion Pictures Association which held that [the] film producer is the first owner of the copyright and authors and music composers do not have separate rights."

101. The amendment was retained in its original form in the final version of the law passed by Parliament two years later as the Copyright (Amendment) Act, 2012. As a result, authors would now own their rights in the music and lyrics even if they were created for a cinematograph film.

The new proviso to Section 17 is not a "saving clause" for the Right to Royalty Provision under Section 18 but expressly reserves ownership rights in works incorporated in cinematograph films as the general rule is that a proviso will be limited to the subject matter of the enacting clause.

- *The Dwarka Prasad vs. Dwarka Das Saraf* 1976 (1) SCC- *The settled law is that a proviso must be limited to the subject matter of the enacting clause. It is also settled rule of construction that proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso*. [Para 18].

- A.N. Sehgal vs. Raje Ram Sheoran 1992 Supp (1) SCC- *It is cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision..*

  Section 17 of the Copyright Act, 1957 defines the first owner of copyright, whereas the Provisos (a) to (e) provide for the exceptions and lay out those circumstances in which the author of the work shall not be a first owner of the copyright in the work. Hence the new proviso inserted after Proviso (e) to Section 17 vide the amendments to the Copyright Act in 2012 can only refer to "ownership of copyright". The suggestion, that the new proviso as inserted in 2012 refers to an Author's right to receive royalty is misplaced.

53.14 RIGHT TO ROYALTY - LIMITATION ON ASSIGNMENTS: ONLY IPRS CAN COLLECT AUTHORS ROYALTY FROM THE PLATFORM

i) Author's Statutory Royalty as set out in 3rd and 4th Provisos to Section 18 is a statutory right which is triggered upon the utilization of the literary and musical work in *any form* [whether as part of a cinematograph film or as part of a sound recording], when the cinematograph film or sound recording is exploited in any form [which includes (a) the Public Performing Right, (b) Communication to the Public Right and (c) Reproduction Right (i.e., Mechanical Right"] – with the only exception being the exhibition of the cinematograph film at a cinema hall.

i. It is a right is triggered in favour of IPRS's Author and Composer members, upon the communication to the public, public performance, broadcast of the works authored by the author and composer members of IPRS.

ii. The Author is prohibited from assigning the Author's Statutory Royalty Right in favour of any Assignee.

iii. This means that a Film Producer OR a Music Company who are assignees cannot collect money on behalf of the Author because the Author is barred from assigning this right.

iv. This right is also non-waivable

v. This Right to equal share of royalty can only be assigned to a copyright society or the author's legal heirs) right to receive royalty as mandated by 3rd and 4th proviso to Section 18 of the Copyright Act, 1957

vi. Any agreement contrary to the foresaid principle would be deemed void.

vii. Post June 21, 2020 only a registered Copyright Society such as IPRS, can administer and collect *'Author's Statutory Royalty'* as granted in favour of the authors and composers.

53.15 SECTION 14 – TERM – "SUBJECT TO OTHER PROVISIONS OF THE ACT" – EXCLUSIVE RIGHTS ARE AS MUCH LIMITED BY SECTION 18 AND 19 AS THEY ARE BY SECTION 31D.

i) Author's Statutory Royalty Right is not merely a monetary right but is in effect a limitation and condition precedent for the coming into existence of copyright in derivative works such as Cinematograph films and Sound recordings.

ii) As Section 13(1) of the Act recognizes the categories of works in which copyright shall subsist throughout India *subject to the provisions of section 13 and other provisions of the Ac*t - during the creation of cinematograph films and sound recordings the producer has to comply with the requirement of other provisions of the Act, including but not limited to provisos to Section 18 (1), Section, 19 and Section 33 of the Act. Section 14 of the Act provides for the various exclusive rights which comprise "copyright" for each category work is also subject to the other provisions of the Act.

iii) Section 13 and 14 would accordingly have to be read in a manner that it "gives way to other provisions of the same statute" including the provisions amended/inserted by the Copyright Amendment Act, 2012 like Section 31D.

iv) Section 13 and 14 have to be read in the light of the changes brought to the Copyright Act in 2012, which includes the limitations on assignment by insertion of second and third proviso to section 18 (1) and the recognition under Section 31D.

53.16 <u>IMPACT OF SECTION 18 AND 19 ON ASSIGNMENTS FOR FILM AND SOUND RECORDINGS</u>

The following relevant changes were brought to the Copyright Act, 1957 by the Copyright (Amendment) Act, 2012:

i) inclusion of proviso 3 and 4 to Section 18(1),

ii) amendment to Section 19(3),

iii) insertion of Section 19(8), Section 19(9) and Section 19(10).

The above-mentioned amendments reserved in favour of the authors of literary and musical works which are incorporated in cinematograph films and sound recordings an un-waivable right to receive royalty. This right can only be exercised by the Author with the option to assign the same to a (registered) Copyright Society or to the legal heir of the Author.

53.17 <u>RULE 54, RULE 56(5) OF COPYRIGHT RULES, 2013 - ROYALTY HAS TO BE PAID BY THE LICENSEE TO THE AUTHOR OR COPYRIGHT SOCIETY AND NOT OWNER OF THE WORK, I.E., MUSIC COMPANY.</u>

(i) Reading the second and third proviso to Section 18 (1) with Section 19 (10) it can be said that RTR is an unwaivable right which can only be assigned by the author to his legal heir or a Copyright Society. IPRS is the only registered copyright society under Section 33, that is authorised to administer the author statutory royalty on behalf of its author members.

(ii) This royalty, which is payable to the author members of IPRS, has to be paid by the licensees of the work authored by IPRS's members, in the instant case the licensees are the Radio Broadcasters.

(iii) The understanding emanates from the mandate of Rule 56 (5) of the of the Copyright Rules, 2013 ("Rules") which *inter alia* says that "*the copyright societyshall collect the royalties from a licensee in advance where the Tariff Scheme provides for lump sum payment of royalties.*" *[Emphasis Supplied]*

(iv) Rule 55 of the Rules lays down that a Copyright Society is authorised to <u>issue licences, collect royalties and distribute such royalties</u> as per its Tariff Scheme in relation to

- the right or the set of rights in the specific categories of works for which it is registered,
- the works authorised to administer in writing by the members and
- for the period for which it has been so authorised.

The Hon'ble Bombay High Court in *Super Cassettes vsTrimurti* [*2017 SCC OnLineBom 8999*] has held that:

(i) *it is not right that when sound recording rights are obtained, the arrangement in that regard would take into its fold or subsume the original literary, dramatic, musical and artistic works. If these works are distinctly defined and understood by law (section 13), then copyright subsists distinctly in them.* [Para-56]

(ii) *the term copyright for the purposes of the Act means the exclusive right, subject to the provisions of the Act, to do or authorize the doing of acts in respect of the work or substantial part thereof. Therefore, when copyright subsists in a work, the acts in respect of each work enumerated in section 14 and sub-section are to be borne in mind. [Para-58]*

(iii) *It is prima facie an incorrect reading of law to say that as far as literary, dramatic or musical work is concerned, if the law permits doing or authorizing of the doing of acts and which includes cinematograph film or sound recording in respect of the work, then rights in relation thereto gets subsumed in the cinematograph film or sound recording. Briefly, it cannot be the case that as soon as the act is performed or authorized to be performed, the rights in relation to the literary, dramatic or musical work do not survive. Law would have specifically said so if this was intended.* [Para 60, 61 and 63]

53.18 <u>SECTION 31D CANNOT BE READ IN A MANNER AS TO DEFEAT THE BENEFICIAL AMENDMENTS BROUGHT ABOUT BY THE 2012 AMENDMENTS IN FAVOUR OF AUTHORS AND MUSIC COMPOSERS</u>

i. Although the Copyright (Amendment) Act, 2012 has introduced Section 31D, it is equally important to bear in mind that the statute as amended, also conferred upon authors of literary and musical works an un-waivable and inalienable statutory right to receive royalty.

ii. Further, the Copyright (Amendment) Act, 2012 also introduced the provisos to Section 18(1), Section 19 amendments and also the second proviso to Section 33(1) and other changes to Chapter VII, which enable the Author to not only enforce its statutory right to royalty but also the ability to participate in valuation of his statutory right to receive royalty along with he owner of literary and musical works (the assignee of the musical work and literary works).

iii. Proviso 3 and 4 to Section 18(1) introduced a bar to the assignment or waiver of this right to receive royalty. Thus, this right has been statutorily reserved to the Author even when his works are utilized as part of sound recording or cinematograph under a license by the assignee. Any voluntary or involuntary license granted must comply with the requirements of Section 19 or risk being declared void and/ or illegal.

iv. It is clear that the statute must be read as a whole and Section 31D of the Act cannot be read disjointly from the other provisions of the Statute

v. Firstly, it bears to keep in mind that the legislature would be aware of the fact that the Copyright (Amendment) Act, 2012 has introduced the un-waivable right to receive royalty for the Authors to protect their interests under the same legislation.

vi. Thus, it would be mischievous to suggest a reading to Section 31D to defeat the very specific/ special rights protected under the framework of S. 17, S.18, S.19 of the Act and to be exercised under Chapter VII of the Act vide Copyright (Amendment) Act, 2012.

vii. The interpretation being suggested by the Radio Broadcasters would defeat the very object of the amendments brought about to protect the rights of the authors in the utilization of their literary or musical works by way of sound recordings. [Paragraphs 10.9 (emphasize 10.12, 10.13) 10.20. of the SCR]

viii. Hence, the use of the phrase "owner of rights in each work" under Section 31D(2) has to be read to include the author as it is the author who is the owner of right to receive royalty emanating from the utilization of his works in any forms including by way of incorporation in a sound recording. Additionally, the framework of exercise of this right to receive royalty from the utilization of underlying works has been exclusively reserved to Copyright Society under Section 33(1) (2nd proviso). Thus, the payment has to be made by the broadcaster for rate of royalties fixed by the IPAB for the underlying literary and musical works to the Copyright Society. Any other interpretation would render complete chapters of the Section otiose and render the smooth functioning unworkable.

53.19 ENIL argues in the present proceedings that the authors and composers are not entitled to a share in royalty when sound recordings are broadcast via radio on the basis of its

interpretation of law that literary and musical works are "subsumed" in the sound recording. As a result, ENIL argues that only one license [from the owner of the sound recording work] is required when a song is being broadcast through radio.

ENIL's Annual Report for the year 2012 highlights the true legislative intent behind the amendments made to the Act in 2012. The stand of ENIL in the present proceedings is completely contrary to the contents of the Report. An extract from the Report is reproduced below:

The Copyright Amendment Bill 2012 has been passed by both Houses of Parliament - first by the RajyaSabha on May 17, 2012 and then by the LokSabha on May 22, 2012. This Copyright Bill brings about many changes in the Copyright Act, 1957. But most importantly, it protects both the creators and users of music. In doing so, it brings about a harmonious balance between the two. The amendment provides for the availability of music to any broadcasting organization (both radio and television) through the mechanism of Statutory Licensing on the payment of royalty to be determined by the Copyright Board. To broadcast music, the broadcaster has to give the stipulated notice to the music owner. The objective of Statutory License is to ensure that music content becomes available to every broadcaster desirous of the same without any discrimination and on reasonable royalties to be fixed by the Copyright Board. At the same time, the amendments make the rights of the creators to receive royalties inalienable. This will give creators a share of royalties generated in perpetuity for the work that they produce during their lifetime. The amended law benefits every creative person in India, be it a composer, lyricist, etc., who was hitherto been deprived of his/her due. The amendments are a step in the right direction. They shall positively expand the symbiotic relationship between Radio and Music Composers/Lyricists/Artists. ENIL has also been petitioning the Ministry of Human Resource Development as well as the Ministry of I&B and Ministry of Law & Justice that there is an imperative need for the Copyright Board to function as a full time Tribunal/Body so that quick closures of matters pertaining to Radio Industry vis-à-vis Music industry can take place. This matter is likely to be addressed shortly by the Government. The ENIL report is being filed with the present proceedings.

53.20 Counsel appearing on behalf of IPRS has submitted that there are many contradictions in music broadcast limited written arguments

- With regard to the Royalty payable to Authors when songs are broadcast through radio, MBL on one hand concedes in its submissions that Royalty is payable to authors of underlying works, out of the share received by owners of sound recordings. As per MBL, the burden of payments has to be borne by the producer/owner of sound recordings and cannot be passed to the FM radio broadcaster. Whereas, on the other hand MBL contends No separate license fee/royalty is payable for underlying works for broadcast of sound recordings.

53.21 In the Reply to IPRS's submissions ENIL says that once the sound recording is legally created, the owner of the underlying works loses all its rights of communicating the same to the public and when a sound recording is being exploited on radio an owner of

underlying works cannot demand any share in the royalty for communicating the sound recording to the public on the ground that while doing so, the underlying works also get indirectly communicated to the public. As per ENIL, the underlying works get communicated to the public as a part of the sound recording and not independently of the sound recording work. It is ENIL's stand that literary and musical works are not being utilized "per se" when a sound recording is being communicated to the public and hence ENIL says that no license fee/ royalty is payable as no underlying literary and musical are being utilized.

Whereas the Author's right to receive royalty was acknowledged as a "special right" in the course of the oral arguments put forth by Mr. Darius Khambatta Senior Advocate on behalf of ENIL on November 5, 2020.

53.22 CONTRADICTIONS BETWEEN RADIO BROADCASTER'S STAND IN AGREEMENTS WITH SCIPL

Counsel appearing on behalf of IPRS has referred the following:

i) It is submitted that based upon the limited agreements disclosed by the Music Companies between Radio Broadcasters and Music Companies, it can be ascertained that the Agreements are contrary to the provisions of the Copyright Act, 1957. The IPAB ought to have sought the disclosure of all agreements to ascertain the prevailing rates, terms and other factors recorded in the agreements.

ii) It is further submitted that, from the disclosed agreements, it appears that these agreements have been fashioned by the parties to defeat the provisions of the Act after 2012 Amendments. Further, the agreements clearly demonstrate that the agreements are contrary to the public policy as mandated by the legislature by the enactment of the Copyright (Amendment) Act, 2012 and providing Authors Statutory Royalty.

CLAUSE	RADIO BROADCASTER	RADIO'S STAND IN THE AGREEMENT	RADIO'S STAND IN ITS ARGUMENTS
Clause d of the Agreement at Page 496 of SCIPL's submissions	Next Radio Limited Renewal cum Amendment of the License Agreement 17.08.2007. Renewal dated 1.08.2018 filed at Page 495 of SCIPL's submissions	Next Radio has acknowledged it would deal with claims received for payment of license fee/royalty for underlying works in accordance with law.	It has been argued on behalf of Next Radio that no underlying literary and musical works are utilised when sound recordings are broadcast on radio.
Clause 2(vi) the	Music Broadcast	MBL has acknowledged it	MBL submits that

Agreement at Page 137 of SCIPL's submissions	Pvt. Ltd. Renewal Deed dated 29.01.2018 filed at Page 135 of SCIPL's submissions	would deal with claims received from any author/composer/copyright society [and not SCIPL] for payment of license fee for underlying works in accordance with law.	royalty is payable to authors of underlying works, out of the share received by owners of sound recordings. <u>The burden of payments has to be borne by the producer/owner of sound recordings and cannot be passed to the FM radio broadcaster</u>. [Pg 18 Para 37; Pg19 Para39, 40, Pg 20 Para 41 of MBL's submissions]
Clause 1.10 at Page 96 of SCIPL's submissions Clause 2.1 at Page 97 of SCIPL's submissions Clause 4.1 at Page 99 of SCIPL's submissions	Music Broadcast Pvt. Ltd. Agreement dated 24.01.2012 [Page 94 of SCIPL's submissions]	As per the Agreement MBL has granted rights and is collecting license fee for sound recordings which by admittedly contains underlying works, in effect accepting that underlying works are also communicated to the public when sound recordings are broadcast through radio 1.10- Licensor Sound recordings are defined as sound recordings of which the licensor is the copyright owner and also the owner of all intellectual property rights embodied therein. 2.1- Rights to broadcast/communicate to the public the Licensor Sound Recordings through radio are being granted. 4.1- Cumulative License Fee is being collected for the grant of rights made in Clause 2.1	No separate license fee/royalty is payable for underlying works for broadcast of sound recordings [Page 14 Para 27, of MBL's submission]
Clause 1.7 at Page 112 of SCIPL's submissions Clause 2.1 at Page 113 of SCIPL's submissions Clause 4.1 at Page 114 of SCIPL's submissions Clause 1.11 at Page 112 of	Music Broadcast Pvt. Ltd. Agreement dated 25.01.2013 [Page 110 of SCIPL's submissions]	As per the Agreement MBL has granted rights and is collecting license fee for sound recordings which by admittedly contains underlying works, in effect accepting that underlying works are also communicated to the public when sound recordings are broadcast through radio 1.7- Licensor Sound recordings are defined as sound recordings of which the	No separate license fee/royalty is payable for underlying works for broadcast of sound recordings [Page 14 Para 27 of MBL's submission]

SCIPL's submissions		licensor is the copyright owner and also the owner of all intellectual property rights embodied therein. 2.1- Rights to broadcast/communicate to the public the Licensor Sound Recordings through radio are being granted 4.1- Copyright License Fees is being collected for the grant of rights made in Clause 2.1 1.11 'Copyright License Fees' is for the broadcast of sound recordings on radio in addition to performance license fee	

iii. Entertainment Network (India) Ltd.'s ["ENIL"] AGREEMENTS WITH SCIPL

1. SCIPL's Agreement with ENIL dated 23rd November 2006 with says that ENIL shall not make payment of Copyright License Fees and/or Performance Licences Fees, directly or indirectly, voluntary or involuntary, to any third party including but not limited to PPL and IPRS for broadcast and/or public performance of sound recordings at a rate per needle that is higher than the rate payable as license fees as under the Agreement. If this is done, then the rate would be increased to an equal higher rate. [Clause 4.5].

2. Further, the 'Copyright Licence Fees' payable for broadcast of the Licensor Sound Recordings at the needle per hour rate [Clause 4.1] in the agreement dated 23rd November 2006is changed post the 2012 amendments to the Copyright Act, 1957 and in the Deed of variation dated 23rd November 2012 to a "Fixed Lumpsum Copyright Licences Fees/Royalty" of Rs. 2,55,00,000 (Two Crore Fifty-Five Lakhs Only) in monthly installments. [Clause 5]. The term 'Royalty' as used in the 23rd November 2006 Agreement is undefined.

iv. LAHARI RECORDING COMPANY ["LAHARI"] AGREEMENTS WITH FM RADIO ENTITIES

Clause stating parties awaiting for SC Judgement –

CLAUSE	RADIO BROADCASTER	
Clause 4.4 of the Agreement at Page 276 of Lahari's reply to HT Media	Reliance Broadcast Network Limited Agreement dated 09.12.2015 At Page 272 of Lahari's reply	Parties agree that the issue of payability of Performance Licensee Fee/ royalty fee for

	to HT Media	broadcast of literary and musical works as a part of sound recordings on FM radio is pending before the SC. Hence, no such Performance License Fee is being charged without prejudice. The Licensor agrees to not charge any fee for broadcast of Works on Radio till the issue is decided by SC.
Clause 4.4 of the Agreement at Page 296 of Lahari's reply to HT Media	Reliance Broadcast Network Limited Agreement dated 8 02.2019 At Page 292 of Lahari's reply to HT Media	Same as above
Clause 4.4 of the Agreement at Page 329 of Lahari's reply to HT Media	Reliance Broadcast Network Limited Agreement dated [8 Feb 2019] At Page 325 of Lahari's reply to HT Media	Same as above

53.23 MUSIC BROADCAST LIMITED - THE ISSUE OF THE BOMBAY HIGH COURT PRE-2012 DECREE AND IMPACT ON IPRS CLAIMS AGAINST MBL

The judgment of the Single Judge of the Hon'ble Bombay High Court, in *Music Broadcast Pvt. Ltd. vs. Indian Performing Right Society Ltd* (2012) 2 AIR Bom R 303, relied on by the Applicants to state that two licenses are not required to be obtained on broadcast of sound recording, has been stayed by the Single Judge himself and then further stayed by the Division Bench in appeal in *Indian Performing Right Society Ltd. vs. Music Broadcast*Appeal No. 615 of 2011 in Suit No. 2401 of 2006 . The Decree does not stand in the way of IPRS's claims for the following reasons:

The Decree was passed before the 2012 Copyright Amendment

1. The decree passed by the Single Judge qua Music Broadcast Pvt. Ltd, was passed before the 2012 Copyright Amendment Act, which as stated above, has changed the position of law and mandates obtaining a license for literary and musical works, for radio broadcast. Further, the decree does not take into account the royalty which is now statutorily mandated to be paid to authors for *any utilization* of literary and musical work *in any form* by virtue of the 2012 amendment.

2. The Applicant Music Broadcast Ltd ("MBL") has contended that the decree passed qua MBL would not be affected by a subsequent change in law by citing the case of *Lekh Raj (Dead) Through Legal Representatives &Ors. v. Ranjit Singh &Ors.* [(2018) 12 SCC 750] which states that "*once a decree has been passed, a subsequent change in law would not take*

away such rights which had attained finality due to lis coming to an end inter se the parties prior to such change."

IPRS submits that the above case does not apply to the current factual scenario and is distinguishable on facts since the rights of the parties have not been crystalized/have not attained finality and the *lis*between the parties has not come to an end. It is settled law that an appeal is a continuation of the suit and the *lis* between the parties. [Ferrodous Estates (Pvt.) Ltd v. P. Gopirathnam (Dead) and Ors.2020 SCC Online SC 825 Para 32 at Page 417 Bay Berry Apartments (P) Ltd &Anr. v. Shobha&Ors(2006) 13 SC C 737Para 36.

3. Since the appeal filed by IPRS in Appeal No. 615 of 2011 in Suit No. 2401 of 2006, is still pending before the Hon'ble Bombay High Court, the *lis*between IPRS and Music Broadcast has not come to an end.

New and Fresh cause of action arises in favour of IPRS post 2012

MBL has continued to broadcast literary and musical works even post the 2012 amendment without taking a license for the said works. Such continuous broadcast and usage will result in a new, recurring and continuous cause of action.

The Supreme Court in *Bengal Waterproof Ltd v. Bombay Waterproof Manufacturing Company &Ors* (1997) 1 SCC 99 has held that in cases of continuing acts of infringement of copyrighted works, each fresh act gives rise to a recurring and fresh cause of action, at each instance of infringement, to the person aggrieved. The Apex Court went on to say that "*It is difficult to agree how in such a case when in historical past earlier suit was disposed of as technically not maintainable in absence of proper reliefs, for all times to come in future defendant of such a suit should be armed with a licence to go on committing fresh acts of infringement and passing off with impunity without being subjected to any legal action against such future act*s."

Hence, Music Broadcast cannot take advantage of the decree passed pre-2012 and continue to broadcast literary and musical works on its radio stations without taking a license and without paying the royalty to authors when there is a specific statutory mandate for the same.

A decree in respect of one party does not disentitle IPAB from fixing a rate *in rem*

With regard to the issue, if MBL has a valid decree against IPAB, it will not disentitle the IPAB from fixing a rate *in rem.* An application may be filed accordingly after fixing the royalty before the appropriate courts in view of change of circumstances as it is an admitted position of law and even fact that proceedings under Section 31D of the Act are *in rem* and the rate that is fixed under Section 31D will operate *in rem* for all parties. Such filing of application will suffice the situation.

54. The application of the IPRS is strongly opposed on behalf of the applicant. Music Broadcast Limited ("MBL") has stated in its Suggestions that no separate license fee/royalty is payable for underlying works for broadcast of sound recording. The present

application is limited to broadcast of sound recording and not for underlying works. IPRS is not an interested party. It is stated that royalty is payable to authors of underlying works, out of the share received by owners of sound recordings. The burden of payments has to be borne by the producer/owner of sound recordings and cannot be passed to the FM radio broadcaster. Therefore, 2% license fee should cover both owners of sound recording and authors

55. The application is also opposed by Entertainment Networks India Limited ("ENIL") on its behalf and on behalf of other applicants, who stated in has stated in its Suggestions that the present proceedings are not initiated for and do not pertain to IPRS. IPRS does not have to be paid any license fee, nor a license is required to be taken from IPRS when the Applicant communicates sound recordings to the public. The 2012 amendment has not changed the above position of law. In its Reply to Suggestions of IPRS, it is contended that as sound recording is an independently copyrighted work as recognized by Section 13 of the Copyright Act, and *the owner of the sound recording enjoys all rights under S. 14 (1) (e)* of the Copyright Act. It is argued that once the sound recording is created the owners of underlying literary and musical works lose all its rights of communicating the same to the public when a sound recording is being exploited. If the owners of *"underlying works demand any share in the royalty for communicating the sound recording to the public on the ground that while doing so, the underlying works also get indirectly communicated to the public. They get communicated to the public as a part of the sound recording and not independently of that that copyrighted work."* It is wrongly suggested that IPRS is claiming a right in the sound recording when sound recording is being exploited. Such a claim is contrary to provisions of the Copyright Act. The amendments to the Copyright Act in 2012,have not modified/changed this position of the law, since (i) Section 14 has not been amended; (ii) the legal position on first ownership of copyright remains unchanged; (iii) the alleged rights claimed under Sections 18 and 19 of the Act, do not get implicated in the present instance; and (iv) in any event, the obligation to share the royalties, if any, with the authors, is not that of the Applicants, but that of the record companies or producers of films.

56. SEPARATE RATE OF ROYALTY AS SUGGESTED BY MUSIC COMPANIES

The following Music Companies have, as part of their suggestions filed before the IPAB, suggested a separate rate of royalty to be fixed for "literary and musical works' and a separate rate for "sound recordings" for broadcast of songs through radio:

(i) Super Cassettes Industries Pvt. Ltd. ("SCIPL")

SCIPL proposes separate rates for Sound recording and Underlying Literary and Musical Works

(ii) Lahari Music Private Limited

IPAB has to set rates for both classes of works. Radio broadcasters must pay royalties for both classes of works.

(iii) Saregama India Limited ("Saregama")

Separate rate of royalty has to be fixed for underlying literary and musical works and a separate rate must be fixed for sound recording [Hearing dated 13th November 2020]

(iv) Tips Music Industries Ltd. ("Tips")

IPAB may fix separate royalty rates for sound recordings and literary and musical works.

(v) Eros International Media Ltd. ["Eros"]

EROS submits that there have to be Different Rates for Different Class of works. ENIL suggested two separate licenses but the same rate to apply to both sound recordings and to underlying literary and musical works.

It is undisputed fact that IPRS represents Owners of Copyrights such as *Saregama, Sony, Universal, Tips* etc., IPRS also represents Authors and Music Composers in respect of the Rights of Authors and Owners of Rights.

Our Analysis

Legal Background

57 STATUTORY POSITION AND JUDICIAL DISCUSSION PRIOR TO 2012 AMENDMENTS

57.1 The interpretation of the third proviso and fourth proviso of Section 18 read with Section 19 (9) & 19 (10) has direct correlation with the rights of the authors of the literary works and musical works and towards their royalty sharing with that of the Assignee in question.. It is therefore necessary that in order to ascertain the true meaning, scope and extent of the above provisions as amended, one has to first comprehend the allocation of rights in relation to Sound Recordings qua films and non films that were earlier existing in the statute.

57.2The erstwhile position of law prior to the 2012 amendments apropos the right of Authors for the underlying works in a cinematograph film including sound recording has been succinctly elucidated by the Hon'ble Supreme Court in of *Indian Performing Right Society ltd. v. Eastern India Motion Picture Association & Ors*, AIR 1977 SC 1443. It was categorically held by the Supreme Court that there exists a separate copyright in the underlying works such as lyrics, music compositions etc. that form part of the cinematograph film and sound recordings by virtue of section 13(4), which is reproduced below:

Section 13(4): ' The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or, as the case may be, the sound recording is made'

57.3 It is pertinent to mention here that though there existed a separate copyright for the underlying lyrical and musical works for the respective authors, even before the 2012 amendments, under the general industry practise, when commissioning or employing the authors/composers for lyrics writing/ music composing for a film, the producer would get all the copyright in that assigned to him. This would make film producer the first owner of

copyright in the literary and musical works incorporated in the cinematograph film/sound recording under S.17 proviso (b) or (c).

*57.4*In the same case it was expounded exquisitely by Krishna Iyer J :

> *"Though a conflict may a first sight seem to exist between Section 13(4) and Section 14(1)(a)(iii) on the one hand and Section 14(1)(c)(ii) on the other, a close scrutiny and a harmonious and rational instead of a mechanical construction of the said provisions cannot but lead to the irresistible conclusion that* ***once the author of a lyric or a musical work parts with a portion of his copyright by authorising a film producer to make a cinematograph film in respect of his work and thereby to have his work incorporated or recorded on the sound track of a cinematograph film, the latter acquires by virtue of Section 14(1)(c) of the Act on completion of the cinematograph film a copyright which gives him the exclusive right inter alia of performing the work in public i.e. to cause the film in so far as it consists of visual images to be seen in public and in so far as it consists of the acoustic portion including a lyric or a musical work to be heard in public without securing any further permission of the author (composer) of the lyric or a musical work for the performance of the work in public.In other words, a distinct copyright in the aforesaid circumstances comes to vest in the cinematograph film as a whole which in the words of British Copyright Committee set up in 1951 relates both to copying the film and to its performance in public. Thus if an author (composer) of a lyric or musical work authorises a cinematograph film producer to make a cinematograph film of his composition by recording it on the sound track of a cinematograph film, he cannot complain of the infringement of his copyright if the author (owner) of the cinematograph film causes the lyric or musical work recorded on the sound track of the film to be heard in public and nothing contained in Section 13(4) of the Act*** *on which Mr. Ashok Sen has strongly relied can operate to affect the rights acquired by the author (owner) of the film by virtue of Section 14(1)(c) of the Act."*

57.5 The Supreme Court further observed as under:

> *"****The composer of a lyric of a musical work, however, retains the right of performing it in public for profit otherwise than as a part of the cinematograph film and he cannot be restrained from doing so. In other words, the author (composer) of a lyric or musical work who has authorised a cinematograph film producer to make a cinematograph film of his work and has thereby permitted him to appropriate his work by incorporating or recording it on the soundtrack of a cinematograph film cannot restrain the author (owner) of the film from causing the acoustic portion of the film to be performed or projected or screened in public for profit or from making any record embodying the recording in any part of the sound-track associated with the film by utilising such sound-track or from communicating or authorising the communication of the film by radio-diffusion as Section 14(1)(c) of the Act expressly permits the owner of the copyright of the cinematograph film to do all these things****. In such cases, the author (owner) of the cinematograph film cannot be said to wrongfully appropriate anything which belongs to the composer of the lyric or musical work."*

"On a conspectus of the scheme of the Act as disclosed in the provisions reproduced above particularly Clauses (d) (v), (f) (m) and (y) of Section 2, Sections 13(1) and 14(1)(c), provisos (b) and (c) to Section 17 and Sections 22 and 26 of the Act, it is therefore abundantly clear that a protectable copyright (comprising a bundle of exclusive rights mentioned in Section 14(1)(c) of the Act comes to vest in a cinematograph film on its completion which is said to take place when the visual portion and audible portion are synchronized."

"This takes us to the core of the question namely, whether the producer of a cinematograph film can defeat the right of the composer of music ..... or lyricist by engaging him. **The key to the solution of this question lies in provisos (b) and (c), to Section 17 of the Act reproduced above which put the matter beyond doubt. According to the first of these provisos viz. proviso (b) when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric therefore i. e. the sounds for incorporation or absorption in the sound-track associated with the film, which as already indicated, are included in a cinematograph film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music on the one hand and the producer of the cinematograph film on the other. The same result follows according to aforesaid proviso (c) if the composer of music or lyric is employed under a contract of service or apprenticeship to compose the work. It is, therefore, crystal clear that the rights of a music ..... composer or lyricist can be defeated by the producer of a cinematograph film in the manner laid down in provisos (b) and (c) of Section 17 of the Act**."

57.6 Observations of Supreme Court 1977 case can be summarised as follows:

a) In a Cinematograph film, there exists a separate copyright for the Film as a whole and the said rights vests with the author namely Producer who is also called first owner.
b) The rights conferred in relation to film shall be governed by the Section 14 of the Act.
c) The rights of the authors of the literary works and musical works though independent in nature but by virtue of the operation of Section 17 proviso (b) & (c) vests with the producer and divested from the authors of the literary works and musical works.
d) The Supreme Court however clarified that the right of the producer shall not be limited to the exhibition of film as whole but the right of the producer shall also extend to the record the soundtrack associated with the film and the copyright in the said sound track and its communication to the public as a part of the film shall also vests with the Producer.
e) The right of the lyric writer and musical composer existed/ survives as per the Eastern Motion case for the performance of the work in public otherwise than by using it as a part of the film. (Emphasis Supplied)

57.7 The jurisprudential evolution of the author's right for underlying work can never be concluded without observing the iconic footnote of the very same judgement, where Justice Krishna Iyer opined as follows:

"The Authors and Music Composers who are left in the cold in the penumbral area of policy should be given justice by recognizing their rights when their works are used commercially separately from cinematograph film and the legislature should do something to help them."

57.8 Further, it is noteworthy to mention that the subclassification theory with respect to exhibition or public communication of the soundtrack of the film apart of the film vis a vis exhibition of film as a whole was always existing as a matter of debate ever since the decision of Eastern Motion India case. Since the statute was unclear on the said point and any indication to the contrary was absent, the Supreme Court interpreted the provision relating to Films liberally and in favour of the producers by observing that the right of the producer extends to not merely exhibition of films but also on the sound track of the film to be heard by the public. But the discussion in the judgment makes it evident that the distinction was attempted to the drawn and existed at that time as well.

57.9 It is these limitations or what we call the exceptions to the interpretation which Supreme Court itself recognized in Eastern Motion Picture (supra) case which became a subject matter of the discussion at the time of the passing of the amendment of 2012 which was aimed at to ameliorate the conditions of the authors and composers of the music. For the sake of better understanding and clarity, we hereby again reiterate the exceptions or limitations of view of Supreme Court Judgement concerns which became the subject matter of discussion before the parliament and also before the standing committee and are also confirmed by the statement of objects and standing committee reports. The said limitations or exceptions to the view of Krishna Iyer J's view in Eastern Motion case were:

a) The attempted but failed or rejected distinction in the judgment of Supreme Court in 1977 relating to limited right of the producer of the film for exhibition of the film as a whole but retention of the rights of the lyric writers and musical composers for the exhibitions of songs other wise than that of film but as a clippings. In simple words, the classification of film as a whole vis a vis a song or sound track without the film and the rights emanating therefrom which as per Supreme Court solely rests with the producers. Though the composers and lyricist attempted to argue before the Supreme Court that the rights of the soundtrack of the film when communicated to public otherwise than that part of film attract their rights.

b) The lament of Krishna Iyer's J expressed in the footnote as reproduced above with a request to the legislature to do something to ameliorate their conditions.

c) The producer's ability to defeat the rights of the authors as lyricist and music composers by invocation of Section 17 by way of commissioning of the works and thereby becoming a first owner. This was another challenge before the parliament as to how to device a statutory provisions in such a way that the rights of the lyric writers and composers remain in tact in a statutory scheme so that the result analogous to 1977 view of Eastern Motion Picture case can be avoided. (This will be seen as an indicator or reason for insertion of these provisos under the chapter or head of assignment so that the rights of lyric writers and musical owners may be recognized.

58 PRACTICAL EFFECT OF EASTERN MOTION PICTURES CASE & CIRCUMSTANCES EXISTED AT THE TIME OF 2012 AMENDMENT.

58.1The view of the Supreme Court in Eastern Motion Pictures case, that rights qua film to include sound track in the film and the same remains with the producer irrespective of the fact whether the soundtrack is played as a part of the film or otherwise except the rights outside film vests with the author of lyric writer and music composer survived for more than 3 decades (1977 until 2012), but the consequential and practical effect of the allocation of the rights for the film overall as a whole and soundtrack embodying the same has resulted into grave inequality in the financial earnings, royalty sharing techniques and the overall well being of the authors and music composers.

58.2 Whereas due to the advent of the technologies and new mediums, the video clips and part/ portions of the soundtracks are continued to be exploited by the producers of the films by earning manifold royalities from manifold sources by entering into further agreements with third parties, the conditions of the author and music composers due to the corresponding deprivation of the said earnings has resulted into financial inequality, disparity and the said class became distressed, exploited and deprived. It is to ameliorate this disparity the amendments were brought into force in the year 2012.

59 PRELUDE TO AMENDMENT OF 2012 & STATEMENT OF OBJECTS & REASONS CONTAINED IN 2012 AMENDMENT

59.1The 'Statement of objects and reasons' appended to the Copyright Act (Amendment) Bill 2010 which ultimately culminated into the amendment of 2012 after acceptance of the suggestions of the standing committee reports also echoed the same view which is that one of the main purposes of the amendments to the Copyright Act is that the rights of authors and music composers rights are specifically recognized for the works incorporated into the cinematograph films and their rights to receive royalty also arises from the same. The same can be discerned when one reads the following objects in the statement of the objects and reasons clauses to:

" a) Give independent rights to authors of literary and musical works in cinematograph films;

b) Clarify that the authors would have rights to receive royalties and the benefits enjoyed through the copyright societies;

c) Ensure that the authors of the works, in particular, author of the songs included in the cinematograph films or sound recordings, receive royalty for the commercial exploitation of such works;"

59.2 That apart, as regards the broadcaster rights, the statement of objects and reasons also informs that the scheme of statutory license has been introduced without any corresponding disadvantages to the owners of the copyright. The said clause reads as under:

> *"introduce a system of statutory licensing to broadcasting organisations to access to literary and musical works and sound recordings without subjecting the owners of copyright works to any disadvantages";*

59.3The reading of the aforementioned objects make it clear that the rights of the authors and music composers are independent in the cinematograph films and their rights to receive royalty from the commercial exploitation along with film is recognized by way of amendment. Further, so far as broadcasting rights are concerns, the access of broadcasting organizations to access to literary, musical and sound recordings are without the subjecting the owners of the copyright to being put to disadvantages. This object is also relevant in the

present case in as much as this tribunal is basically concerns with the fixing of the royalties for the statutory scheme provided for broadcasting organizations under Section 31 D.

59.4 The object clearly mandates that the access to all the three categories of the works that are literary, musical and sound recording which is in consonance with the approach, we are proceeding to adopt. Further, the object also makes it clear that the rights of the owners of the copyright should not be put to disadvantages while granting the access to broadcasters with all the three categories. At present, it is only relevant to comprehend that the above 4 objects speak in the same voice which are the rights of the literary works, musical works and sound recording are independent and they gain relevance while deciding the licensing scheme provided under the Act for granting the access to broadcasting organizations.

59.5 This also negatives the contention of the Broadcasters/ Petitioners that they are merely seeking the license for the sound recording and therefore the role of the authors of the literary works and music composers and their independent rights not into consideration while considering this application for the royalty relating to sound recording. **The said position taken by the petitioner is erroneous in as much as the petitioners being well cognizant of the amendments of 2012 and knowing fully well that the rights of the authors and composers to receive the royalty has been emerged as a distinct right cannot be heard be to say that they are oblivious to the legal position. As per the settled law, the ignorance of law is no excuse, so it is not legally permissible for the petitioner to argue and state before this board that this tribunal should ignore the rights of the authors and composers when admittedly they have their right to receive royalties granted by the amendments and their works are part and parcel of the sound recording. So, the petitioners could not limit the fixation of the royalty only under the head of the sound recording purely for their own economic benefit which is contrary to the legal position as per the amendment of 2012. By filing a petition for the fixing the rate of the royalty under the statutory licensing scheme for a sound recording, the implicit in the petition of the petitioners is that the petitioners are seeking access to the use and exploit the literary works and musical works which forms the intrinsic part of the sound recording but as per the amendments both the rights are separately recognizable and subject to separate fixation of royalties and their share as per the rights under sound recording and literary work and musical work**. **Once, the amendment recognizes the rights of the literary works, musical composers as independent right to that of the producers so far as their works embodying film and dehors the film are concerned, then, the broadcasters organizations like Petitioners are duty bound to invoke the scheme as per the amended law wherein the royalties shall be paid both to the owner/ producer/ assignee of the right in the context of the film/ sound recording and also a shared royalty under the head of the literary and musical composers right between the producers/Assignee and the assignors i.e. authors of literary works and musical works to be shared equally as per the newly inserted provisions**. This finding will be further fortified once the interpretation of the provisos and the newly inserted provisions are discussed in more depth below. (Emphasis Supplied)

60 PURPOSIVE CONSTRUCTION & DISCERNING PARLIAMENTARY INTENT AS PER STATEMENT OF OBJECTS & STANDING COMMITTEE REPORT

60.1 It may also be apt to rely on the Parliament Standing Committee's Report dated 23rd November, 2010 presented to the Rajya Sabha and laid at the Lok Sabha, which at paragraph 9.12 observes that the main contention between Authors/Composers of the film lyrics and music compositions and Film Producers/Music companies is about the rights relating to film music.

60.2 It goes on asserting further in paragraph 9.13 that when a song or music is incorporated in a film, the related Synchronization right of author and music composer, which is assigned to the producer of the film as per section 17 (b) or in absence of contrary agreement, film producer is the first owner. For further commercial exploitation the producer of cinematograph film further assigns these rights to the Music companies for upfront lumpsum amount, when the film songs are performed separately and independently through TV/Radio, restaurants, airlines, auditorium or public functions etc. The Authors/Music Composers fail to reap the economic benefits of exploitation of their works, to the Film Producer being the first owner and to music companies who become subsequent assignee and ultimate owners of these works.

60.3 The Parliamentary Committee also takes note of the fact at Para 9.14 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 Supreme Court judgement in *Indian Performing Rights Society Vs. Eastern India Motion Pictures Association* (AIR 1977 SC 1443).

60.4 At para.9.16 the Parliamentary Committee laments that the long standing infirmity in the Copyright law outlined above warrants proposed amendments in Section 18 and 19 were overdue. It further rants that it has taken more than thirty years for the legislature to act upon a Supreme Court directive which indeed is a very sad state of affairs. The Committee emphatically recommends that this long lasting infirmity in the Copyright law needs to be removed without any further delay.

60.5 In this background, we have to see now, the amendments carried out in Section 14, Section 17, Section 18 and Section 19 , brought by Copyright (Amendment) Act, 2012 (27 of 2012) with effect from 21st June 2012 .

60.6The rejection of the plea in Eastern Motion Case by the Supreme Court refusing to recognize the rights of the authors and music composer in the sound track which is played independent to playing of the film in the Cinema Hall is remedied by the amendment.

60.7 The amendments of 2012 aimed to benefit the authors by broadening their rights through insertions of the certain provisos in the Section 18 and some analogous provisions in Section 19 so far as the assignment of the rights to the producers by the lyric writer and musical work author is concerned.

60.8 The standing committee report further shed light on the point that the core purpose of the amendments is to remove the long standing anomaly of the retention of the sound recording right embodying the film solely with the producer. This has been done by the recognition of the independent right of the author of the literary work as well musical composer to receive royalties for the said exploitation of the works with the assignee. The amendment recognized this independent right of the authors of literary works and musical works to receive the royalties without affecting the right of the producer/ assignee in the

sound recording/ cinematograph film.**<u>In effect, the amendment detached the right of the sound recording/ cinematograph film (whichever is applicable) which was earlier and now also belonging to the producer/ creator from the earlier rightunder the head of the literary and musical works belonging to producer due to its merger with the cinematograph film or sound recording by way of assignment or commissioned work and has made this laterassigned right as shared right between the assignors i.e. authors on the one side with that of the assignee/ producers (whichever is applicable) on the other for the purposes of the receiving the royalties.So, this detachment/ bifurcation or independent recognition of the rights from that of the producers allowed the rights in sound recording and rights of the authors of literary works and musical composers to operate independently in their own field as per the operation of amended provisions. This appears to be to one of the mischief relating deprivation of the economic benefit arising out of the utilization of rights of the authors of literary works and musical works in sound recording or in cinematograph film which is sought to be remedied that can be evinced from the reading of the circumstances prevailing at the time of the amendments, existing case laws, the statement of the objects and reasons and also the standing committee reports</u>**. (Emphasis Supplied)

60.9 It is a settled principle of law that the amendment conferring the rights to benefit the class of the persons or ameliorating measure has to be given purposive construction and in that context, the statement of objects and reasons as well as standing committee reports both are recognized by Supreme Court as valid aid of construction for ascertaining the true purpose and substance of the legislation.

60.10 In the case of *Lanco Anpara Power Ltd v. State of UP, MANU/SC/1317/2016*, the Hon'ble Supreme Court speaking through Hon'ble A.K. Sikri J (as he then was) succinctly discussed the concept of the purposive construction in the context of the beneficial piece of legislation or ameliorating measure in the following words. The Supreme Court observed thus:

" 27. **<u>Purposive interpretation in a social amelioration legislation is an imperative, irrespective of anything else</u>**. This is so eloquently brought out in the following passage in the case of Atma Ram Mittal v. Ishwar Singh Punia MANU/SC/0032/1988 : (1988) 4 SCC 284:

> 9. Judicial time and energy is more often than not consumed in finding what is the intention of Parliament or in other words, the will of the people. **<u>Blackstone tells us that the fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law</u>**. **(Emphasis By The Court)** See Commentaries on the Laws of England (facsimile of 1st Edn. of 1765, University of Chicago Press, 1979, Vol. 1, p. 59).
>
> Mukherjea, J. as the learned Chief Justice then was, in Poppatlal Shah v. State of Madras [MANU/SC/0074/1953 : AIR 1953 SC 274 : 1953 SCR 677 : 1953 Cri LJ 1105 : (1953) 4 STC 188] **<u>said that each word, phrase or sentence was to be construed in the light of purpose of the Act itself</u>**. But words must be construed with imagination of purpose behind them said Judge Learned Hand, a long time ago. It appears, therefore, that though we are concerned with seeking of intention, we are rather looking to the meaning of the words that the legislature has used and the true meaning of what words [Ed.: Lord Reid in the aforecited case had observed: (All ER p. 814) "We often say that we are looking for the intention of Parliament, but this is

not quite accurate. **We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.**"] as was said by Lord Reid in Black-Clawson

International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975 AC 591, 613 : (1975) 1 All ER 810 : (1975) 2 WLR 513]. We are clearly of the opinion that having regard to the language we must find the reason and the spirit of the law.

28. How labour legislations are to be interpreted has been stated and restated by this Court time and again. In M.P. Mineral Industry Association v. Regional Labour Commr. (Central) MANU/SC/0243/1960 : AIR 1960 SC 1068, this Court while dealing with the provisions of the Minimum Wages Act, 1948, observed that this Act is intended to achieve the object of doing social justice to workmen employed the scheduled employments by prescribing minimum rates of wages for them, and **so in construing the said provisions the court should adopt what is sometimes described as a beneficent Rule of construction**. In Surendra Kumar Verma v. The Central Government Industrial Tribunal MANU/SC/0316/1980 : (1980) 4 SCC 443, this Court reminded that semantic luxuries are misplaced in the interpretation of 'bread and butter' statutes. **Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions.** (Emphasis Supplied)

29. We would also like to reproduce a passage from Workmen of American Express v. Management of American Express MANU/SC/0237/1985 : (1985) 4 SCC 71, which provides complete answer to the argument of the Appellants based on literal construction:

> *4. The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes (we have borrowed the words from Lord Wilberforce's opinion in Prenn v. Simmonds [(1971) 3 All ER 237]). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations...*

30. In equal measure is the message contained in Carew and Co. Ltd. v. Union of India MANU/SC/0551/1975 : (1975) 2 SCC 791:

> *21. The law is not "a brooding omnipotence in the sky" but a pragmatic instrument of social order. It is an operational art controlling economic life, and interpretative effort must be imbued with the statutory purpose. No doubt, grammar is a good guide to meaning but a bad master to dictate...*

31. The sentiments were echoed in Bombay Anand Bhavan Restaurant v. Deputy Director, Employees' State Insurance Corporation and Anr. MANU/SC/1596/2009 : (2009) 9 SCC 61 in the following words:

20. ***The Employees' State Insurance Act is a beneficial legislation. The main purpose of the enactment as the Preamble suggests, is to provide for certain benefits to employees of a factory in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto****. The Employees' State Insurance Act is a social security legislation and the canons of interpreting a social legislation are different from the canons of interpretation of taxation law.* ***The courts must not countenance any subterfuge which would defeat the provisions of social legislation and the courts must even, if necessary, strain the language of the Act in order to achieve the purpose which the legislature had in placing this legislation on the statute book. The Act, therefore, must receive a liberal construction so as to promote its objects.*** *(Emphasis Supplied).*

32. In taking the aforesaid view, we also agree with the learned Counsel for the Respondents that 'superior purpose' contained in BOCW Act and Welfare Cess Act has to be kept in mind when two enactments-the Factories Act on the one hand and BOCW Act/Welfare Cess Act on the other hand, are involved, both of which are welfare legislations. (See Allahabad Bank v. Canara Bank MANU/SC/0262/2000 : (2000) 4 SCC 406, which has been followed in Pegasus Assets Reconstruction P. Ltd. v. Haryana Concast Limited and Anr. MANU/SC/1489/2015 : 2016 (1) SCALE 1 in the context of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Companies Act, 1956. **Here the concept of 'felt necessity' would get triggered and as per the Statement of Objects and Reasons contained in BOCW Act, since the purpose of this Act is to take care of a particular necessity i.e. welfare of unorganised labour class involved in construction activity, that needs to be achieved and not to be discarded. Here the doctrine of Purposive Interpretation also gets attracted which is explained in recent judgments of this Court in Richa Mishra v. State of Chhattisgarh and Ors. MANU/SC/0143/2016 : (2016) 4 SCC 179 at Page No. 197 and Shailesh Dhairyawan v. Mohan Balkrishna Lulla MANU/SC/1206/2015 : (2016) 3 SCC 619-Para 31**.(Emphasis Supplied)"

60.11 As regards, the reliance of the standing committee report as an aid to construction of the statute, the said point has been decided by the Constitutional Bench of the Supreme Court of India in the case of *Kalpana Mehta v. Union of India, MANU/SC/0519/2018* wherein Hon'ble DY Chandrachud in his concurring opinion to the opinion of Chief Justice Mishra and Justice Khanwilkar has following to observe about the standing committee report reliance in the proceedings:

"Parliamentary Committees are an intrinsic part of the process by which the elected legislature in a democracy exacts accountability on the part of the government. Department related Parliamentary Standing Committees undertake the meticulous exercise of scrutinizing the implementation of law, including welfare legislation and the performance of the departments of the State. It is for the court in each case to determine the relevance of a report to the case at hand and the extent to which reliance can be placed upon it to facilitate access to justice. Reports of Parliamentary Committees become part of the published record of the State. ***As a matter of principle, there is no reason or justification to exclude them from the purview of the judicial process, for purposes such as understanding the historical background of a law, the nature of the problem, the causes of a social evil and the remedies which may provide answers to intractable problems of governance****. There is no reason why reliance upon the report of a Parliamentary Standing Committee cannot be placed in proceedings under Article 32 or Article 136 of the Constitution. Once the report of a Parliamentary Committee has been published, reference to it in the course of judicial proceedings will not constitute a breach of parliamentary privilege.* ***The validity of the report of a Parliamentary Committee cannot be called into question in the court. When a matter before the court assumes a contentious character, a finding of fact by the court must be premised on the evidence adduced in the judicial proceeding.*** *(Emphasis Supplied)*

60.12 The reliance of the standing committee report in the present case by this tribunal squarely falls within the ambit of the observations of the Supreme Court in Kalpana Mehta (supra) wherein the this tribunal has relied upon the standing committee report in the context of the ameliorating measure/ beneficial legislation to identify the historical facts and also the evils sought to be remedied by the legislature. Therefore, the reliance of the standing committee report in the present case is completely justifiable as an aid of the construction of the Copyright Act in particular amendments carried out in the year 2012.

61 ROLE OF THE AMENDED PROVISIONS AS PER THE PURPOSE

61.1 It has already been seen above that the law which aims to provide the benefit to the class of the persons by providing a measure to remove financial disparity is a beneficial piece of legislation so far as the authors of literary works and musical works are concerned. Every provision has to be interpreted keeping the purpose of the law in mind. We have also seen above the statement of objects and reasons and noted some objects which are relevant for the discussion here. **The resultant effect of the said objects and legal position**

prevailing at the time of the amendment is that the amended provisions are inserted under the Act in such a way so as to give effect to each of the objects noted in the statement ofobjects and to remove the limitations to earlier legal position as noted above It is further pertinent to note we are only discussing the setting and placement of the amended provisions for the purposes of the discussion relevant here and not considering in general all other objects of the amendments and the inserted provisions. This can be seen by examining and analysing in detail the setting and placement of the amended in provisions in the following manner.

61.2 Wherever in the existing Act, there was an ambiguity that the right of the author and composer did not exist independent to that of the producer in the context of the literary and musical work incorporated in the cinematograph film, the legislature provided sufficient indicators as clarifications so as to remove such ambiguity so that the object of the independent right of the author and composer can be given effect to. This can be further realized by looking at the amended provisions in the following manner:

(i) In Eastern Motion Case, the view was that so far as the commissioning of the literary work and musical work for film by the producer is concerned, the right for the film as a whole rests with the producer as a first owner. To recognize the independent right of the author and music composer, a new proviso is added under section 17 which clarifies that despite what has been contained in section 13 which is the provision relating to allocation of the rights in respect of the various works as well as provisions of section 17 relating to first owner, the right of the author and composer of the work incorporated in the film shall remain intact. The proviso reads as "[Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13". This proviso is both clarificatory of the rights of the authors of literary works and musical works as well as carving out an exception to the rule of the first owneras it has been inserted under the provision relating to the first ownership which ordinarily rests with the producer so far as film is concerned. The combined reading of section 13 read with proviso to Section 17 makes it clear that in relation to the works incorporated in the cinematograph film, the rights of lyricist and musical composer shall remain independent to that of the producer as first owner in the cinematograph film.**This right will remain irrespective of the contract of service and contract for service as provided under Section 17 (b) & (c) and therefore this proviso acts as an exception to the rule relating to commissioning of the works and ownership arising therefrom and thereby aims to remove the effect of 1977 view of the Supreme Court which was based of Section 17 (b) &(c) of the old Act.**

(ii) The legislature was conscious that the film is composite whole which is aggregation of the various works and a distinct copyright exists in the same. The said works forming part of the film are separately assigned and considering the advent of technology, the rights under the film and the works forming part of the film are distinctly required to be recognized so that the aimed benefit to the author and composers are not lost and eventual benefit should again not be deprived under the guise of assignment. To remove such further ambiguity, the third proviso to Section 18 (1) has been added in the form of non-derogable

provision or a provision wherein the rights of the authors and composers cannot be contracted out or waived and any such assignment shall not be entered into which takes away the rights of the composers and any agreement contrary to the same is void . The said third proviso reads as under:

"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 the cinematograph film in a cinema hall,except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void"

61.3 At present, it is relevant to note that the proviso is also aimed at amplifying the rights of the authors and composers to receive royalties alongside the assignee of the works for the utilization of the works in other forms other than films as a whole in Cinema Hall. One can easily discern that this is basically aimed at recognition of the rights of the authors and composers to receive royalties due to their works contained in the film including their literary work and musical work and sound recording which is communicated to the public each time, the song or clipping is being played either visually or otherwise in the radio through broadcast which are all other forms of utilizations apart from exhibition of the film in the Cinema Hall, the classification of which was a subject matter of debate in 1977 Supreme Court Case of Eastern Motion Picture(supra) but was rejected by the Supreme Court at the relevant time.

61.4 Again, the legislature was conscious as to how the industry functions wherein not merely the rights of the films and sound track forming part of the films are sold and traded for utilization of the said works for royalties, but even the non- film songs are equally popular, wherein the contribution of the lyric writers and music composers in the said sound recordings which are non film songs, of which such works form a composite part are equally necessarily required to be recognized so that the rights of the authors and composers to receive royalties alongside the assignee of the work shall not be undermined or foreclosed solely for the reason that the said songs are not forming part of the film. To remove such ambiguity, a non- derogable and similar no contracting out provision has been inserted in the form of forth proviso contributed to non film sound recordings which reads as under:

"Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shallnot 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."

61.5 The legislature was equally conscious that not merely the rights in the sound track/ sound recording forming part of the film and also non films songs are sold and assigned for the purposes of newer mediums or platforms **post their making** which are taken care of in the form of third proviso and fourth proviso to Section 18 (1) but **the rights in the film songs as well as non film songs can even be sold or assigned or contracted out even at the time of entering into a contract for making such sound recording forming part of the film and non film sound recordings/ songs. In order to prevent the contracting out of the rights of authors or composers** or to prevent exploitation so as to seek assignment

as a whole **at the time of making of the sound recordings of film or non film songs**, the two non derogable provisions similar in terms of language of third and fourth provisos to Section 18(1) have also been inserted in Section 19 as Section 19 (9) & Section 19 (10) wherein the language used is " No assignment of copyright in any work **to make a cinematograph film**" and "No assignment of copyright in any work **to make a sound recording**" have been used to make it distinguishable from third and fourth provisos to section 18 (1). In short, whereas the third proviso and fourth proviso to section 18 (1) are no contracting out which prevents the future assignments or creates future non waiver or non assignability of the rights of the composer by using the language " The author of the literary or musical work included in a cinematograph film **shall not assign" by declaring all such agreements to be entered in future to be contrary to law as void**,however in contrast, the provisions of Section 19 (9) & (10) which are similarly worded concern with no contracting out provisions "**at the making stage**" of the films and sound recordings and **aims to nullify the legal effect of already entered assignments after the amendment** by stating and using the language which reads **" No assignment of copyright** in any work to make a cinematograph film or sound recording **shall affect** the right of the author…." (Emphasis Supplied). Therefore, **in sum, the assignments that are already entered in presenti between the period of enforcement of amended provisions till date nor the future assignments can take away the rights of the authors and composers to receive equal share of the royalities with the assignee.** This appears to be the combined effect of the said provisions.

62. The placement of the amended provisions as discussed in the preceding point (a) are mainly concerning the recognition, amplification and no contracting out of the rights of the authors and composers of the literary works and musical works embodying the sound recording. All this was aimed at removal of the first limitation or exception to Supreme Court view which was that the copyright in the film rests with the producer and the rights of the authors and composers were assignable in character. Both these aspects of the earlier view of Supreme Court have now done away with in the form of amendments wherein the rights of the authors and composers have become non assignable in the form of no contracting out provisions as well as the sole rights of the producers is not there but the independent rights of the lyric writers and musical composer are also recognized in the form of indicators and provisions discussed above placed at various relevant places of the Act. The connected with this another limitation or exception to the view of Supreme Court, which was the failed or rejected attempt to classify the playing of the sound track/ sound recording as a part of the film vis a vis playing of the sound track of the film apart from film**. This limitation of Supreme Court view has also been done away with wherein the sole right of Producer to receive royalty in the communication of the sound track/ sound recordingas a part of the filmis restricted to the exhibition of the film including its sound track in Cinema Hall only**. This can be readily evinced from the combined reading of Section 13, 14, proviso to Section 17, Section 18 (1) third proviso and Section 19 (9). **Therefore**, **it is that the producer can exercise his sole right to receive economic benefit so far as the communication of the sound recording containing contributions of lyricists and musical composers are concerned only to the extent when the film is played in the Cinema Hall as such wherein sound track/ sound recording forms the intrinsic part of it as a whole**, **In all other eventualities,The right to receive royalties of Producer/ Assigneeunder the head of "Literary & Musical works" which are embodied work of the sound recording forming**

part of the film when played outside the Cinema Hall is a shared right between the producer/ Assignee & Authors. In sum, there is a recognition of the right of the author of the literary work and musical work as embodied in the film or sound recording and simultaneously with the recognition of the said right, so far as the Cinematograph film is concerned, there is corresponding narrowing down of the sole right of the producer to receive the royalties for communication of the sound recording separately from the film and it has now been recognized as shared right between the producer/ Assignee as well as the authors and composers. This is also logical and obvious in as much as the legislative intent is not to cause intrusion with the right of the producer to exhibit the film in the Cinema Hall but instead grant a shared royalty to the authors and composers wherever the sound track/ sound recording containing their contribution is played or exploited or used for commercial reasons by providing the equivalent level of the economic benefit to them. All other forms of the exhibition or utilization of the of the sound recording including the broadcast through radio which is otherwise than a part of the film shall attract the shared right of authors and composers to receive the royalty alongside the assignee of the said right whoever is the assignee or holding title at the relevant stage.

62.1 The legal effect of the amended provisions in the form of third proviso and fourth proviso to Section 18 (1) and Section 19 (9) & (10) apart from what has been discussed above in detail is that the right of the authors and composers to share the royalty is the shared right between them as assignor and the assignee on the other side on equal basis. The rationale behind such sharing is that since the right of the authors and composers were already assigned at the time of the making of the film so far as the Section 19 type of the cases are concerned, the right to receive royalty is still revived for the exploitation and utilization as a special economic right created by the amend. **Since under section 19 (9) & (10), the said rights were already assigned to the producer/ assignee for making the cinematograph film or for making thesound recording, the assignee cannot be completely ousted from the purview and therefore a middle path of shared royalty right is created to validate the said legal arrangement so that the assignees interest is also served along side the assignor. So, though amelioration has taken place with the aim of reducing the financial disparity but the aim equally is not to completely reverse the sale of the absolute rights already assigned by the authors and/ composers at the relevant time to the relevant assignee. It is only the economic benefit which is aimed to be given by the insertion of Section 19 (9) & 19 (10) types of cases and therefore, there exists a shared right between the assignor and assignee despite the fact that the assignors/ lyric writer and composers rights being independent flowing from section 13 & 14. Although the right under section 13 & 14 of the author and composers are independent as per the law as it looks like from the plain reading of the provisions, there are some restrictions in the exercise of the said rights by assignors solely as the assignment already undertaken by the assignors to the assignee comes in the way of the complete exercise of the rights. Most of the underlying rights like literary and musical work when it comes to composite works like cinematograph films and sound recordings are already assigned to the producers/ music companies by way of assignment at the time of**

<u>making of the said films or sound recordings whichever are applicable. This is the reason why there exists a joint exercise of the rights in underlying works or co-extensive nature of right of equal sharing of royalties has been enacted under section 19 (9) & (10) for the assignments already undertaken at the time of the making of the cinemograph films and sound recording and for future utilizations under the analogous provisions in the form of third and fourth provisos to Section 18 (1) of the Act</u>. (Emphasis Supplied)

62.2 The meaningful and prudent reading of third proviso, fourth proviso to section 18 (1) and Section 19 (9) & (10) would reveal that there exists a distinction between "right to receive royalty" and "liability of the utilizer". This can be evinced from the wordings "the right to receive royalties to be shared on an equal basis with the assignee of copyright" as against the wordings " for utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall".

62.3 Whereas the right to receive royalty is shared right between the assignee along side the author and music composer. We are of the opinion that the liability or payment of royalty lies as an onus on the actual utilizer. This is due to the reason that payment of the royalty is connected or linked to "utilization of the work" and as such the payment of the royalty shall rest upon the utilizer of the work. Therefore, to take an instance if the Broadcaster is seeking an access to the sound recording, literary works and musical works in terms of Section 31 D, then it is towards the said utilization, the royalty is payable as per the scheme of the Copyright Act, the broadcasting organization's payment shall be termed as royalty towards the utilization of the works including the literary and musical work embodied in the sound recording within the meaning of third proviso& fourth proviso (depending upon the circumstances as per the provisions) to Section 18 (1) of the Copyright Act. Contrariwise, the right to receive royalty shall be a shared right between the assignee, author and music composer.

62.4 The wording "Assignee" so far as the entitlement to receive royalty is concerned is not an abstruse term but in fact the same gets clarified when one reads the provisos alongside the Section 18 (2). The Section 18 (2) clarifies that "Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly". So one cannot travel beyond the scope of the express provision which is Section 18 (2). Therefore, if there exists merely an agreement between the author and producer for making the cinematograph film, the assignee i.e. producer so far as the rights so assigned shall be termed as assignee within the meaning of the provision of Section 18. In the same example, the assignor or author shall be termed as owner. Likewise, if there is a further agreement between assignor and assignee, to say the producer and music company, the music company shall be the assignee and producer shall be the assignor. If the music company in turn assigns or licenses the right to the broadcaster, the broadcaster can be assignee of the right to broadcast or licensee contingent upon the terms of the agreement and nature of relation between the parties. So, the assignee as a word does not require any definite or fixed designation as the context of the term may vary in varied circumstances as there may be distinct kinds of the relations to be entered by different participants. In short, the assignee can be termed as a party who is holding a right/ title as per the deed of the assignment in terms of

Section 18 and Section 19 as per the contractual relationship to extent of the right assigned to it by the assignor.

62.5 There is another reason as to why the assignee as a term cannot be put into a strait jacket compartment. This is due to the reason that the relationship between the right holder and the right provider in cases of bundle of rights to be exercised on various mediums may involve multiple contractual rights entered through various contractual relationships. In the event of a dispute as to who has the right or holds the title, it is a matter of civil controversy which is to be resolved in the competent of court of law which is a civil court. This tribunal is primarily concerned with the scheme of the access to the sound recording, literary works and musical works, at the behest of the broadcasting organization is hardly concerned with the term "assignee" and cannot take a rigid view of the matter by confining it to one entity or a person. This is due to the reason that the assignee's role under the relevant provisions i.e. third proviso and fourth proviso of Section 18 (1) and Section 19 (9) & (10) is relatable to entitlement to receive the royalty along with the authors and musical composers. Therefore, the assignee as a word is inextricably connected with the title or ownership of the right concerned which is parted with by the assignor by virtue of the contractual relationship. In the event of the dispute as to who holds the title, the remedy lies with the civil court to resolve the controversy and seek recovery or payment of royalty if any on establishment of title and not this tribunal. Likewise, there is also a separate mechanism for the disputes as to Assignment under Section 19 A before IPAB, if any such issues arises, depending upon the domain of the tribunal or court, this tribunal may entertain such dispute.

63. All the counsels appearing on behalf of the applicants and respondents do not dispute and have admitted before us that authors and music composers are entitled for monetary benefits of special rights by virtue of amendments brought in various provisions of the Act, including in Section-18 and 19 of the Act. The only area of issue is who will pay the said benefit to them and who will share the same. Whereas the contentions of the broadcasting organizations appear to be that they will pay the royalty only under one head which is "Sound recording" whereby it is upon producer/ music companies to share the revenues with the authors and music composers. On the other hand, the music companies argue that the authors and composers are entitled to the royalties under the separate head as the Broadcasters were doing earlier albeit under protest as many of the payments were earlier made under protest as the conclusive decision from IPAB or this tribunal was awaiting for all this while. Therefore, the broader question is how to accommodate the interests of the authors and composers when they are entitled to receive the royalties as shared right with that of the assignee.

Interplay of Section 18, 19 with Section 31 D proceedings and Interpretation of Section 31 D & Relevant Rules

64. Where an assignment is made between the author and the assignee,the assignee shall be treated as owner. This has been clarified by Section 18 (2) which reads as "Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned**, shall be treated for the purposes of this Act as the owner of copyright** and

the provisions of this Act shall have effect accordingly. Therefore, so far as the term "owner" is appearing in Section 31 D (2) "owner of the right in each work". The said "owner" may mean first owner if in case the right is not assigned by the author. If in case, the right is assigned to the producer/ music company or to the society, the term "owner" depending upon the last title available with the assignee shall be construed accordingly. The payment shall be made to the owner of the right. However, the distribution of the royalty on shared basis shall be made between the relevant owner/ assignee and co-owners/ authors and composers as per the direction of the board.

65. Fixing a rate of royalty in respect of statutory license to broadcast to a broadcasting organization. The present determination of royalty is only concerned with the benefit conferred by Section 31D – which is the grant of the license after fixing the rate of royalty. The provision of Section 31 D is concerned with the broadcasting organization desirous of gaining access to the sound recording, of which the literary and musical work form are embodied work. The broadcast is obviously one form of the utilization as the operation of Section 18 (1) third proviso and fourth proviso as well as Section 19 (9) & (10) is not restricted to one form. But rather, the right to receive royalty of the composers and authors accrue with the assignee for the utilization in "any form" which are the wordings used in the said provisions. Therefore, the broadcasting on radio is one such form of utilization within the meaning of Section 31 D or communicating the work to the public by way of broadcast shall be deemed to be utilizing the said works of the authors, owners or assignees respectively.

66. It is evident from the reading of Section 31D(1) that the broadcasting organization is the sole beneficiary of the statutory license and the license cannot be conferred upon anyone else. Therefore, the broadcasting organization alone is statutorily obliged to make payment of the royalty to the owners of the works. The person who enjoys the benefit has to make payment. In this way, the broadcasters are utilizing the said work for commercial benefit and the said liability of the broadcasters cannot be shifted or imposed on any other participant. Therefore, the person who is to pay is the broadcasting organization alone.

67. The section makes it clear that the broadcaster is to pay all the works if utilized by them. On the plain reading of S. 31D, there is an obligation of payment or royalty under S. 31D is on the broadcaster alone. 31D (2) states that "*(2) The broadcasting organisation shall give prior notice, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Appellate Board.*"

68. It appears from the heading of S 31D states that it is in respect of 'for broadcasting of literary and musical works and sound recording'. The section contemplates three types of works - sound recording (which is a must) and literary, or musical work either jointly or severally as they may feature in a Sound Recording. A broadcasting organization has to

pay royalty for the works which it broadcasts. The broadcast will be of a sound recording coupled with only a literary work as the underlying work; OR broadcast may be of sound recording coupled with only a musical work as the underlying work; OR broadcast may be of sound recording coupled with both literary and musical works as underlying works.It depends on the facts of each case. Either two works or all three works are involved when a broadcasting organization makes a broadcast. Normally, in practical terms, in the cases of film songs or non film songs, the broadcast of a complete song would involve a sound recording right along side the right of the literary work right of the lyricist of the song and musical work right of the underlying music contained in the song. The royalty shall be computed and paid accordingly depending upon the communication to the public of each such work to the public.

69. S. 31D (2) expressly states that "*The broadcasting organization… …shall pay to the owner of rights in each work royalties in the manner and at the rate fixed by the Appellate Board.*"

Therefore, from the plain reading of S. 31D (2), the broadcasting organization has to pay the owners of rights in each work which is broadcasted. The broadcasting organization has to pay in respect of each works broadcasted – i.e. sound recording and literary and/or musical work depending on what gets broadcasted. Under S. 31D (2), we have to fix rate/s of royalty for the owner of each work separately and the broadcaster has to pay to each owner of the work separately. The wordings of section speak for itself. The payment shall be in respect of *each work* separately. There is no question of owner of sound recording collecting on behalf of owners of other works. The sound recording owner is entitled to royalty in respect of broadcast of sound recording.Thus, the broadcaster alone has to make payment to the owner of each work, when it broadcasts the work. Thus, as far as receiving the royalties from utilization of underlying works are concerned, to this extent, they also become the owners being their entitlements, which shall be paid to IPRS for the purpose of distribution respectively, whether those are members or otherwise.

70. The reasoning behind the separate payment of the royalty to the owner of the sound recording as well as the owner of the lyric and musical composer right arises due to the reason that the rights in the sound recording whether incorporated in the film or otherwise than of film are recognized separate works within the meaning of Section 2 (y), the author and owner of which is the producer as per Section 2 (d) and the rights of the same also distinctly recognize and flow from Section 13 and 14 respectively. As against the rights of the literary and musical work discussed above in detail are distinctly recognized, amplified and revived for the purposes of receiving economic benefit as a shared right in cases of sound recordings and cinematograph films in the cases wherein the assignment has already been entered by the authors of the literary works and musical works with the producer or any other relevant assignee. Therefore, the payment of royalty for the sound recording as a distinct whole, the owner of which is the producer shall be directed towards the producer. Whereas the payment of the exploitation/ utilization of the literary work as lyric and musical work within the same sound recording which is

separately recognized as a right for economic benefit which was earlier merged with the producers right under the head "literary and musical work right" and now known as shared right shall be separately computable and payment which shall be directed towards the producer/ assignee whichever is applicable along side the authors of the literary works, musical works which are either represented by the IPRS or by the legal heirs as per the scheme of Section 18 & Section 19 of the Act. Therefore, the payment of the royalty shall be made separate for the each work which has been separately recognized as work within the meaning of the Act. Its altogether different matter though as to what shall be rate of the payment of the royalty towards the sound recording work as a whole vis a vis the rights of the authors and composers which has been discussed later in the judgment in detail.

The provisions of Section 13(4) read with Section 14(a)(iii), Section 18 (third and fourth proviso), Section 19(9) and (10) of the Act along with Section 31D clearly mandate a separate rate of royalty to be fixed for underlying works. Section 13(4) of the Act, separate copyright in literary works and musical works not affected. Right for communication of literary works and musical works to the public under Section 14(a)(iii) of the Act are separate rights. When a song is communicated to the public, the literary work and the musical work, embodied in sound recording are also simultaneously performed/communicated to the public along with the sound recording and this position remains the same regardless of the mode or medium of communication to the public. In this respect, radio broadcast is no different. Every time a song is broadcast on a radio channel, each of the three separate works which are part of the song namely sound recording, the literary work and the musical work, is communicated to the public. Section 31D also contemplates separate payment to Owners of i) rights in underlying works and (ii) rights in sound recordings. Fixing rates for underlying works is consistent with S.31D and Rule 31. The prevailing practice for underlying work is that the fee for the same is payable is in addition to and separate from the sound recording fee. The second proviso to Section 17 was inserted in 2012 to protect the rights of the author. The said proviso states that in relation to a work included in a cinematograph film, nothing under Section 17(b) or (c) shall affect the rights of the authors in their underlying works under Section 13(1)(a).

71. PPL is an organization or a society representing the owners of sound recordings alone and is not concerned with literary or musical works which are embodied in the sound recording. If a sound recording owner has agreed with the PPL by way of agreement that PPL can collect the royalty on its behalf instead of broadcaster paying to owner. If a sound recording is being broadcasted by the broadcaster, PPL may collect the royalty on behalf of the owner of the sound recording if the owner is a member of PPL. We may clarify here that PPL does not receive the money in its own right, it receives the royalty as a representative or on behalf of sound recording owners. Similar is the case of IPRS.

72. IPRS is a society registered under the Copyright Act and is to collect royalty for literary and musical works, on behalf of the authors and music composers and owners by virtue of their respective assignments/authorizations of literary or musical works. This tribunal is merely deciding the case basing upon the representations made by the parties before this tribunal about the type of activities carried out by each of the societies and their role play in collection of the royalty.PPL or IPRS are representative Copyright Societies of the respective owners, the broadcaster instead of paying 20 owners separately, can pay PPL and/ or IPRS wherever applicable and it is the PPL and/or IPRS who will carry out further distributionor division of the royalties as per the accordingly.

73. This order nowhere grants any recognition or sanctity to any of such society either PPL or IPRS. If there exists any objection of any party questioning the entitlement of the society to receive the payments on behalf of the respective owners, the said party may approach the civil court in accordance with law and this order cannot misconstrued to mean to accord any such legitimacy to any such society

SINGLE LICENSE TO EXPLOIT BUT SEPARATE ROYALITES PAYABLE

74. The contentions of the various advocates appearing on behalf of the music companies as well as the broadcaster raised different contentions on the point as to whether there exists a need to issue single license for the sound recording which also covers the works like literary works and musical works embodying the sound recording or whether there exists a need to issue two licenses instead wherein first shall be of sound recording and another shall be of literary work and musical work respectively. We shall proceed to deal with the said aspect.

74.1 As we have seen above, the present application is filed by the broadcasters concerning the access to the sound recording of which, the literary and musical works are forming the intrinsic part of the same. Therefore, we are concerned with the application for the utilization of sound recording for the purposes of broad cast. We have already observed above that the petitioners/ applicants were well cognizant of the amendments of 2012 which separately recognized the shared rights of the owners/ assignees of the sound recordings alongside the authors of the underlying works which include literary work and musical work. It has been observed above that when the applicant files the application to utilize the sound recording, the implicit in the same is that the applicant is aiming to utilize the literary and the musical works comprised therein which is the shared right between the producer/ assignee as an owner and assignor/ author of the literary work and musical work contained therein.

74.2. It is noteworthy to mention that though within the scheme of Section 31 D, the royalty is fixed for each of the work, for which the permission or access to communicate the work in public is sought for by the broadcasting organization. However, the independent payment of royalty in the present case for sound recording as single work and literary

work and musical work as an embodied works of the sound recording is arising in the peculiar facts of the case and legal position stated above. The sound recording as work and rights flowing therefrom which was all inclusive right as per 1977 view of Supreme Court which prevailed until 2012 amendment remained solely the right in the hands of the owner. However**, post the amendment, the rights of the authors of the literary work and musical work embodied in the sound recording either comprised in film or non film bifurcated into distinct rights, the exercise of the same different in their operations. Whereas the sound recording as distinct work and right can be exercised by the producer/assignee alone but the right of the authors of literary work and musical work embodying the sound recording can be exercised as shared right as observed above.**

74.3. It has been time and again emphasized before us by the Advocates appearing on behalf of the petitioners that the petitioners/ applicants are seeking the license only for sound recording and therefore, the relief in the form of the license should be granted under the one head "Sound Recording". We have realized after hearing the parties that the effect of the amendment of 2012 is that the rights of the authors to receive royalty is someway intertwined with the right of the producer/ assignee is concerned but only to the extent of exercise of the independent nature of work of literary and musical work is concerned. The said exercised of right is shared between assignor and assignee as observed and seen above. Therefore, in order to cure the ambiguity, we issued yet another public notice dated 25.11.2020 whereby we invited the public objection from literary and musical works also embodying in the sound recording so that any technical legal infirmity can be avoided.

74.4 We have also considered the submissions of Mr. Amit Sibal Senior Advocate and Mr. Akhil Sibal, Senior Advocate and concur with their opinion that its merely a matter of semantics whether there exists a two licenses separately issued under Section 31 D and/ or whether there exists a one composite license containing two distinct rates, one for the producer/ assignee and another for the exercise of the shared right between the assignee and authors of the literary works and musical works. The consequence of both the approaches is the same and its merely a matter of technicality rather than the substance. The same consequence which flows from each the route to be adopted is that the authors are ultimately required to be paid royalty in view of the recognition of their rights in the composite or unitary works like sound recordings whether incorporated in the film or otherwise. The said payment of the royalty to the authors has to be shared with the assignee/ owner. The said right shall be in addition to the recognition of the work Sound recording as whole as the component parts of the sound recording i.e. literary work and musical works and its utilization also leads enure royalty. The said additional royalty accruing as a matter of law or by operation of the amendment falls with in the larger ambit of the head "utilization of the sound recording".

74.5. Considering the above submissions of Mr. Sibal with which we concur, we are of the view that as the counsel for the broadcasters time and again asked for the license under the one

head namely “Sound Recording to be communicated to public”, no injustice will be done if the license to access the sound recording is issued under the head “Sound Recording” which itself is a separate work under section 2 (y) and the literary work and musical work forms intrinsic part of the said sound recording enure payment of the separate royalty though falling within Sound Recording itself. In sum, by providing the rates in composite form, out of which some rate is applicable to exercise of joint right between the authors and assignee, the tribunal is ultimately providing access to single unit or work only viz Sound Recording for which, the license is sought for by the Petitioners.

Criteria For Payment of Royalty: Needle Hour or Net Advertisement Revenue

75. **Broadcaster's view : Net Advertising Revenue (NAR) is a more relevant standard under the provisions of Copyright Act, 1957 and Copyright Rules, 2013 than Needle Per Hour (NPH) standard**

The petitioners argued before this tribunal that NAR is the industry paradigmand is the standard in the Indian market and not NPH. The only exception is SCIPL, and an exception cannot be treated as “prevailing standards”and nothing in Rule 31 (7) is inconsistent with the NAR scheme as the factors within Rule 31 (7) are satisfied in the following manner:

i. *time slot in which the broadcast takes place and different rates for different time slot including repeat broadcast* – The Applicant is recommending a prime time rate of 2% of net advertisement throughout the day but the same may be reduced for non-prime time broadcast.If the IPAB seeks to differentiate on the basis of time slot, then 1% of NAR may be fixed for non-primetime and 2% of NAR may be fixed for prime time.

ii. different *rates for different class of works* – Only one class of work is relevant for the present proceeding, i.e. broadcast of Sound Recordings.

iii. *different rates for different nature of use of work* – Only one use of the work is relevant for the present proceeding, i.e. FM Radio Broadcast.

iv. *the prevailing standards of royalties with regard to such works* – The prevailing standards which adopt the NAR Model are as follows:

- The CRB Order which expressly rejects the NPH Model and adopts the NAR Model on the following grounds:
  - Government Policy is to reach the remotest parts of the country. NPH will saddle Radio stations in these remote areas with rates which high and unsustainable.
  - NPH is unrealistically high in percentages and is riddled with its own complexities of operational nature
  - NPH, as a concept, looks at the music as a bare deal in the nature of selling of goods by the licensor to the licencee. For licensor, the seller, goods have a unit price tag and he must get that and nothing less. It is oblivious of the fact that there are others also in the operation, namely, the advertiser and the listener.

- Capacity of the licencee to pay to the licensor is dependent upon his advertisement revenue and the advertisement revenue has direct linkage to both the quantitative and qualitative aspect of the listeners. In a situation where the segment of listeners, even if greater in number, belongs to poorer classes of the society and are not buyers of the goods normally advertised for, it shall result into lesser advertisement revenue.
- FM broadcasting is more a vehicle of governmental plan for socio-economic upliftment and therefore the music providers should be satisfied with a revenue sharing plan.
- Since music providers supply the music to all the broadcasters throughout India, the aggregate revenue earning in NAR will be much more than they expect from a small number of broadcasters under NPH mode.
- NAR shall prompt new breed of broadcasters to come into the field and have FM radio broadcasting in remotest corners of the country
- The CRB vide its order dated 19 November, 2002 set an NPH rate which was rejected in Phonographic Performance Ltd. v. Music Broadcast Pvt. Ltd. *2004 (29) PTC 282* by the Hon'ble Bombay High Court and Hon'ble Supreme Court in Entertainment Network (India) and Ors. v. Super Cassettes Industries Ltd. and Ors. *2008 (37) PTC 353*

It is submitted that there is only one instance of NPH Agreement i.e. SCIPL owing to special circumstances.After the CRB Order, SCIPL specifically obtained a favourable order in Super Cassettes Industry Ltd. vs. Union of India &Ors. Dated 15th September, 2010. *in WP(C) 6255 of 2010, Para 12.* wherein it was held that the CRB Order will not be applicable on SCIPL. Since SCIPL has a dominant market position with a large sound recording repertoire, some of the broadcasters had to enter into an Agreement with SCIPL for license of sound recordings on unfavourable terms.

76. In order to justify their arguments, it is submitted that under GOPA, several restrictions are imposed on private FM Radio Broadcasters:

- The Broadcaster is mandated to broadcast Public Interest Announcements as may be required by the Central Government/concerned State Government. (Clause 10.2, GOPA Phase III Agreement)
- The Broadcaster shall ensure that at least fifty percent (50%) of the programmes broadcast by it are produced in India. (Clause 10.3, GOPA Phase III Agreement)
- In case of multiple permissions to an entity/related entities in a city, the attempt should be to distinguish programming on each channel based on era of music, language of music, genre of music etc. to the extent possible to ensure diversity of programming to the listener. (Clause 10.5, GOPA Phase III Agreement)
- The Broadcaster will be permitted to carry the news bulletins of All India Radio in exactly same format (unaltered) on such terms and conditions as may be mutually agreed with PrasarBharati, No other news and current affairs programs are permitted under the policy (Phase-III). (Clause 11.1, GOPA Phase III Agreement)

- It is also to be ensured that at least 20% of the total broadcast in a day (reckoned from 0000 hrs to 2400 hrs), is in the local language of that city and promotes local content. (Clause 15.1, GOPA Phase III Agreement)
- Broadcaster, whether with or without foreign investment, shall not be permitted to change the ownership pattern of the company through transfer of shares of the majority shareholders/promoters to any new shareholders without the written permission of the Grantor. (Clause 8.4, GOPA Phase III Agreement)
- The Permission granted under GOPA Phase III is non-transferable. (Clause 6.1, GOPA Phase III Agreement)

It is also stated on behalf of broadcasters that they have to spend about Rs. 300 Crore as a Non-Refundable One Time Entry Fee (NOTEF) and Migration Fee under GOPA for its 39 stations, operational for a period of 15 years. They have incurred Total Expenditure of 115.6112 Crorein FY 2019-2020 including cost of:

1. Cost of rental of tower to BECIL and PrasarBharti
2. Frequency monitoring fee paid to the Wireless Planning Commission (WPC)
3. Electricity for maintenance of towers paid to BECIL
4. Taxes
5. Royalty Payouts

Estimated costs for setting up a new Radio Station includes setting up a Studio within the Radio Station, equipment Cost etc. which is estimated to be in the range of approximately Rs. 3 Crores.Thus, radio is a highly regulated industry with various government fee and licences and a high operational cost. NPH, being another fixed fee model does not take into consideration the various compliance requirements of radio broadcast and thus does not further the government's objective of survival of radio.

77. It is alleged that Clause-F of Sub-rule 7 of Rule 7 is most appropriate in view of the financial state of the Radio Industry and its future may be considered relevant for the present proceedings as NAR complies with all factors within Rule 31 (7). It is specifically stated that the NAR system has been prevalent in the Indian market for at least a decade and is nothing new as the Owners of Sound Recording are making it out to be.The paying capacity of listeners and thus the advertising rates and revenue are substantially lesser in smaller cities as compared to a metro. A fixed NPH system shall burden the Radio Station in smaller cities which earn much lesser advertisement revenue but works on fixed fee. Therefore, an NPH system shall make running Radio Stations in smaller cities unviable.

78. It is stated on behalf of all applicants/broadcasters that NPH Model does not take into consideration the change in circumstances and thus cannot stand the test of time. The NPH Model will disincentivize radio broadcasters from paying less popular, local, regional sound recordings since broadcasters will have to pay a fixed fee and thus, radio shall lose its flexibility to promote smaller artists and music companies. NAR is a more just

methodology because it takes into account the increase or decrease in revenue of each radio station and shall ensure that even smaller music companies who do not have a large repertoire earn higher royalty depending on revenue generation of the radio station.

79. Even the intention of the Legislature is clear from the inclusion of the provision under Section 31D (7) of the Copyright Act, 1957 which gives the right to the Owner of Sound Recording to inspect the books of accounts of the Radio Broadcasters. Such a right is redundant in an NPH system which shall have fixed rate of royalty.

80.. As per the interpretation of Rule 31(7) proposed on behalf of broadcasters, it is not correct that the Applicant is only relying on Rule 31 (7) (f) and asking this Board to consider factors beyond those enumerated in Rule 31 (7). The 227th Parliamentary Committee Report has specifically stated that the responsibilities of the erstwhile Copyright Board has increased manifold over the years and the strengthening of the same is increasingly felt. Rule 31 (7) (f) cannot be read *ejusdem generis* to Rule 31 (7) (a) to (e) but is to widen the powers of this Board so as to include various other factors which the Legislature could not have thought of. Any other reading of the same shall be truncating the powers of this Board which is against the statute. The Hon'ble Supreme Court in ***Union of India and Anr. v. Paras Laminates and Anr.*** **[(1990) 4 SCC 453]** held that a Tribunal no doubt has all the powers within its jurisdiction which have been expressly granted by the statute. Further, it also has all those ancillary and incidental powers which are necessary to make fully effective the express grant of statutory powers.

81. It is alleged that while Rule 31(7) provides for factors for determination of mode and rate of royalty, the factors to be considered for payment to be made is provided in Rule 31(8). Rule 31(8) (a-d) provides for factors for consideration while determining payment of royalties as under:

i. works included in the scheduled programmes;
ii. works newly published and not included in the scheduled programme;
iii. works communicated to the public on unexpected circumstances; and
iv. use of works in excess of the duration, different time slot or territorial coverage than mentioned in the notice

The said factors indicate that payments have to made after the broadcast of the works and thus, the respondents' arguments that,since all payments are to be made in advance and therefore NAR model is not in line with the rules, has no basis. The aforesaid provision takes into account that in view of an advance notice requirement comes with operational difficulties. Thus, on the basis of Rule 31(8), legislature ensures that the owners of sound recordings are paid on the basis of actual broadcast of the work and not only as per the notice under Rule 29.

82. **Role of Rule 29 in determining the Criteria of Payment of Royalty**

The third proviso of Rule 29 clearly provides that a broadcasting organization shall give a notice under Rule 29 only after the royalty to be paid is determined by the Board under rule 31. Thus, the factors to be determined are provided in Rule 31(7) and Rule 29 only provides for the procedure for notice. Section 31D(4) provides that "*the Appellate Board may require the broadcasting organisation to pay an advance to the owners of rights*." the requirement of an advance is not mandatory, but rather directory and it nowhere provides that the entire amount is to be paid in advance. Thus, a part payment may be made as advance to the music companies, adjustable basis the NAR.Thus, on a composite reading of Section 31D(4), Rule 31(7) and Rule 29, the legislative intent is clear. While giving a notice under Rule 29, a broadcaster may be required to pay an adjustable advance to the owner of sound recordings, which may be a lumpsum, however, the full payment is to be made after the broadcast of works on the rates fixed by the IPAB. This shall ensure that payments are made to broadcasters not on the basis of the notice under Rule 29, but rather on the actual broadcast and shall also permit the broadcasters to retain business and programming flexibility.

83. It is argued on behalf of broadcasters that the comparison with AIR is not relevant since AIR is at a different standing as the operation of the AIR FM Radio funded by the Government but is also supported by Government advertisement expenditure. AIR is not required to pay the various government licenses and fees which the Private FM Radio Broadcasters are burdened with and form a significant part of the cost of radio business.The CRB Order in *Para 30.14* has rejected that AIR is a good comparator for the following reasons:

1. AIR is having big network of broadcasting set up throughout India and thus huge listenership resulting into major share of advertisement income out of the whole industry;
2. Its broadcasts are not subject to restrictions imposed upon the private FM broadcasters resulting into more advertisement revenue to it;
3. Agreement with AIR was entered into when the present scale expansion of FM channels had not taken place;
4. With far bigger number of channels tied up with the musicprovider with licences, whether voluntary or compulsory, for the same product, it increases to the revenue of the music provider in that multiple as the number of agreements are with no added burden upon the music provider since the product to be provided is unlike commodities where that many fold of products are needed to meet the supply. It is PPL's own case that AIR has not been making payments of royalty or providing logs of use of sound recordings.

84. Radio broadcasters are mandated by law to maintain accounts and logs of use of the work which are regularly provided to sound recording owners. Section 31D (7) specifically provides that the broadcasting organization shall maintain such records and books of account, and render to the owners of rights such reports and accounts; and allow the

owner of rights or his duly authorized agent or representative to inspect all records and books of account relating to such broadcast. Further, Rule 30 also provides for maintenance of records similarly. Radio is a commercial venture and thus it would be to the detriment of the radio broadcasters to reduce advertisement revenue due to royalty payments. Radio broadcasters always attempt to increase their advertisement revenue and seek to be a profitable business.

No Payment of Royalty to IPRS in view of Judicial History between the Parties and Current Legal Position as per the Broadcasters

85. It is case of the petitioner/ Applicant namely Music Broadcast that IPRS is not entitled to Royalty payment. It is argued that the Applicant was approached by IPRS and was asked to enter into a Voluntary License with IPRS which the Applicant did, under a mistaken belief of law, that a separate license has to be obtained for Underlying works from IPRS when broadcasting Sound Recordings over FM Radio. It is stated that the agreement, continued till 2006 when IPRS began asking for exorbitant rates while the Applicant was expanding into more cities under the Phase II Policy. Thereafter, litigation between the parties started which finally culminated into a Suit titled Music Broadcast Pvt. Ltd. v. The Indian Performing Rights Society Suit No. 2401 of 2006 before the Hon'ble Bombay High Court which was filed by the Applicant for a declaration that no royalty is payable to IPRS and for return of monies paid to IPRS. The Hon'ble Bombay High Court, in ***Music Broadcast Pvt. Ltd. v. The Indian Performing Rights Society Suit No. 2401 of 2006*** held that two specific licenses are not required to be obtained by the Applicant herein and therefore no separate royalty is payable to IPRS while broadcasting Sound Recordings over FM Radio. Thereafter, the said Judgment was appealed in an Appeal titled ***Indian Performing Rights Society v. Music Broadcast Pvt. Ltd. Appeal No. 615 of 2011 in Suit No. 2401 of 2006.*** It is admitted that the operation of the judgement was stayed. Counsel has referred the case of ***Lekh Raj (Dead) Through Legal Representatives &Ors. v. Ranjit Singh &Ors. [(2018) 12 SCC 750]***, it was held by the Hon'ble Supreme Court that once a final decree which crystalizes the rights of the parties, then, a subsequent change in law would not take away such rights which attained finality due to the lis coming to an end. Thus, it is submitted that in view of the aforesaid decree in favour of the Applicant, Music Broadcast Limited against IPRS, IPRS has no claim of a separate royalty against the Applicant. It is the claim of IPRS that owing to the amendments brought in 2012 in the Copyright Act, 1957, a separate license is now liable to be obtained. However, since 2012 till date, IPRS has not moved before the Hon'ble Bombay High Court to seek setting aside of the said decree against it.

86. Apart from the aforesaid decree, the Hon'ble High Court of Delhi in ***Indian Performing Right Society Ltd. v. AdityaPandey&Ors. CS (OS) 1185/2006 2011(47)PTC 392***dated 28th July 2011 upheld in ***Indian Performing Right Society Ltd. v. AdityaPandey&Ors., 2012(50)PTC460***has answered the question pertaining to the need

for obtaining a separate licence and payment of royalty for underlying works. The Hon'ble Court held that underlining works do not require obtaining a separate licence or payment of royalty to IPRS. The same has been confirmed by the Supreme Court as well in ***International Confederation of Societies of Authors and Composers v. AdityaPandey&Ors. 2016(68)PTC472(SC)***. A copy of the said Orders of Ld Single Judge, Hon'ble Division Bench and the Hon'ble Supreme Court are placed on record. Thereafter, the suit being CS(OS) No. 1185/2006 ***The Indian Performing Right Society Ltd. Vs. AdityaPandey and Ors.*** has also been dismissed vide order dated 5th April, 2018 since the Plaintiff did not lead any evidence.. It is submitted that a suit pending before the Hon'ble High Court of Delhi being CS (OS) 666/2006 The Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd. also deals with a similar question of law however, the judgment in the said matter is currently reserved.

87. The Respondents have also argued that even under pre-amendment regime, broadcasters have paid and have continued to pay a separate and additional royalty for utilization of underlying works when a sound recording is broadcast through radio under Voluntary Agreements to SCIPL. It is replied on behalf of the applicants that prior to 2012 when the Decree in favour of MBL was passed, SCIL had insisted and forced the Applicant to pay separately for underlying works. However, in the agreement between SCIL and MBL from 2006, a specific clause was inserted which read thus –

> "*15.By entering into this MOU the* ***<u>MBPL does not acknowledge that Performance License Fee is payable for the broadcast of sound recording on FM Radio Station</u>****, since the issue is presently being agitated before various Courts. The parties agree that they shall abide by any such Court Order that settles the issue regarding the applicability of Performance License Fee on radio broadcast of sound recordings.*" (emphasis supplied)

Therefore, it is clear that the payments being made supposedly for Underlying Works were being made under protest by the Applicant and was subject to decision of Courts.

88. Post the decree awarded in *Music Broadcast Pvt. Ltd. v. The Indian Performing Rights Society* Suit No. 2401 of 2006, and during the pendency of *ICSAC v. AdityaPandey and Ors.* before the Hon'ble Supreme Court instead of paying royalty, only a bank guarantee was furnished by the Applicant for the Underlying works. The clause in the agreement between MBL and SCIL in 2013 was modified to read -

> "*4.2 The Licensor grants to the Licensee a non-exclusive and non-transferable Performance License for the Designated Radio Stations throughout the Term and Territory in consideration of the Performance License Fees. The* ***<u>Licensee disputes the legality and legitimacy of the grant of such license and payment of such Performance License Fees</u>****. It is hereby also agreed by and between the parties that the issue concerning chargeability of Performance License Fee for radio broadcast is disputed by the Licensee and the identical issue is currently pending adjudication before the Hon'ble Supreme Court of India.*
>
> *4.2A In view of this dispute,* ***<u>it has been further agreed that the Licensee shall, at the moment, not make any payment towards the Performance License Fees</u>****, and shall rather furnish a bank guarantee of an amount of* INR *60,00,000 (Rupees*

Sixty lacs only) in favour of the Licensor, which the Licensor shall be entitled to invoke in the event that the Hon'ble Supreme Court holds that Performance License Fees are payable by radio broadcasters. The said Bank Guarantee, having a validity of one year, shall be provided by the Licensee immediately upon the execution of this Agreement, provided however that the Bank Guarantee amount shall be enhanced after 6 (six) months of the Effective Date of this Agreement in accordance with the Performance License Fees which would have accrued at the end of the said period of six months based on the playout of the Licensee during the said period. The Licensee hereby unconditionally undertakes to renew the said Bank Guarantees without protest or demur for further periods of one year at a time until the Hon'ble Supreme Court decides the issue of payment of Performance License Fees and the obligation of the Licensee contained herein shall survive the termination or expiration of this Agreement. In the event that the Licensee fails to provide the Bank Guarantees as aforesaid, the Licensor, shall be entitled to take appropriate legal recourse to recover the accrued unpaid Performance License Fees on or after the date of the afore-said Performance License Fee becoming due and payable to the Licensor. In the event that the Bank Guarantees become enforceable during the term of this arrangement and the unpaid Performance License Fee is below the bank guarantee amount, the Licensee shall be entitled to adjust the balance amount of the Bank Guarantees against the Performance License Fees, if any, payable to Licensor in the future."(emphasis supplied)

89. Finally, after the Order in *ICSAC v. AdityaPandey and Ors.* 2016(68)PTC472(SC), the clause in the agreement between MBL and SCIL entered into in 2020 reads thus –

"*The Licensor confirms that it has and continues to own and/or control all the rights in the Underlying literary works and the musical works embodied in the Licensor Sound Recordings being the owner of such works, however, no Performance License Fee is being charged at present, given the difference of understanding between the parties on the issue whether such a separate license fee for communication to public by way of radio broadcast of the underlying literary and musical works in addition to Copyright License Fee is at all payable in law or not.*"(emphasis supplied)

90. It is submitted that all the Respondents have deliberately concealed the fact that when any non-advertising revenue is generated using a sound recording, a separate license fee/royalty is paid to the owners of sound recordings for such use. For instance, in the event a Radio broadcaster conducts an event such as Super Singer (similar format as Indian Idol) where only the literary and musical works or where sound recording of a music company is to be utilized, a separate requisite licenses are obtained and a separate royalty is paid for such an event. Thus, Music Companies are already paid from non-advertising revenue where it pertains to use of sound recordings.

91. In response to the Voluntary License and Prevailing Standard argument, it is stated that in fact the revenue share model which takes into account all the factors provided in Rule 31(7) as follows:

1. *time slot in which the broadcast takes place and different rates for different time slot including repeat broadcast* – The Applicant is recommending a prime time rate of 2% of net advertisement throughout the day but the same may be reduced for non-prime time broadcast.

2. *different rates for different class of works* – Only one class of work is relevant for the present proceeding, i.e. broadcast of Sound Recordings.

3. *different rates for different nature of use of work* – Only one use of the work is relevant for the present proceeding, i.e. FM Radio Broadcast.

4. *the prevailing standards of royalties with regard to such works* – The prevailing standard of royalties as per the CB Order and voluntary licenses entered into by the Applicant – both of which broadly comes to 2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station to be distributed to the content owners on a pro rata basis.

5. *the terms and conditions included in the Grant of Permission Agreement (GOPA) between Ministry of Information and Broadcasting and the broadcaster for Operating Frequency Modulation (FM) Radio Broadcasting Service* –Except for the fee under GOPA, all fixed fee paid by the Applicant ranges from 0.5%-3.5% of the Applicant's Net Revenue and the cost for broadcast of Sound Recordings ought to be lesser than the aforesaid costs and fee and therefore the recommendation of the rate of royalty to be set at 2% of net advertisement earnings is fair and just. Additionally, the content allowed to be broadcasted over FM Radio continues to be highly regulated and therefore,in order to protect the 'free-to-air' Radio Industry, 2 % NAR is a reasonable rate.

Our Finding on Criteria for Assessment of Royalty

92. We have gone through the material on record and given due consideration to the submissions advanced by the counsel for the parties. There are innumerable reasons that are counted by the broadcasters as applicants to persuade this tribunal to either to retain the previous rates fixed by the Copyright Board in its order of decade ago which is 2 % of NAR or fix lesser rates than the same in view of the projected losses sought to shown by us by informing us about other burden and issues faced by the Broadcaster. As we shall see below that both the broadcasters and the Music companies proceed to place on record their expert reports which show the diametrically opposite stand though both the parties challenge their respective reports of one and another on several grounds. As this Tribunal is deciding the rates of royalty in a consultative decision-making process and not as a civil court, wherein this Tribunal has to appreciate and assess the credibility of each and every expert report like Civil Court, This tribunal has its own constraints in terms of time bound nature of proceedings which is that the decision to be given within 2 months and non-consideration of evidence as per the rules of evidence and thereby making it impermissible to conduct full fledged trial. The counsel while addressing and raising these objections have to be mindful of the constraints of the tribunal like the present one working in a consultative decision making mechanism that is time bound in character as against the civil court wherein all the objections on the admissibility, relevance and credibility of the evidence can be determined with the certainty.

93. In view of what has been observed in the preceding paragraphs, it is clear that though the objections of the parties on the credibility and relevance of the reports are left open, it is suffice to say that the fact that the broadcasters are canvassing that there is a steep decline in their business and the situation as it prevailed about the "nascent stage of the business" which weighed heavily in the mind of the Copyright Board in fixing the royalty of 2 % of the NAR at the relevant time a decade ago continues to persists cannot be accepted on the ipse dixit of the Applicants. The Radio business has evolved systematically over a period of time and this needs no second thought. The listeners access and interest to the radio has also gained and increased tremendously and manifold considering the choice the listener has got amongst various radio channels to listen, competition with which the songs are played, level of interests in the kinds of the songs like English, Hindi, Film or non film songs, the time period of access to radio including in Cars, during leisure time for the programs for ladies in the afternoon, on holidays, in the morning or during the night time for the listeners, these are based on the kinds of the programs, its varieties offered by Radio station depending upon age group, social needs, kind of the listener, its taste and other variety of factors. All these factors which contribute to attracting the listener and gaining the listenership in close competition to each other and thereby consumer gaining such wide options by switching channels in minutes were neither available at times when AIR was the sole entity providing radio services at the time of passing of Copyright Board order nor these practical realities can be ignored of present times. Therefore, in practical terms as well, the listenership in the radio fluctuates as per the time slots and during office hours, free times of ladies, in the night times for bachelors and other keen listeners varies from time to time. Therefore, during these fast pace environment of high level listenership, coupled with fluctuating listenership during the time of the day and adding manifold revenues in terms of the advertisement and reach of the broadcaster cannot allow the same criteria to be adopted for payment of royalty which was considered relevant as for "initial push" for the Radio stations to flourish as a matter of concession.

94. Perhaps this is the reason that the Central government while realizing the fluctuating nature of the listenership in the radio which is based on time slots, have come up the criteria to assess the payment of the royalty on time slots basis. This is also relevant for the discretion which has been given to the IPAB to revise the rates of the royalty based on demonstrable figures if the evidence supports the revision which is that the time slots showed much higher level of the revenues and thereby commensurate payment on hourly basis needs to be revised. This can be evinced from reading of Rule 31 (7) & Rule 31 (9) of Copyright Rules 2013. Accordingly, once the time slots have been recognized as one of the criteria both for fixation and revision of the royalty based on which the discretion of the IPAB would revolve around, it cannot be said that the fixed rate of 2 % or lesser based on advertisement revenue is justifiable. Therefore, this tribunal is of the view that once the criteria is laid down by the Rules of 2013 which were not present at the time of passing of Copyright Board order of 2010, the situation has been altered significantly both in terms of facts as noted in the preceding paragraph as well as in terms of law wherein

the criteria based on time slots have been introduced for fixing the royalty based on ground realities and logical reasons as stated above. Therefore, the said criteria which regulates the discretion of the tribunal cannot be ignored and this tribunal if offered to opt between the NAR and Needle Hour Basis, has to take into consideration Needle Hour Basis as a criteria for assessment of Royalty as the same is based on time slot basis and this tribunal being a creature of statue has to decide the case within the bounds of the statute and rules framed by the delegate as guidelines and cannot travel beyond the same.

95 ***Plea that Royalty can be fixed only for the period of 1 year***

Rule 31(9) provides as under:

> *"The Board may revise the rates of royalties periodically, at least once in a year keeping in view the provisions of these rules."*

The purport of Rule 31 (9) only suggests that the tribunal has got the discretion to revise the rate of royalties periodically keeping the factors for assessment in mind and variations in the same. The said discretion to revise the rates of the Tribunal cannot be read as a mandatory requirement. The aforesaid rule only provides for the room for discretion to revise the royalty in the event there is any significant change in the factors envisaged in the rules, however the said Rule nowhere bars the Tribunal from fixing a royalty for a longer duration. In the event of the interpretation of one of the Respondents is accepted, then the parties shall be required to litigate the same issue continuously each year, which could not have been the intent of the legislature.

96. In any case, if there is any evidence is available warranting the revision of the royalty rates after the period of one year allowing this tribunal to exercise a discretion based on the times slots or other variation, the applicant do so and call upon IPAB to revise the same. However, its upon IPAB to exercise or refusing to exercise a discretion in as much as the consultative process should not be converted into a frequent litigation process unnecessarily without any supporting evidence warranting a real variation or revision in the royalty rates.

97. **Capacity To Pay Higher Royalty Depends On Other Financial Burdens**

The capacity to pay of a radio business does not exclusively depend upon the revenues earned but also the expenses of running a radio business.

The procedure of setting up of a Radio Station, other formalities, costs, no. of Employees, etc.

a. All Private FM Radio Broadcasters must execute a Grant of Permission Agreement ("**GOPA"**) with the Ministry of Information and Broadcasting **(MIB)** for each of its Radio stations in India. GOPA permits Radio Broadcasters to run, maintain and operate FM Radio Stations for a period of 15 years. Radio Broadcasters are required to pay an Annual License Fee which is calculated at 4% of the Gross Revenue or 2.5% of Non-refundable One Time

Entry Fee ("NOTEF") whichever is higher. At the operating level, Radio Broadcasters deal with two more arms of MIB:

b. **PrasarBharati,**is a statutory autonomous body established under the PrasarBharati Act, 1990. A Radio Broadcaster is mandatorily required to enter into an Agreement with PrasarBharti for the use of Licensed Infrastructure. The Radio Broadcaster is liable to pay advance License Fee for the use of the Licensed Infrastructure on an annual basis. The Licensed Infrastructure covers Open Space, Tower Aperture, and common facilities at the Common Transmission Infrastructure ("**CTI**") site of PrasarBharti. The essence of the said Agreement is to allow the use of the Licensed Infrastructure in consideration of Rental/License Fee.

c. **Broadcast Engineering Consultant India Ltd (BECIL),**a Public Sector Enterprise of Government of India. A Radio Broadcaster is also required to pay monitoring charges to BECIL for monitoring the Radio Transmission under an Agreement.

98. It is alleged that the FM radio industry has been adversely affected due to the influx of digital platforms leading to a decline in the growth rate of radio industry.With growing access to cheap mobile data, an increased internet coverage and high sale of smartphones in the country, advertisers, both Governmental and Private parties, have chosen to shift their focus to online advertising. Therefore, the advertisement revenue which is the primary source of income of the radio industry has taken a severe hit. It is alleged that the mandatory average annual costs incurred for fixed charges such as License Fee under the Grant of Permission Agreement (GOPA), PrasarBharti/BECIL Tower Rental, Operation and Maintenance of Common Transmission Infrastructure; have increased manifold. This is more so since the expansion under Phase III of GOPA to smaller towns and cities is a high cost, low revenue exercise. Advertisers that advertise on Radio may engage services for one Radio Station or multiple Radio Stations– National, Regional and Local. All three kinds of Advertisers are willing to pay a substantially lesser rate for advertisement for a small city as compared to a metro owing to the paying capacity of consumers. A fixed NPH system shall burden the Radio Station in smaller cities which earn much lesser advertisement revenue as the same does not take into account the economic cycles of the business. Therefore, an NPH system shall make running Radio Stations in smaller cities unviable.

Our view on Capacity

99. We have gone through the submissions of the list of "other burdens" lie on the radio broadcasters who are other than All India Radio. However, we are of the video that the mere fact that the petitioners/ applicants have to take other licenses or permissions which also causes expense or revenue sharing does not imply that the copyright license royalty shall be reduced or discounted out for any reason. It's the wish of the broadcaster to

venture into radio broadcasting business and thus has to serve as many interests and participants, the said system has got as per the regulations. Its no argument to say that the fact that the private radio channels are loaded with the responsibilities and therefore, they deserve differential treatment other than the statutorily prescribed criteria of time slots basis. So far as the regional players having limited listenershipin small cities are concerned, we are permitting them to enter into the voluntary license agreement which can be entered into mutually between the said station and music company at a lesser rate than the rate we are fixing depending upon the satisfaction of the respective companies about the limited nature of the listenership. Any of the applicants facing such issues can also avail the said benefit subject to furnishing such limited listenership details as per the mutual arrangement to be discussed and entered into between the parties. However, to connect the issue of the regional players with advertisement revenues and thereby paying capacity is like convoluting the issue of the payment of the royalty unnecessary. It is to be noted that the advertisement revenue was considered as benchmark at the time when the other factors and guidelines for assessment of royalty were not in place. The popularity and the extent of the radio station is dependent upon the quantum, nature and the kind of the listenership it enjoys alongside the time period, the said criteria as incorporated under the Rules of 2013 cannot be given go by just because the earning capacity in the regional markets are distinct from the metropolitan markets. That will obviously be case with every business module of public communication including journalism or news channel. But that does not take away the fact the utilization and public communication of the work will be delivered to the large segment of the public given the large number of the listenership of the station. Therefore, as per our view, the time slot basis or the alternative needle hour basis is more rational basis than the advertisement revenue as a criteria for the payment of the royalty as it makes certain vital elements like level of listenership and time period obscure and reduce their role play. Where as the needle hour basis takes in to consideration the basis which is listenership on which the popularity, goodwill and gains in terms of financials or otherwise of the radio stations are dependent upon. We are also of the view that the capacity of the radio station thus is not affected in true sense for the manifold reasons recorded in this paragraph coupled with the contradictory nature of the reports which are emerging that show that the radio stations are already paying to non PPL members at an inflated rate far more than the needle hour basis which are proceeding to fix in the present case.

Analysis of the Reports and Variation of the Royalties Rates PaidBy Broadcasters To PPL's Member Music Companies vis a vis Non Members

100. The respondents during hearing in order to propose rates rely on these three reports commissioned by the respondents. The same are also laid to dispute by the applicants. The said reports are:

i) Haribhakti Report

ii) Dunn and Bradstreet Report

iii) Praveen Chakraborty Report.
iv)

101. No doubt, Report dated 9.9.2020 of Haribhakti indicates about the payments made to PPL and non-PPL content owners. It appears from the said reports that the broadcasters have been paying higher rate to non-PPL than PPL members as the non-PPL content owners were not bound by the 2010 CB Order, and it agreed upon higher rates as a willing seller and a willing buyer. The Report relies on documents of broadcasters themselveswhich are published and available publicly.

102. Documents and figures and tables produced before us clearly show that there is a difference in respect of royalties paid by ENIL to PPL members as compared to Non-PPL entities as highlighted by the aforesaid Report as stated on page 69 & 70 are reproduced below:

Annexure 1: The Table below shows the analysis of the Royalty paid by Entertainment Network India Limited (ENIL) to PPL and Non- PPL Music Companies

Particulars		19-20	18-19	17-18	16-17	15-16	14-15	13-14	12-13	11-12
Advertising Revenue (INR In Lacs)	A	35,750	41,245	36,619	54,085	48,478	42,716	37,430	32,583	29,466
% Utilisation of PPL Members' Content	B	37.95%	32.67%	30.92%	40.08%	44.17%	52.25%	53.42%	57.17%	58.50%
% Utilisation of Content of Non PPL music companies	C	62.05%	67.33%	69.08%	59.92%	55.83%	47.75%	46.58%	42.83%	41.50%
Royalty paid to PPL (INR in Lacs)	D	259	288	270	413	403	412	370	358	330
Royalty paid to Non PPL Music Companies (INR in Lacs)	E	2222	1933	1673	1537	997	824	780	703	772
PPL Royalty % to Ad Revenue	D/A*B %	2%	2%	2%	2%	2%	2%	2%	2%	2%
Non PPL Royalty % to Ad Revenue	E/A*C %	10%	7%	7%	5%	4%	4%	4%	5%	6%

Annexure 3: The Table below shows Needle Hour Rate (PNH) incurred by Entertainment Network India Ltd. (ENIL) for utilization of music of PPL Members and Non PPL Music Companies

Particulars (ENIL)		19-20	18-19	17-18	16-17	15-16	14-15	13-14	12-13	11-12
Total Hours (Hours in Lacs)		4.73	3.76	3.1	2.64	1.87	1.92	1.98	2.02	2.04
PPL Hours (Hours in Lacs)	A	1.79	1.25	0.96	1.05	0.82	0.99	1.04	1.14	1.18
Non PPL Hours (Hours in Lacs)	B	2.94	2.51	2.14	1.59	1.05	0.93	0.94	0.88	0.86
Total Royalty Incurred (INR in Lacs)		2481	2221	1943	1950	1400	1236	1150	1061	1102
Royalty paid to PPL (INR in Lacs)	P	259	288	270	413	403	412	370	358	330
Royalty paid to Non PPL Music companies (INR in Lacs)	Q	2222	1933	1673	1537	997	824	780	703	772
PNH rate paid to PPL (INR)	P / A	145	231	282	393	492	416	356	314	280
PNH rate paid to Non PPL Music Companies (INR)	Q / B	756	770	782	967	950	886	830	799	898

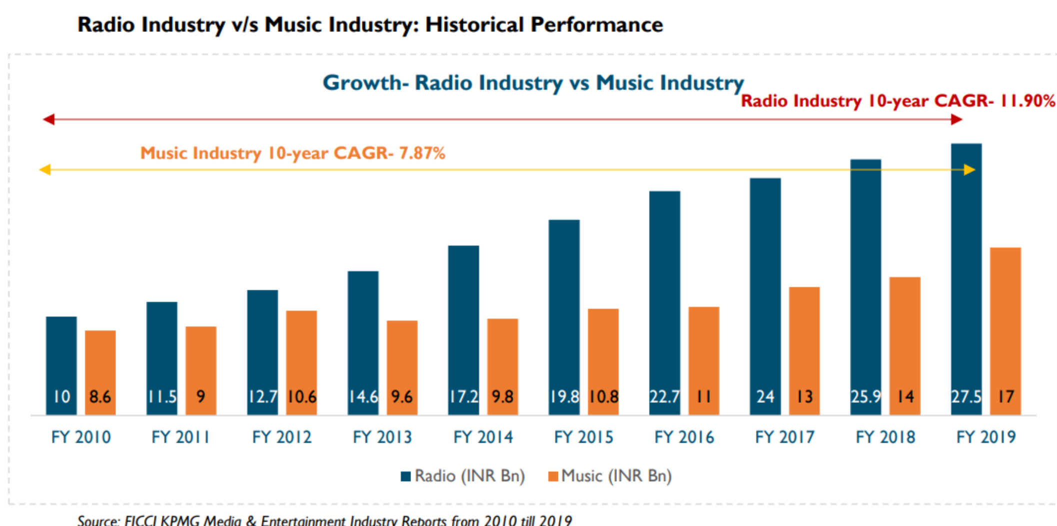
Note: Royalty received by PPL and paid to non PPL Music companies by ENIL is converted into "Per Needle Hour rate" on the basis of the Hours of utilization and actual royalty incurred for the year.

It is not denied on behalf of the broadcasters that they have not paid a higher of the content. It is alleged that there is a on-going litigation in this regard.

103. Dun & Bradstreet Information Services India Private Limited also submitted a Report titled '*Financial Performance Analysis of Major Indian Radio Broadcasters*' to Sony inOctober 2020. The said Report is based on the FICCI-KPMG report which was published financials of the broadcasters themselves. The broadcasters have disputed the correctness of this report as it is not on authentic figures. However, it has come on record thatthese figures are published by the broadcasters themselves in their financial statements as per contents owners. Following extracts of the Report are relied upon by the respondents, which are reproduced:

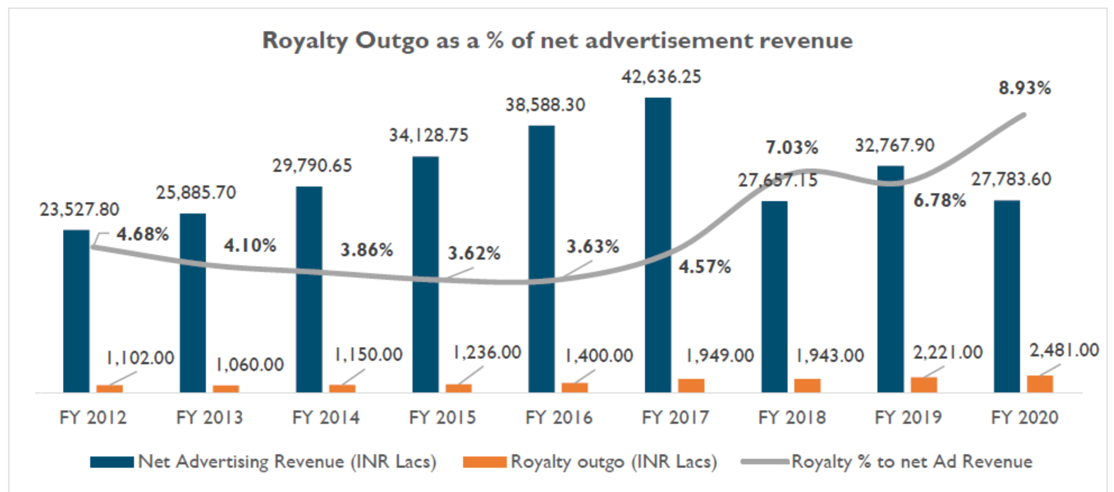
a. An overview of Media and Entertainment Industry in India and reflects startling growth from 2010 to 2020, wherein it grew to twice the size of the music industry.

Radio Industry v/s Music Industry: Historical Performance

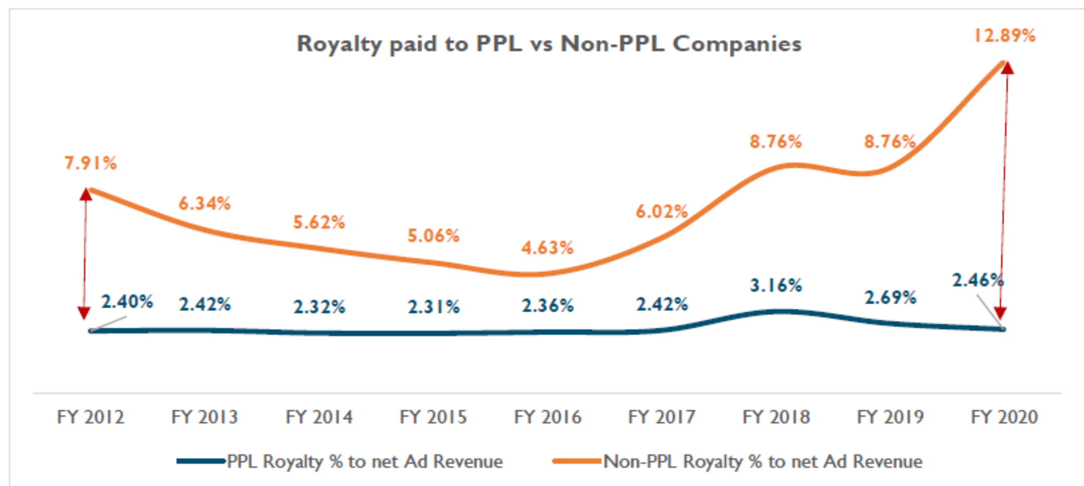


Source: FICCI KPMG Media & Entertainment Industry Reports from 2010 till 2019

b. The below reproduced chart at page 115 of the Convenience Compilation shows the Net Advertising Revenues (NAR), royalty outgo and royalty % to NARof ENIL from FY 2012 to FY 2020 in INR Lacs. It indicates that in FY 2020, ENIL paid 8.93% of its NAR as royalty.



c. Below is the bifurcation of difference in royalty paid by ENIL to Phonographic Performance Limited (PPL) and non-PPL companies (at page 115 of Convenience Compilation). The difference is five-fold in FY 2020 where 12.89% is paid to Non-PPL entities while close to 2% is paid to PPL.



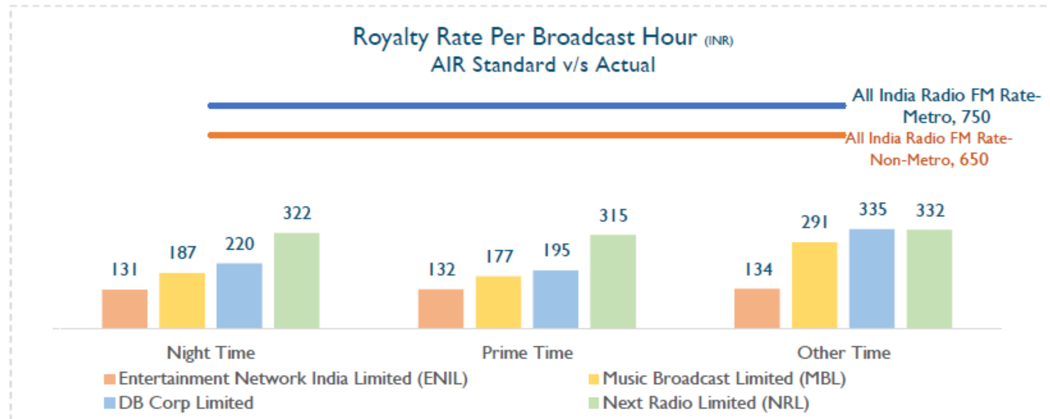
Source- Information sourced from PPL

d. Apart from financial analysis and royalty outgo of Entertainment Network (India) Limited (ENIL), the Report also plots out growth trajectories of Music Broadcast Limited (MBL), DB Corp Limited, Next Radio Limited (NRL), Kal Radio Limited (KRL), South Asia FM Limited, Digital Radio (Mumbai) Broadcasting Limited, Digital Radio (Delhi) BroadcastingLimited, Digital Radio (Kolkata) Broadcasting Limited and Udaya FM Private Limited.

e. The Report also extracts statements from officials of the radio broadcasters from E&Y & KPMG FICCI Reports, 2019 and 2020 and other documents already in public domain which reflect the radio industry's continued growth contrary to their statements made in the Application by the applicants.

f. The standard AIR approved Rate stands at INR 375/- per Broadcast Hour for Primary Channels, INR 500/- per VividhBharati& Commercial Broadcast, INR 750/- per Metro FM and INR 650/- per Non- Metro FM Channels. However, as per the royalty rate variance analysis shown in the Report, Sony Music Royalty Rate per Hour earnings from top 4 companies stands very low on different Time Slots as detailed in the graph as reproduced below:

Royalty Rate Variance Analysis



g. Royalty Rate per Hour received from Entertainment Network India Limited (ENIL) is ~5 to 6 times lower than the AIR set Royalty Rates.

h. Moreover, there is also a disparity between Advertisement Revenue earned by the Radio Broadcaster vis-a-viz Royalty Rate paid to the Music labels.

104. **PRAVEEN CHAKRAVARTY REPORT**:

The said report announced in favour of a free market is due to the majority of radio market governed by a voluntary license mechanism. The report analyses both the legislative intent and the CRB Order. It was discussed and concluded that the various companies left PPL because of the CRB order completely valid to be drawn in favour of the contents owners.

105. It has come on record that in an interview of the CEO of ENIL, Prashant Pandey himself stated that Compounded Annual Growth Rate (CAGR) of Radio is 11% which is the rate mentioned in the Haribhakti Report and by KPMG in its report.

106. ***Challenge to Dun & Bradstreet Report Laid by Applicants***

i. Fails to provide any background material to disclose the basis of figures noted in the analysis;

ii. The figures mentioned in the report pertaining to the Applicant are incorrect and baseless as:

1. No data of music companies, particularly Sony Music itself,has been analysed;

2. Data concerning PPL v Non-PPL playout has been picked up from the Haribhakti Report, without confirming the authenticity thereof – Haribhakti data is also flawed for the reasons mentioned above. Further, there are differences even between the Haribhakti Report and the Dun & Bradstreet Report.

3. No consideration of present value or future potential of Sony's music.

4. Incorrect statement on growth of music and radio industries, respectively.

5. No reason for selectively relying upon certain data for EBITDA performance as a concept and of why certain companies' data has been ignored.

6. No basis for Sony to claim that they have 20% market share.

7. Baseless reliance on the advertisement rates of the radio stations, also because the actual rate at which the ad spots are sold are discounted up to 90%.

8. Inherent fallacy that the rates are comparable with AIR

iii. The fallacy of the net advertisement figures in the report are starker when the same are compared with the NARfigures of the Applicant as provided in the HaribhaktiReport. It is submitted that the percentage of NAR of the Applicant between FY 2012-20 as mentioned in the Dun & Bradstreet report is inconsistent with the percentage of the NARof the Applicant between FY 2012-20 as mentioned in the HaribhaktiReport

Dun & Bradstreet Report (NAR-in Lacs) % of NAR	**FY 11-12**	**FY 12-13**	**FY 13-14**	**FY 14-15**	**FY 15-16**	**FY 16-17**	**FY 17-18**	**FY 18-19**	**FY 19-20**
	4405.93	4837.54	6305.13	7651.53	8551.25	10144.65	10771.62	12307.26	10990.15
	15.10%	13.26%	8.73%	7.73%	7.10%	7.03%	7.80%	6.21%	5.89%
Haribhakti Report (NAR-in Lacs) % of NAR (after deducting 40% of performance royalty reserve)	**FY 11-12**	**FY 12-13**	**FY 13-14**	**FY 14-15**	**FY 15-16**	**FY 16-17**	**FY 17-18**	**FY 18-19**	**FY 19-20**
	5502	6658	7926	9548	10374	12699	13571	15414	13789
	7.6%	6.26%	4.7%	4.23%	3.81%	3.76%	4.08%	3.32%	3.15%

iv. Considering the above comparison, even if the performance royalty reserve **is not** deducted from the revenues of DB Corp as mentioned in the Haribhakti Report,

even then, the NAR outgo percentage is inconsistent between the Haribhakti Report.

Dun & Bradstreet Report (NAR-in Lacs) % of NAR	FY 11-12	FY 12-13	FY 13-14	FY 14-15	FY 15-16	FY 16-17	FY 17-18	FY 18-19	FY 19-20
	4405.93	4837.54	6305.13	7651.53	8551.25	10144.65	10771.62	12307.26	10990.15
	15.10%	13.26%	8.73%	7.73%	7.10%	7.03%	7.80%	6.21%	5.89%
Haribhakti Report (NAR-in Lacs) % of NAR (before deducting 40% of performance royalty reserve)	**FY 11-12**	**FY 12-13**	**FY 13-14**	**FY 14-15**	**FY 15-16**	**FY 16-17**	**FY 17-18**	**FY 18-19**	**FY 19-20**
	5502	6658	7926	9548	10374	12699	13571	15414	13789
	12%	9.62%	4.7%	6.95%	5.6%	5.6%	6.19%	4.95%	4.69%

107. ***Challenge toPraveen Chakraborty Report***

a. The report indicates that PPL v. Non- PPL Music has reduced from 70-30% in 2010 to 35-65% 2020. The response of the applicants is that the reduction in PPL playouts is completely erroneous.

i. For ENIL, this reduction from PPL playout has been from 75% in 2012 to 62% in 2020

ii. For DB Corp Ltd.PPLplayout has reduced from 53% in 2012 to 45% in 2020

The report makes such categorical statements without even considering the reasons therefor, including the exit of companies from membership of PPL, more new content being acquired by non-PPL companies, etc. Absence of such evaluation and impact thereof on the playout of music on radio stations, makes the report suspect and biased.

b. In reply to part of report the non-Ad revenues of radio operators has increased from 7% in 2018 to 20% in 2020,the response of the applicant is that the aforesaid figures are baseless. Radio industry is heavily dependent on ad revenue. The Non- FCT (free commercial trade) events which are attributable to music are included in the NAR calculated for the purpose of license fee payment- of ENIL Rejoinder.Furthermore, all barter cash deals are included in the NAR calculation. As per Clause 3.2 of the Grant of Permission Agreement**,** radio operators are mandated to include barter revenue in its revenue calculation.

c. In reply to part of report that radio companies engage in revenue misclassification- Reliance on Music Broadcast Pvt. Ltd. v. Axis Bank&Ors., the response of the applicant is that many radio companies are public companies, whose records are available for public scrutiny. Further, radio companies engage internationally accepted accounting practices for calculating revenue and NAR.Further, radio broadcasters engage in statutory audits and internal audits in a quarterly, semi-annually and annually, which audits are conducted by leading accounting firms. Public companies are under the scrutiny of statutory body such as SEBI etc. As per Rule 30 of Copyright Rules, 2013, radio broadcasters are mandated to maintain records of total number of works broadcast etc. which further counters the argument advanced by the Respondent music labels as these records show the correct details of music usage and the consequent pro-rata payment which will be required to be made.

d. The proposed Rates- 5% of gross revenue for A and A+ category cities and flat fee of INR 1200 per needle hour of PPL music played for B, C, & D circles, as suggested in the report, the response of the applicants is that the preliminary objection to the Praveen Chakraborty Report, which is the same for the other reports placed on record by the Respondents, is the failure to consider or study the cost & revenues of music companies or impact thereon by radio broadcasting. Instead, the sole basis and reliance for the conclusions drawn by all such reports is the net advertisement revenue earned by the radio stations. Though the music labels have relied on the reasoning of Praveen Chakraborty Report, they have sought a much higher rate of license fee, even at a rate of 7.5% of gross revenue as in case of T Series (Super Cassettes) or hybrid rate of 7% of gross revenue or needle per hour rate of INR 10,000/-, whichever is higher for A+ category cities as in case of Saregama India Ltd.Music labels as also Praveen Chakraborty report fail to justify why the rate should be 5% of gross revenue or 7% of gross revenue or at a flat rate of INR 1200 NPH in B, C, D as opposed to the 2% rate which was fixed by Copyright Board Order, 2010, which has withstood judicial scrutiny. No justification has been provided in support of the NPH rate sought to be fixed.While Praveen Chakraborty records ENIL's total royalty payments at 3.6% of total revenues, and considers this as benchmark, it has still proposed a rate of 5% of gross revenue **(GR)**without any cogent reason. Further,T Series has relied on the 5% of GR rate of Praveen Chakraborty as the current market rate and further made an assumption on the incorrect ratio of PPL and Non PPL play out (30%: 70%) and payments to PPL and Non PPL companies to arrive at 7.5% of GR.Additionally, Praveen Chakraborty's suggested rate of INR 1200 flat rate is based on PPL's published rates of INR 2400 per needle hour in 2001. The old rates proposed by PPL which were considered by the interim order of CRB dated 19.11.2002 has been set aside on appeal by the Bombay High Court and subsequently by Supreme Court on appeal in *ENIL v. Super Cassettes India Ltd.*, (2008) 13 SCC 30.

<u>Our view on the Expert Reports and its challenge</u>

108. We have already stated above that the challenge on the expert reports, their credibility cannot be adjudicated or appreciated in a time bound consultative decision making, the aim of which is to fix the royalty based on the fluctuating business interests which varies with the time. Its suffice to say that the projections of complete distressful nature of business of the radio station is neither supported fully in documented form nor the same goes uncontroverted by the music industry. In fact, the documents and reports filed by the Respondent suggests some telling facts which are ofcourse subject to challenge that the applicants are paying the royalties at the inflated rates wherever it suits the interests of the applicants. The said facts are not denied by the applicant except challenging the reports on technical grounds. Therefore, without commenting on challenging of the rival parties on the credibility of the reports, It can still be safely concluded considering such disputed position, a credible nature of the doubts can be expressed on the position taken by the applicants in relation to their incapability to pay the royalties at the needle hour basis or at the revised. The practical position noted above in the preceding paragraphs by us also supports this view. Perhaps, the earlier rates fixed by the Copyright Board suits the applicant so well that they consider them as suitable subsidized rates which they do not intend to part with for the longer period of time as they consider them standard governmental type rates when in fact the time spent and quantity, kind and nature of listenership are the criterion that are main variables operating behind altering the financials of the radio stations as the utilization and exploitations of the works increases and thereby their paying capacities. So, despite the challenges presented by the rival parties to the reports, we are unpersuaded by the pleas of the applicants/ radio stations to stick to the rates of 2 % of the Advertisement revenue or anything lesser than that. Instead, we are opting to follow the needle hour basis and reject the plea that the radio stations (majority of the national level players who are petitioners before this tribunal) lacks any such paying capacity to be subject to the new regime of time slots basis introduced by the Copyright Rules of 2013.

<u>Rationale of Newer Regime of Statutory License Narrated by Counsel Appearing for Sony</u>

109. Mr. Virag Tulzapukar, senior counsel appearing on behalf of Sony has rightly argued that the language and words used in Section 31 triggered litigation between the stakeholders mainly on the following issues:

(1) "Whether a complaint for grant of compulsory license under Section 31 of the Act can be submitted in relation to grant of license for broadcasting a sound recording which has not been withheld from the public. If it is held that the sound recording has not been withheld from the public, can a complaint be entertained?

(2) Whether the Copyright Board could have made an order for grant of license to more than one complainant in relation to the same city, in view of the provisions of Sub-section 2 of Section 31 of the Act?"

[*Phonographic Performance Ltd. &Ors. v. Music Broadcast (P) Ltd &Ors.* 2004 (29) PTC 282 (Bom.)]

(3) Whether it is possible to read Clauses (a) and (b) of the section conjunctively?

(4) What should be the factors to determine the rate of royalty for broadcasting the works under compulsory licensing regime in absence of any express provision in the Act and the Rules?

The first three issues raised by the stakeholders came to be decided by the Hon'ble Supreme Court in *Super Cassettes Industries v. Entertainment Network India Ltd*, (2008) 13 SCC 30, which held that:

a. There can be more than 1 license
b. provisions (a) and (b) are totally different provisions.
c. Work withheld from public is requirement of section 31(1) (a) and not (b)

and the matter was remanded back to the Copyright Board for the fixation of royalty. While remanding the matter back to the Copyright Board the Hon'ble Supreme Court declined to prescribe principles of valuation or the factors to be taken into consideration while fixing the rate of royalty.

110. In order to take care of these issues, amendment was proposed. The amendment also has background of international treaties.

a. Article 13 of the TRIPS Agreement: Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

b. Preamble of WIPO Copyright Treaty (1996) reads:

'Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention, '

c. Preamble of WIPO Performances and Phonograms Treaty (WPPT) (1996) reads:

'Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,'

None of the above listed treaties which were implemented by the 2012 amendment imposes or restricts the rights of the copyright owners. In fact, the rights of the copyright

owners are strengthened by these treaties. The rights of the broadcasting organization **are subject to the rights** of the copyright owner because the right of the broadcasting organization is a neighbouring right and not a copyright.

111. It is true that the balance between the copyright owners and the public is achieved by the legislation by putting reasonable restrictions on the right itself by virtue of the provisions of Section 31 D. The Amendment to the Act and the introduction of Section 31D on the statute book, so as to make a provision of statutory licensing, while retaining the provision of compulsory licensing, is only to take care of procedural hurdles and to provide a smooth mechanism and not intended to dilute the copyright of the owner in its work.The Standing Committee Report clearly mentions, as far as it relates to the provision of statutory licensing, that the Copyright (Amendment) Bill, 2010 seeks to amend the Copyright Act, 1957 with certain changes for clarity, to remove operational difficulties and to address certain newer issues that have emerged in the context of digital technologies and the internet.

112. The Object and Reasons appended to the Bill at clause IX mentions that the Bill introduces a system of statutory licensing to broadcasting organizations to access to literary and musical works and sound recordings without subjecting the owners of the copyright to any disadvantage.

113. The Object and Reasons to introduce statutory licensing regime in the Act is also clear from the observations and findings of the standing committee in paragraph 15.4 of its Report which reads as follows:

> *"15.4 When asked to clarify their stand on the aforesaid reservations, the Department apprised the Committee that at present, the access to copyright works by broadcasters in the light of the new system of auction of licences for FM operators was dependant on voluntary licensing. As a result, unreasonable terms and conditions were being set by the copyright societies and owners. This has also led to divergent views by the courts in interpreting the existing compulsory licensing provisions under section 31. There were litigations pending before various High Courts as well as the Copyright Board regarding the nature of licence and the rate of royalties to be paid when works particularly songs were used for broadcasting. Automatic licence or non-voluntary licence such as proposed statutory ensuring adequate return to the owner of works was the best solution to make access easy for broadcasting. The Committee is inclined to agree with the contention of the Department. Fast-growing industry like broadcasting industry needs to have hassle-free access to works. The Committee also notes that this provision is similar to that of statutory licensing for cover version."*

Therefore, a new licensing regime in respect of cover versions of the sound recordings also came to be introduced by way of 31C and by deleting old section 51J. The Standing Committee Report, the objects and reasons of the Bill clearly mentions that the provision is made for operational purposes and to have hassle free licensing mechanism without compromising or curtailing the copyright of the owners. The whole purpose of bringing on board the statutory licensing provisions is only to ensure that there are no operational difficulties. The intention is very clear so as to ensure that copyright of the owner's rights are not affected or curtailed in any manner. If at all the intention was to dilute any of the

rights granted by S. 14 of the Act, then there would have been amendment to S 14. In fact, it is ensured that economic rights of the creators are not diluted at all. The proposal of the department and the stakeholders that there are operational difficulties, there are issues pending before the Court, there is difficulty in respect of interpretation of S. 31 came to be considered while amending the Act. To overcome all those difficulties, this statutory licensing regime is introduced. Section 31D as it stands on the statute book today does not contain the language of Section 31 which includes: *works withheld from the public, has refused to allow communication to the public by broadcast, on the terms which the complainant thinks reasonable,* etc.

114. The Section takes care of the questions of law and interpretations of Section 31 which was subject matter of contention before the Bombay High Court and the Supreme Court as mentioned hereinabove. There is no separate right created in favour of the Broadcasters except the entitlement to broadcast the work subject to the provisions of Section 31D. The entitlement of license is without affecting the copyright of the owner. The provision is also made in the Rules which prescribes the factors to be taken into account while determining the rate of royalty which was absent in the old compulsory licensing regime. The provisions of Section 31D are not made solely for the benefit of the broadcasters as sought to be argued by the broadcasters. The same is made to ensure that the questions of law and the interpretation of Section 31 which was subject matter of earlier litigation is resolved and a smooth mechanism is provided for. Section 31D is not a provision which is meant to serve the public interest as sought to be argued by the broadcasters. The Act has retained the provisions of Section 31 which expressly mentions that the provisions are in public interest. The provisions of Section 31D are meant to ensure that the economic benefits of the Copyright Owner are not diluted in any manner and there is no inroad of any nature whatsoever on the rights of Copyright owner as conferred by the Act. The Broadcasters are entitled to broadcast the copyrighted work by making a payment of royalty at the rate fixed by the Board. A rate of royalty after considering the factors laid down by the Rules. Thus, the provisions of the sections achieve a balance between the economic rights of the owner of the copyright and the entitlement of the broadcasters to have access to the work by making a payment of royalty at a rate which ought to be in consonance and conformity with the other economic rights conferred by the Act.

115. The economic right protection provided to the owners by Section 31D is reflected in the section and the Rules in the following manner:

- Section 31D (2) reads "*the broadcasting organisation <u>shall give prior notice</u>, in such manner as may be prescribed, of its intention to broadcast the work stating the duration and territorial coverage of the broadcast, and shall pay to the owner of rights in <u>each work</u> royalties in the manner and at the rate fixed by the Appellate Board.*"
- Section 31D (4) reads "*In fixing the manner and the rate of royalty under sub-section (2), the Appellate Board may require the broadcasting organisation to <u>pay an advance</u> to the owners of rights.*"

116. The international rates of royalty cannot be a factor which can be considered for fixation of rates of royalty in the light of e express provisions which were not available when the Copyright Board decided the pro tem rate in 2010.The procedural and factual aspects of foreign jurisdictions cannot be imported to decide a matter on facts in accordance with the provisions of Indian legislation which is territorial in nature. These can be considered for guiding purpose in the absence of express provisions.

The Hon'ble Supreme Court in ENIL case Supra has noted the difference in other jurisdictions in para 81 of the judgment and in para 140 has held that:

> "*140. We have, moreover, been called upon to lay down the principles of evaluation. We decline to do so. We have been taken through various judgments of different jurisdictions. We have noticed hereinbefore that the scheme therein is different. The Tribunal exercises a limited jurisdiction in India. Different cases are required to be considered on its own merits. What would be reasonable for one may not be held to be reasonable for the other. The principles can be determined in a given situation. The Bombay High Court has remitted the matter back to the Board for the said purpose. We endorse the views of the Bombay High Court.*"

117. The prevailing rate of royalty as contemplated by the Rules does not contemplate international rates. That was not to be specifically included in the consideration otherwise it would have been expressly included as a factor as the 2010 CB Order was available with the rule makers. The rate of royalty in other jurisdictions or the practice of determining royalty on the revenue sharing model cannot be considered in India for various reasons, which includes different works, different market conditions, different licensing regime, if at all, different terms which are not freely negotiated, etc. and also because the nature of work, the listeners, the languages, market conditions etc. is totally different. No doubt, we can take the idea fixing the royalties as per Indian law. International rates cannot be considered to be a rate prevailing in the territory under R. 31(7)(d), nor can it be considered under R. 31(7)(f).

In respect of the factor of prevailing rates:

118. Per Needle Hour model has been historically followed. By virtue of an interim Order passed by the Calcutta High Court dated 28th September 2001, the sound recording owners were getting Rs. 400 PNH, that rate of royalty was increased in the year 2002 was made to 660 PNH. Therefore, up to the implementation of the Orders of Copyright Board, the owners were getting an average rate of Rs. 660 PNH.

119. By virtue of the CB Order which introduced a revenue sharing model, the owners are getting 2% of the Net Advertising Revenue of the broadcasters which translates to ENIL paying PPL an equivalent of Rs. 132PNH in the year 2019-20 as shown in the Dun & Bradstreet report and the calculation is shown. This itself shows the arbitrariness and

unfair and inequitable and disproportionate rate of royalty. At the same time, the All India Radio (AIR) is paying Rs. 750 PNH for FM Metro cities and Rs. 650 PNH for Non-metro FM. While fixing the rate, the Copyright Board ought to consider the fact that there was no revision in the rate for the past 10 years causing grave harm and injury to the content owners.

120. The non-revenue sharing model or Needle per Hour model has been accepted and implemented by the broadcasters prior to the 2010 CB Order and selectively with a few content owners and has benefitted both the stake-holders and also stood its test prior to 2010 and thereafter. Several Agreements with several radio broadcasters are produced of the Suggestions filed by Super Cassettes. Further, these agreements contain covenants such as Minimum Guarantee and Committed Needle Hours which are against and defeats the content owner's entitlement and the concept of revenue sharing model. If a NAR sharing model is adopted, nothing prevents the radio broadcasters from entering into similar restrictive covenants cheating the content owners in the future.

Since NAR model completely excludes the content owner and subjects him to broadcasters' business practices and ethics and given the history of judicial findings of discrepancies and manipulations, there is grave disadvantage caused to the content owner by the NAR model. Statement of Objects and Reasons in respect of 2012 amendment, Clause 3 (xiv) mandates that the rate to be fixed will not be disadvantageous to the content owner, which is an aspect that would have to be considered while considering the factor of prevailing rate.

Our view on Prevailing Rates of Royalty

121 We concur with the submissions canvassed by Mr. Tulzapurkar, learned counsel appearing for Sony. We agree with him that the international rates are merely meant for taking a cue as to how the royalty can be fixed but the international rates cannot be imported into Indian rates or treated as such as prevailing rates. We also concur with his suggestion that the needle hour basis was even followed prior to the passing of the order of the Copyright Board. This is evident from the documents presented before this tribunal. Moreover, now, as we have noticed at length that the time slots basis and various other factors have become recognized determinants for assessing the royalty. There is a clear indication that the needle hour basis is more appropriate methodology to be adopted in fixing the royalty as against the revenue sharing model. We are fortified by our own finding the in previous paras that the revenue sharing model obscures certain determinants which are necessarily required for ascertaining the royalty as per the need of today's times.

Suggestion and arguments of Saregama in nutshell

122. The valuation of intellectual property may be relevant factor as per Rule 31(7) for determining the royalty to be fixed under Section 31D in view of amendments in the statute. The said provisions were incorporated in June, 2012 after passing the order

(R.Order dated 25.8.2010. Thus many factors were considered at the time and even evidence of the witnesses were recorded. After amendments,the mandate of the law is that such application is to be decided within two months. Earlier, the applications were filed under Section 31(b) of the Act under different law. After amendments, there is a specific Rules 29 and 31 which guides us to determine/fixing the royalties and to factors to be considered for fixing of royalty under Rule 31(7). The same are :

Time Slot

a) **Different rates for class of works** – The same rate should be fixed for all classification of works since there are many classic songs which are very popular among the listeners and people tune in to radio station because of those songs. It will be difficult to differentiate between popular and non-popular songs. Different rate due to different nature of use – Tier wise city basis – since Radio stations charge advertisement rates as per city wise classification.

b) **Terms and Conditions included in GOPA between MIB and broadcaster –** GOPA asks for a rate of 4% of Gross Revenue or 2.5% of the Non-Refundable One Time Entry Fee, whichever is higher.

123. The music industry being a creative industry, the income or the input cost method would not be an appropriate method for valuing the IPR. Music companies invest in the creation of a lot of content, and only a small proportion of those actually get popular and generate revenue. Even otherwise, the music companies, authors and music composers are the owner/assignee of the works. They are to receive the royalties as per law from the broadcasters who are desirous to communicate to the public. The financial health/conditions capacity is to be checked up in order to arrive royalties to be payable as per mandatory provisions. No doubt, many music companies here give some details, the burden is uponthe broadcasters about their poor conditions and radio industries. Thus, strict rule cannot be applied towards respondents.Therefore, IP valuation should not play a role in the same. The rate which will be fixed would be one rate for all, regardless of the popularity of the content being played, and hence valuation of the content owner's IP is not relevant with regard to music companies, the financial condition of the broadcasters is relevant.

124. Saregama's music repertoire of golden era classics is played on premium prime time programming on radio. Old songs are like old paintings, they regain their charm after ages and people hold them of much more value. The mere fact that the songs are old classics does not mean that is of lower value. Profit earned by Saregama from the sales of the Saregama Carvaan is not relevant to decide the royalty (as argued by the Counsel for ENIL). In fact, the sales of Saregama Carvaan shows the popularity and the demand for old music in the market and the value of the same.

125. **PREVAILING RATE OF ROYALTY**

The rate of 2% as fixed by the Copyright Board cannot be considered as the "prevailing rate of royalty" as the same was not a voluntary rate. The music companies collecting the said royalty were either bound by the CRB order or were collecting the same under various interim orders passed by the High Courts. When the order dated 25.8.2011 was passed,the legal position pertaining to the rights and receiving the monetary benefits of the authors and music companies were different. The mandate of the law was that after sound recording, no rights or monetary benefits are accrued but after amendment of June, 2012, the position is changed. The author and music composers are also become stakeholders as far as monetary benefit are concerned irrespective of assignment executed by them in favour of the owner/assignee.

126. Commercially negotiated rates paid by the radio broadcasters to non-PPL members such as T-series, Bennett Coleman, Yashraj, etc., including the notional rates of barter deals, minimum guarantees is also be taken into account for deciding the prevailing standards of royalty.A prevailing standard can only be a freely negotiated rate and not a rate which parties are bound by.

127. We agree with the arguments of the respondents that the capacity of the radio broadcasters to pay rates and there must be equitable cost distribution within the broadcasting organizations themselves. The payout towards royalties for utilization of sound recordings is the lowest as compared to the other expenses on these organizations. E.g., as per the figures given by MBL in its note filed before the IPAB, it spends approximately **INR41.5 Cr** on marketing and advertising expenses, **INR 4.34 Cr** on legal and professional expenses, against it spends only **INR 6.87Cr** on music royalties.

128. **INTERNATIONAL RATES SHOULD NOT BE RELIED ON FOR THE FIXATION OF THE ROYALTY IN THE PRESENT APPLICATION**

It appears to us that there is a lack of uniformity in the market practices regarding the radio and music industry from country to country. Music and radio industries in all of the countries are in different stages. The said criterion has not been included under Rule 31(7) of the Copyright Rules, 2013.

The Radio Companies have relied on the royalty rates of some of the countries and few details are mentioned as follows:

i. **Germany**: The maximum rate is capped at 7.5% for 100 per cent music share divided by 100 and multiplied by music share of program e.g. 78% music share would be 7.5/100 x 78 = 5.85 (GEMA Tariff). Therefore, the royalty rate is 7.5% of broadcast revenues for 100% music content.

ii. **Canada**: Re:Sound (Copyright Society) which collects royalties for the telecast of sound recording over radio collects:

- For low use 0.75% of gross income for first $625,000 gross income, 0.75% of gross income for next $625,000 gross income and 0.75% for rest.
- For high use 1.44% of gross income for first $625,000 gross income, 1.44% of gross income for next $625,000 gross income and 2.1% for rest
- Bad accounting practices and barter deals led to Canada abandon Net Revenue and adopt Gross Revenue model
-

iii. **UK**: The fees payable under PPL's Traditional Radio Licence are the greater of the minimum fee(s) or a share of Net Broadcasting Revenue ("NBR" – 85% of gross broadcasting revenue)

The annual fees that apply from the Licence Year ending 30 September 2019 to the Licence Year ending 30 September 2021 are as follows:

Platform	Minimum fee
AM/FM	£779
Local DAB	£779
Local DAB Simulcast	£142
National DAB	£1,418
Satellite Simulcast	£1,418
Local Cable Simulcast	£142
National Cable Simulcast	£1,418
DTT	£1,418
Internet Simulcast	£1,418
Test transmissions	£347 per month/part-month

NBR thresholds

The thresholds are adjusted annually on 1 October in each Licence Year, reflecting any movement in the RPI.

The NBR thresholds for the Licence Year ending 30 September 2021 are as follows:

NBR threshold	Rate
Up to £41,889	Minimum per platform fee(s)
£41,890 to £782,850	2% of NBR
£782,851 to £1,565,698	3% of NBR
£1,565,699 or greater	5% of NBR

It is pertinent to note that the performing rights society (i.e. the equivalent of IPRS in the UK) is paid a separate royalty by the radio broadcasters for the use of the underlying literary and musical works in sound recordings.

iv. **France:** SPRE charges 4-7% of gross revenue

v. **Australia**: The royalty rate of 1% is based on Gross earnings of the radio broadcasters. The said rate is also a controversial and much-debated aspect of Copyright Act,1968 and there is a big demand to increase the said royalty rate.

vi. **New Zealand**: Radio Royalty was increased in 2010 by Decision of Copyright Tribunal in *Phonographic Performances (NZ) Ltd V Radioworks Ltd & The Radio Network Of New Zealand Ltd* to 3% for stations playing more than 20% music and 0.75% of the Gross Revenue for the stations playing less than 20% Music.

vii. **Japan**:

- For NHK: multiplying the broadcasting operation income for the fiscal year preceding the current fiscal year by 1.5%
- For commercial broadcasters: multiplying the broadcasting operation income for the fiscal year preceding the current fiscal year by 1.5%

Even if the reliance on international rates is made under Rule 31(7)(f), these rates are higher than the present 2% rate and are based on the Gross Revenues for many countries.

129. **Our view of Reliance of International Rates.**

We concur with the suggestions made by Mr. Akhil Sibal, Senior Advocate appearing for Saregama that the international rates cannot be relied upon for assessing the rates of royalty in statutory licensing under Section 31 D. We have already discussed this above while concurring Mr. Tulzapurkar on the said point and adopt his reasonings to support our view.

130. **APPROPRIATE MODE OF CALCULATION OF ROYALTY UNDER SECTION 31D**

It is stated on behalf of all respondents and IPRS that the radio companies are suggesting a revenue share model based on "Net Advertising Revenue" for calculating the rate of royalty. However, the same is not suitable for the following reasons: -

i. In absence of a standard accounting practice to arrive at "Net Advertisement Revenue (NAR)" across all the Radio companies, the methodology used by Radio companies to arrive at NAR is questionable and open to manipulations.

ii. Radio companies are engaging in revenue misclassification in order to minimise royalty payments to music owners.

iii. Non-advertising revenues now form nearly 20% of all revenues for Radio companies, up from just 7%, showing a clear shift to non-advertising led revenue model.

iv. The actual revenue earned by the radio companies is also disguised due to the barter transactions entered into by the parent companies of the radio companies, which provide a combined advertising rate to companies for advertising on their print, digital and radio media offerings. The true value of this rate is not reflected in the records of the radio companies, therefore leading to a miscalculation of actual revenues.

a) The mere ability of the music companies to inspect the accounts under Section 31D and the appropriate rules is not an adequate safeguard as the accounts of the radio companies are voluminous and vaguely categorised. The possibility of revenue misclassification cannot be ruled out.

b) Any cases of revenue misclassification, if so discovered, would lead to further litigation between the parties which was the exact problem which was sought to be resolved under Section 31D.

c) It has not been denied by the radio companies that non-advertising revenues now form nearly 20% of all their revenues, showing a clear shift to non-advertising led revenue model.

d) Radio companies are paying a percentage of Gross Advertisement Revenues as a license fee to the Government.

e) In view of the above**,** Saregama has proposed a fair 'hybrid model' that amalgamates an approach between 'per needle hour rate' (PNR) and 'percentage of gross advertisement revenue' (GAR), <u>whichever is higher.</u>

Saregama has proposed different rates of royalty for different cities, keeping in view the differences in the listenership and the amounts of revenue being earned by radio stations in different cities.

Advertising rates vary widely across markets and are very dynamic:

i. Advertising rates for Mumbai were 10 times higher than advertising rates for Lucknow for one radio company;
ii. The advertising rates for A+ circles (cities where listenership is above 50 lac) are at least five times higher than ad rates for D circles (cities where listenership is under 2 lac), but music played in D circles is 50% higher than in A+ circles, which would lead to a discrepancy between the use and advertising revenue of radio stations;
iii. This has been conceded by the Applicant as a right idea but has been dismissed as administratively inconvenient.

131. **<u>Our view on the Hybrid Model</u>**

We have gone through the proposal of hybrid model proposed by Saregama represented by Senior Counsel. No doubt, the proposal appears to be rational and analytical in nature, however it is difficult to monitor both the models simultaneously and this will create more uncertainty amongst the stake holders as to computation of the royalty sum. Further, we have already observed that the needle hour basis or time slot basis has a connection with the time which alters the financials of the radio stations when the listenership is higher or lower. The said factor at present captures the royalty assessment fairly as we have already got a model of All India Radio which runs on the needle hour basis on all over India basis. We are of the view that at present we have to revise the rates in such a way so as to accommodate the interests of all the parties in the manner which is consistent, certain which may lead less dissatisfaction and litigation in the future. Moreover, as regards the small players, we are already making an exception where they can enter into voluntary agreements at a lesser price by demonstrating the lesser level of listenership as per the mutual terms and conditions agreed between the parties. Therefore, at present, we do not find any need to adopt the hybrid model in view of the systemic complications it may present in the working of the royalty assessment.

132. **GROWTH OF DIGITAL SECTOR DOES NOT HAMPER THE RADIO INDUSTRY AS PER THE CASE OF ALL RESPONDENTS. THE REASONS ARE AS FOLLOWS:**

a) The revenue of digital and OTT platforms as cited by the radio companies includes the revenue from all the streams on digital platforms i.e. audio streaming on mobile applications (Gaana, Saavn etc.), Video Streaming (Hotstar, Netflix etc.), Internet Radio, social media etc. Growth in digital media is not comparable with any other medium of the media and entertainment industry especially Radio which plays only sound recordings. Hence, the reports relied by the broadcasters cannot be considered to give a true picture of the revenue for sound recordings.

b) Revenue of audio streaming and OTT platforms was just Rs. 270 crores which is nowhere in comparison with radio industry which is worth more than Rs. 3000 crores.

c) CEOs of the radio companies have themselves agreed that the radio industry does not have to fear the digital music streaming industry and instead work along with it: -

i. COO & Director of Red FM, Ms Nisha Narayanan stated that: -
"*Radio is constantly innovating and integrating its content with digital. The sector needs to change the way it sells and [radio and digital] is a potent combination for advertisers*"

ii. COO of My FM – DB Corp Limited, Mr Rahul J Namjoshi stated that: -
"*The consumption of Radio in tier II & III markets is increasing and we see growth of digital medium as an added boon to amplify reach for radio.*"

133. **Our view on Expansion of OTT Platforms & Its ability to affect payment of Royalty**

We have gone through the submissions as reasons for the growth of OTT platforms that do not affect the ability to pay the royalty by Radio Stations. We agree with the reasons expressed by the Respondent on that point. We are also of the view that the growth of the mediums are statutorily recognized by the Copyright Act including the Amendments of 2012 when it inserted the new provisos to Section 18 including second, third and fourth provisos. Every time, there is a new medium which is discovered, the new royalty avenues is created and entitlement of the owner and author for the royalty sharing arises. Therefore, one cannot stop the growth of the technologies and avenues. The consumers and listeners who were earlier not listening radios at all in the early 1990s till 2000s due to presence of limited exposure to All India Radio are now wanting to listen ratio due to availability of multiple radio based devices including systems installed in Car, Bluetooth speakers, smart display devices, Carvan based devices facilitating radios, online radios and other means. Likewise, the songs are not merely accessed through radio but are also

available at OTT platforms like Amazon, Sportify and many other online streaming platforms. Those are additional platforms that gains and facilitates the access to songs and is a kind of competition to radio which are basically device aided platforms working on tablets, phones and computers. Similar avenues were earlier also available prior to OTTs like Stereos, CD Roms, Televisions, MP3s etc. So, the evolution of technologies, competition should not deter the applicants their ability to pay the royalty. In fact, the radio has mass reach than that of the device aided platforms which may be accessible to the limited class. Therefore, we are of the firm view that for manifold reasons discussed here by us and by the respondents the growth of OTTs does not take the away the liability of the radio stations to pay the royalties which are the legitimate and lawful share of the owners and authors under the Copyright Regime.

134. **IMPACT OF COVID-19**

It is stated on behalf of respondents that the COVID-19 pandemic has not affected the radio industry as badly as is sought to be shown. The radio industry has managed to increase its listenership base by 23% i.e. to 51 million. (**Association of Radio Operators for India (AROI) Article on Money Control)** The advertising volumes of the radio companies arose to 162% in June and July 2020. (**Financial Express article on advertising revenues.** Covid cannot form a basis for fixation of royalties which may be fixed for a longer period of time.

135. Our view of on Impact of Covid-19

We are of the view that considering the fact that Covid- 19 and longstanding lockdown for more than 3 months and staggered opening has allowed many people to have sometime with their family and leisure time to listen to radio music, access to videos, movies and engage into various hobbies of their interests which they were unable to do during the normal times. The reduction of the working hours post lock down is equal contributor of the same. Its quite likely that given the investment of the time and expense on technology is increasing, the listenership of the radio and their revenues must have gone up considering the kind of the documents presented before this Tribunal. In any case, we are not merely fixing the royalty on the basis of this windfall situation which might have affected or increased the revenues of the radio stations during these exceptional times. We are taking an overall holistic view about the matter considering the fact that 10 years have gone by after the fixation of the earlier royalty rates when the newer regimes allows the Tribunal to exercise discretion on yearly basis depending upon the time and variables provided under the Rules, it's a need of the time that the reasonable royalty rates are to be fixed so as to atleast make the private players operating at national level to bring it at par with the All India Radio rates for the time being so that the royalties which are legitimate interests of the authors and owners of the Copyright may be reasonably distributed to them as per the mechanism provided under the Copyright regime.

136. **DISCREPANCIES IN MBL'S DATA AS PROVIDED IN THEIR REJOINDER NOTE AS SUBMITTED BY THE RESPONDENTS.**

a) The following table has been submitted by MBL in their rejoinder dated 23rd November 2020:

Sr. No.	Label	Royalty Cost				Playout ratio		
		Fy 2017-18	Fy 2018-19	Fy 2019-20		Fy 2017-18	Fy 2018-19	Fy 2019-20
1	PPL (including Saregama and Sony)	2,95,67,472	3,31,72,113	2,31,95,136		56.00%	58.80%	55.00%
3	T-Series	2,14,49,149	2,11,12,957	1,59,66,366		15.10%	15.20%	10.20%
4	Tips	30,16,693	29,12,230	18,64,591		6.20%	6.10%	4.90%
5	Zee	42,25,245	8,37,138	49,39,498		5.90%	1.00%	12.80%
6	Yashraj	24,33,300	26,92,347	22,81,032		6.00%	6.90%	6.60%
7	Super Audio (Madras) Pvt. Ltd	-	-	-		-	-	-
8	SIMCA	15,72,074	14,07,417	13,49,091		1.00%	1.00%	1.00%
9	Bennet Coleman (Speed Records)	96,016	7,35,484	12,60,000		0.00%	0.50%	0.80%
10	Lahiri	-	-	-		-	-	-
11	EROS	17,92,888	19,07,897	10,51,778		4.30%	4.40%	3.30%
12	Ananda Audio	16,79,716	21,27,773	16,37,449		1.00%	1.00%	1.00%
13	Shemaroo	11,818	22,837	6,825		-	-	-
15	Other Labels	35,14,875	42,06,490	30,17,666		4.40%	5.10%	4.40%
	Total FM Royalty (On air)	**6,93,59,246**	**7,11,34,683**	**5,65,69,432**		**100.00%**	**100.00%**	**100.00%**
	Digital Royalty	**6,99,15,593**	**6,98,38,587**	**1,22,31,125**				
	Total Royalty Paid	**13,92,74,839**	**14,09,73,270**	**6,88,00,557**				

b) MBL has submitted that royalty has been paid at following rates to some of the non-PPL companies:

i. Super Cassettes Industries Pvt Ltd (SCIL): 3.63% of Net Advertising Revenue

ii. Zee Entertainment Enterprises Ltd: 1.75% of Net Advertising Revenue

iii. Bennett Coleman & Col Ltd.: 3.72% of Net Advertising Revenue

iv. Eros International: 2% of Net Advertising Revenue

137. It is submitted on behalf of Super Cassettes that the conclusions drawn from the music playout data by MBL is erroneous on the face of it. For example, the effective percentage of royalties paid to T-Series (Super Cassettes) in the year 2019-20 works out to **7.4%** against **3.63%** as alleged by MBL. This is obvious by following the simple arithmetic calculations laid down below: -

i. PPL was paid royalties at 2%. As PPL's playout ratio was 55%, the effective royalty rate to be applied on the entire NAR of MBL was 1.1% [55% of 2%].

ii. PPL was paid INR 2.32 Cr as royalty. If INR 2.32 Cr amounts to 1.1% of the NAR, the total NAR of MBL would amount to INR 210.9 Crore [232 divided by 1.1%]

iii. T-Series's playout ratio for 2019-20 is 10.2%. Thus, the NAR share on which T-Series was paid royalty was INR 21.51 Cr [21090 * 10.2%].

iv. T-Series was paid a royalty of INR 1.59 Cr during 2019-20 which when applied on NAR share of INR 21.51 Cr gives a percentage of 7.42% [1.59 divided by 2151*100]

138. Our view on the discrepancy of data

We have already indicated above that the challenge to the data provided by the either side will not solve the controversy before this Tribunal. This tribunal unlike civil court cannot decide on veracity and credibility of any of the data as sought to be challenged by the either side by launching a detailed trial unlike civil court. This is due to the time bound mandate provided by the legislature to this Tribunal. Therefore, we are taking an overall view about the matter considering the determinants for accessing the royalty on time slot basis and reasonable level of the suspicion which can be posed on the so called decline in the trend of the profits of the Radio station as sought to be projected by the applicants in order to evade the fixation of the royalty at the revised coupled with the passage of the time for which the earlier rate survived and other host of the factors which warrant revisions of the rates.

139. ***Phase III terms have become more beneficial to the radio industry as compared to the terms applicable to the radio companies in 2010 as alleged by the respondents***

a) Annual license fees to be paid by the radio company has been fixed at a rate of 4% of Gross Revenue or 2.5% of the Non-Refundable One Time Entry Fee, whichever is higher.

b) FDI+FII limit in a private FM radio broadcasting company has been increased from 20% to 26%.

c) Broadcast relating to sporting events (excluding live coverage), live commentaries of sporting events of local nature, information on traffic, weather, announcements on civic amenities, natural calamities are allowed by Phase III policies.

d) The steps taken in the new policy will bring down operational costs and improve viability in general due to the following factors:
   i. Private entities have been allowed to own more than one channel in one city;
   ii. Networking of channels will be permissible within a private FM broadcaster's own network across the country, instead of in 'C' and 'D' category cities of a region only allowed at present;
   iii. To improve the viability further as against a maximum of 4 channels in D category cities permitted in FM Phase-II, FM Phase-Ill proposes only 3 FM channels in D category cities so that there are lesser operators to share the advertisement pie;
   iv. Phase III Policy Guidelines allow more than 15% ownership at the national level for channels allotted in specific areas such as Jammu and Kashmir, North Eastern States and island territories to incentivize more bidding. Further, for these regions, there is a relaxation of 50% in the annual license for three years from the day the license fee becomes payable.

140. Our view on Favorable terms to Radio Companies in Phase III:

This can be one of the indicators that the value added by the Radio companies is higher in nature and the government is also allowing the radio stations to expand their reach on all over India level by providing relaxations. So, these relaxations and allowance of increased

operations liberalizes the radio sectors to a greater extent and thereby someway restricts the constraints of Radio stations including the earlier constrained ability to pay when they were at the nascent stage of their operations. So, this is one of the factor which may indicate a revision in the rate and also shows that the kind of the latitude which was given to the applicants earlier should not be given at present times especially when copyright regime which is equally significant has amended and is aiming to seek royalties for their share for newer mediums which remained in halt for more than 10 years. So, the real balance needs to be struck and we cannot remain stagnant by maintaining status quo of earlier times when the radio stations needs an "initial push" or "patting as an encouragement" and proceed to the advance level in this fast pace environment to keep up to the level of international standards at least for a robust copyright regime to be in place.

Apart from other contentions, the main submissions and arguments on behalf of PPL

141. **Royalty Rates paid to non-PPL players**

1. Hari Bhakti & Co. (Chartered Accountant) filed a Report dt. 09.09.2020, on the basis of financial statements of ENIL (Radio Mirchi), DB Corp, Music Broadcast Ltd. (Radio City), Reliance Broadcast Network Ltd., Next Radio Ltd., and highlighted the following:

a. During the FY 2019-2020, ENIL paid licence fees to PPL at 2% of their Net Advertising Revenue (NAR). The rate of licence fees by ENIL to other Music labels (non-PPL players) was 10% of their NAR.

b. Likewise, during the FY 2018-2019, ENIL paid royalty to other music labels (non-PPL) at 7% of the NAR.

c. Aforementioned royalty rate for FY19-20 amounts to a meagre Rs. 145/- per needle hour. Whereas, ENIL paid royalty to other music labels (non-PPL) at the rate of Rs. 756/- Per Needle Hour.

d. During the FY 2018-2019, the effective Per Needle Hour rate to PPL was Rs. 231/, whereas, the effective rate to other music labels stood at Rs. 770/- Per Needle Hour.

e. DB Corp. Ltd. in FY 2019-2020, paid Rs. 2919 Per Needle Hour rate to other music labels (non-PPL) for category A cities, whereas only Rs. 906 to PPL.

2. As is evident, Radio broadcasters have continued paying royalty at a rate as high as 7-10% to other music owners who are similarly situated. This has also created an evident irregularity and disparity in the market and has also led to several members leaving PPL collective burning a huge monetary whole. Thus, there is a need for a uniform royalty rate which is both applicable and reasonable to all the content owners.

3. Another report filed by Hari Bhakti & Co. in 2018 is worth taking noting of inasmuch as it noted the following –

a. Log files of broadcasts of sound recordings were not retained and hence could not be verified at a later stage.

b. Calculation for excess royalty by MBL to PPL has not been provided for.

c. The completeness of barter transactions could not be verified since they were not recorded by MBL, hence, the entire amount transacted was not being booked as revenue.

142. **Financial and Statements filed by the Applicant broadcasters depict their capacity to pay prevailing royalty rates around 7%**

FICCI-E&Y report 2020 states that the Listenership of FM radio as per the Indian Readership Survey remained stable across last three studies at 20%. Top selling phones of 2019 all have had inbuilt FM receivers, thus keeping up well with the technology.

142.1 As per various year's FICCI reports, from 2010-2019, the Radio Industry has experienced growth at a staggering compounded annual growth rate (CAGR) of 12%. On the contrary, the Music Industry has grown at a meagre CAGR of 5.7%.

a. Radio is no more a dying industry – Mergers and takeovers, aggressive bidding and acquisition from Govt. of India, annual reports of ENIL.

b. After the Phase 3 auctions, the Radio industry saw a monumental surge of 66% in the number of stations to 407, as compared to 243 stations in 2 and the total FM coverage expanded from 85 to over 100 cities in India. This spurt in growth of FM channels and coverage has been accompanied by a steady growth in radio ad inventory.

c. Reference may be had to the –

i. Results of e-auction of First batch of Private FM radio Phase III Channels, noting that a total Rs. 1057. 30 crores were spent by radio broadcasters for 93 radio stations. HT Media spent Rs. 169 cr for second frequency in Delhi and Rs. 123 cr for second frequency in Mumbai. ENIL spent Rs. 109 cr for second frequency in Bangalore. Digital Radio (Red FM) spent Rs. 123 cr for second frequency in Mumbai.

ii. Results of e-auction of Second batch of Private FM radio Phase III Channels noting that a total Rs. 200.24 crores were spent by radio broadcasters for 66 radio stations.

iii. Migration fees paid by radio broadcasters, noting that approximately Rs. 500 cr were spent on just migration fees. Similarly, during Phase II bidding, Rs. 900 cr were spent on acquiring 245 radio stations and approximately Rs. 250 cr were paid to GOI towards Migration Fees. Reports are available on website of Ministry of Information and Broadcasting (MIB).

d. **Profit and Loss account of ENIL for FY 19-20 (@ Page 460 of PPL Docs. – <u>Table 1</u>**

		Fig. in cr
Particulars	FY 18-19	FY 17-18
Income	**635.41**	**545.91**
Empl. Benefit exp	126.18	118.53
Operating & Other Exp	354.49	301.94
Total Exp	**480.67**	**420.47**
EBITDA	154.74	125.44
EBITDA %	24%	23%
Profit After Tax	53.91	35.15
Profit after Tax %	8.48%	6.43%

e. EBITDA for FY 19-20 comes out to be 24% and not 16% as falsely shown by the broadcaster. EBITDA for FY 19-20 has shown a marginal increase that of 1% over last FY 18-19.

f. Furthermore, EBTIDA for the past decade can be shown as hereunder: Drawing reference to the Profit and Loss account of ENIL for FY 19-20 at 459 of PPL Docs.

Table 2 Particulars	FY 09-10	FY 08-09
Income	**231.18**	**230.17**
Production Exp	19.97	21.15
License fees	11.90	12.27
Employee Cost	48.18	53.89
Admin Exp	91.19	91.04
Total Exp	**171.24**	**178.35**
EBITDA	59.94	51.82
EBITDA %	26%	23%
Profit After Tax	17.86	2.91
Profit After Tax %	7.73%	1.26%

g. As is evident form the table above, EBITDA was in the same range of 23% - 26 % and thus, the Broadcaster's argument that EBITDA Margins and Profit before Tax margins have been on a constant decline in the last four years beginning 2016 till 2020 from 23% to 3% is entirely false.

h. **Drawing reference to Revenue of Music Broadcast Limited for FY 2013-14 to FY 2018-19** indicates beyond any doubt that MBL's total revenue has increased with a CAGR of 13.6%

Table 2A **MBL Revenue**	**Total Income (in cr)**	**CAGR %**
2013-2014	157.73	
2014-2015	207.53	
2015-2016	240.22	13.6%
2016-2017	275.84	
2017-2018	317.62	
2018-2019	339.79	

142.2 Interview of the Radio Broadcasters' CEO's, whereunder they themselves admit to their staggering growth –

a. Mr. Vineet Singh Hukmani, MD and CEO, Radio One was quoted "*2019 has excellent prospects and radio will gain tremendously from elections and cricket. While we cannot project a figure for specific activities, the annualised growth should be in the vicinity of 14-16 per cent, almost double the growth of 2018. The growth will be in mid-teens in both volume and pricing.*"

"*FM Radio is not losing out to digital music streaming services and inthe future also, the medium won't face any threats from music apps*"

b. Mr. Prashant Pandey quoted as "*The good news is that with every month, the gap with last year is reducing. If this continues, we should see a good Q3, and hopefully some growth in Q4*".

c. Furthermore, Mr. Asheesh Chatterjee, CFO, Big FM stated "*The year looks promising. The national advertisers who flirted with digital and FTA channels have now realised the content integration, high frequency, long tenure, theatre of mind or surround that radio and digital offer is anything unlike its television and print counterpart (degree of customisation). They are back to radio in a big way. People who are able to give them the rightly curated solutions will see money coming their way.*

143. **Our view on the payments made to Non PPL members and related pleas of payment of higher sums to third parties.**

We have already indicated above that the reasonable suspicion can be raised on the said inability to pay the royalty as sought to be projected by the radio stations. Some of the

factors noted above can be said to be nothing more than as an attendant circumstance to the said inference without commenting on the challenges and cross challenges to the reports filed by the parties. Therefore, we would not like to dilate more on the said aspect apart from what has been said above.

144. **Fixation of New Tariff Scheme by PPL**

If the rate of 2% of the Net advertising revenue is to be translated and calculated into Per Needle Hour (PNH) rate, PPL as on date is being paid a very meagre amount.

a. For instance, the ENIL operates 73 FM Stations for which the effective rate of the royalty paid was at an average of Rs. 144.48/- per Needle hour to PPL for the FY 2019-2020, whereas, for FY 2018-2019 an average rate of Rs. 231.41/ was paid to PPL. That during FY 2019-2020, Licence fees paid for Aurangabad station was a meagre Rs. 64/- per Needle Hour on an average, Licence fees paid for Kolhapur is at an average of Rs. 70/- Per Needle Hour and Licence fees paid for Mangalore is at an average of Rs. 77/- Per Needle Hour.

b. Out of 73 radio stations that ENIL owns, 31 radio stations pay the licence fees lower than Rs. 50/- Per Needle Hour and 13 radio stations pays licence fees at Rs. 51 to Rs. 100/- Per Needle hour, 11 radio stations pay licence fees at Rs. 101 to Rs. 150/- Per Needle Hour. In view of the above, it is submitted that the average rate that is arrived at in the last 10 years is much less than the rate fixed by the Copyright Board on 19th November 2002.

PPL's Tariff rate dated 01.08.2020 has been prepared in terms of Rule 31(7) and 31(8) of the Copyright Rules, 2013. It has adopted a fair approach with a 'hybrid model' that amalgamates an – either/or – approach between 'per needle hour rate' (PNH) and 'percentage of net advertisement revenue' (NAR), whichever is higher, in order to arrive at an appropriate rate of royalty to the Music copyright owners.

Safety net of a Hybrid Model is the need of the day. There should be an either/or approach between a per needle hour rate and percentage of NAR rate.

a. Hybrid model becomes an imperative solution as in certain cities the 2% rate corresponds to a royalty as meagre and low as Rs. 11/- per needle hour which is evidently not feasible for any copyright owner. A hybrid model with an either/or approach on a percentage of NAR and PNH shall thus prove to be effectively fruitful in gaining appropriate revenue and monetary benefits to the Music copyright owner.

145. **Our view on proposal of Hybrid Model**

We have already indicated above the reasons for considering Needle Hour basis as a model which is necessary determinant for the assessment of Royalty which takes into

consideration time slots and other variables operating as per the statutory scheme. Therefore, we need not indulge ourselves more on the feasibility of the alternative models including Hybrid models proposed by various parties.

146. **Tarif Scheme dated 01.08.2020 formulated by PPL is fair, just and reasonable for all stakeholders**

Radio broadcasters neither create music content nor do they hire any creator to produce new content. The conventional input costs such as that for production and distribution do not come under the input cost that accrues to the Radio broadcasters who just have to cherry pick the best available option to bank on for increased listenership. The content risk is zero.

146.1 The Royalty paid towards Music acquisition is the lowest out of all the variable costs to the Applicant in last 5 years. That the employee cost, admin and other cost adds to 60-65 % of Total Income during 2015-2020.

Table 3

ENIL	FY 15-16	FY 16-17	FY 17-18	FY 18-19	FY 19-20
Total Income	**533.71**	**575.37**	**545.91**	**635.41**	**553.35**
Expenses					
Royalty	14.00	19.50	19.43	22.21	24.81
License Fees to Govt	26.18	33.37	34.69	36.41	35.61
Employee Cost	93.53	105.37	118.54	126.18	134.83
Admin & Other Exp	215.52	271.63	247.81	295.88	221.83
Int /Fin. Cost	0.04	13.56	4.72	3.97	18.39
Depreciation	36.27	53.60	63.45	67.10	99.06
Total Expense	**385.54**	**497.03**	**488.64**	**551.75**	**534.53**
% of Expenses to Radio Income					
Royalty	3%	3%	4%	3%	4%
License Fees to Govt	5%	6%	6%	6%	6%
Employee Cost	18%	18%	22%	20%	24%
Admin & Other Exp	40%	47%	45%	47%	40%
Int /Fin. Cost	0%	2%	1%	1%	3%
Depreciation	7%	9%	12%	11%	18%

On the other hand, the major cost of operation and production of music that accrues to a music owner such as PPL has risen sharply over the past two decades. That the increasing cost of film music acquisition, creation and production of music and costs of

marketing and promotion of sound recording content have added to the woes of the music labels. That with the greater outreach and wide scope of music and sound recordings, the cost of acquiring music rights of new films has been very high that have in turn led to an increase of input cost for PPL.

147. **Stagnant nature of the Music Industry over the last decade**

Income of PPL from Radio royalty was Rs. 24.47 Cr in 2011, Rs. 15.12 Cr in 2015, Rs. 23.59 Cr in 2019 and Rs. 24.25 Cr in 2020. PPL has not grown at all, let alone proportionally to the radio sector, inspite of rapid increase in the number of operating radio stations post 2015.

Table 4

Year	PPL's Radio Revenue (Rs. Incr)
2010-2011	24.47
2011-2012	26.29
2012-2013	13.98
2013-2014	18.83
2014-2015	15.12
2015-2016	18.31
2016-2017	18.27
2017-2018	19.78
2018-2019	23.59
2019-2020	24.25

However, the growth in the Radio Sector has been multifold. Taking ENIL, Digital Radio, DB Corp, HT Media, Rajasthan Patrika and SAFM as an example hereunder:

ENIL Revenue	Total Income	CAGR %
2010-2011	283.56	
2011-2012	312.95	
2012-2013	355.36	
2013-2014	407.17	
2014-2015	470.65	6.9%
2015-2016	533.71	
2016-2017	575.37	
2017-2018	545.91	
2018-2019	635.41	

2019-2020	553.35	

148. **Deloitte in association with Indian Music Industry (IMI) prepared another report titled "Economic impact of the recorded music industry in India"(@ 270 of PPL suggestion documents)** and made the following observations regarding the challenges faced by the Music Industry in India:

Piracy epidemic: The increased penetration of smartphones and affordable data charges in India have been accompanied by an increase in the consumption of pirated content online. In a recent study in India, 76% of the surveyed internet users admitted to accessing musical content through pirated means, underlining that piracy is rampant in the country.

Increasing Value Gap: Record labels consistently highlight the expanding "value gap" as a key challenge. The recorded music industry describes value gap as the growing mismatch between the value that some digital platforms (notably user upload services) extract from music and the revenue returned to the music community (those who create and invest in music).

Legislative and regulatory impediments to achieving fair value: Record labels invest about USD 5.8 billion globally on Research and Development. the amount is spent on discovering new artists, and promoting and marketing content. Permitting the industry to negotiate voluntary licensing arrangements reflecting the value of their investments is expected to help facilitate fair value to all stakeholders in the value chain. Not allowing this could create bottlenecks for investments and speed breakers for further investments in the recorded music industry. This, in turn, could have an impact on creative talent, authors, and composers – the value chain in the music ecosystem."

For instance, Zee Entertainment spent 39%, 36%, 33% and 44% of revenue on Media Content cost in FY 20016-2017, FY 2017-2018, FY 2018-2019 and FY 2019-2020, respectively. Similarly, Balaji Telefilms spent 79%, 72%, 79% and 62% of revenue on Production / Content acquisition cost the FY 2016-2017, FY 2017-2018, FY 2018-2019 and FY 2019-2020, respectively.

Royalty paid towards Music acquisition is the lowest out of all the variable costs to the Applicant in last 5 years. That the employee cost, admin and other cost adds to 60-65 % of Total Income during 2015-2020.

149. **Stagnant nature of PPL as compared to the Radio Industry**

The income of PPL from Radio royalty was Rs. 24.47 Cr in 2011, Rs. 15.12 Cr in 2015, Rs. 23.59 Cr in 2019 and Rs. 24.25 Cr in 2020. That PPL as a collective has not grown at all, let alone proportionally to the radio sector, in spite of rapid increase in the number of operating radio stations post 2015.

150. **Our view on Stagnancy of Music Industry and PPL as against Radio Industry**

We are of the view that no conclusive opinion can be formed on the subject of the stagnancy of one industry over the other as the reports of the either side are put to challenge by the rival parties. However, the reasonable suspicion on the so called declined projections provided by the appellants/ radio stations in order to seek lesser fixation of rates or reduced which were already operative for 10 years have already been raised. The above noted report even if not appreciated fully can still even if read prima facie without commenting on either side can simply be said to be strengthening the said suspicion already raised. In any case, the practical terms as noted above suggests the awareness of the radio, listenership, avenues, kinds of channels, their service delivery have increased manifold allowing the customers to attract towards radio which was earlier considered to be almost abandoned device or meant for older people at the earlier when merely one service of All India Radio Channels were at place. We are of the view the practical terms, change in the listener habits, wide area of coverage gained by the radio stations, coupled with reasonable suspicion are all factors which indicates towards the revision of the royalty rates and that is the mandate of this Tribunal instead of giving conclusive findings on each and every factual point raised by the parties.

151. **No public interest is served by the Private FM Radio Sector**

The Sound recordings owned by Music Companies are not public goods. These sound recordings as owned by the Music labels/owners are intellectual property rights that continue to draw significant capital investments by the music companies in terms of cost of acquisition, maintenance, promotion and distribution.

a. So as to achieve the objective of larger public interest, a Radio broadcaster shall have to not only play front- line Bollywood Music but also enable Ghazals, folk, Indi-pop, regional, devotional, local content, local artiste and every other genre of music that one could think of on their platform.
b. All India radio is the only radio broadcaster that confines with the aforementioned scheme.
c. All Applicants are private FM Stations and belong to a commercially driven radio Sector that has the sole aim to earn huge profits out of the same.
d. The Applicant(s) herein only wish to conduct a lucrative business by earning substantial profits by cherry picking the best available music content for maximum commercialisation. The Applicants are evident 'Free Riders' in the Music-Radio industry interface.
e. None of the Private FM stations are educational platforms, traditional occupational oriented or work solely for women and child upliftment etc.
f. On the other hand, Music Industry solely helps the country by supporting and creating regional content, promoting regional artists investing in creation of classical and instrumental music genres etc. Music Industry at its own cost and belief upkeeps the heritage and hence public service is being

served solely by the Music Industry and not by the Radio Industry anyhow which banks on the best available content to increase its profits.

Our opinion on Public Interest

152. We agree with the larger point that radio stations are not serving public interest and instead engaged in commerce which is a full fledged business model. Therefore, the utilization of the works by the applicants are for commercial purposes which warrants the royalty to be paid. Therefore, under the copyright regime, the interests of radio stations are no different from that of the ordinary licensees. Therefore, the public interest doctrine cannot be pressed into service to plead any concession in the royalty fixation. The right to knowledge of the citizens or for that matter the social responsibilities of the Radio Stations are altogether different in nature and cannot allow to impair or restrict the competing interest of the respondent's to right to carry on trade on royalties based on their intellectual properties which is equally significant business interest. So, public interest does not come in the way of the royalty fixation either in limiting or restricting the fixation of the royalty which is otherwise determined on revenue sharing or on time slots basis and gains arising therefrom.

153. **Super Cassettes Industries Private Limited (SCIPL) – situation prior to July, 2011**

The Radio Broadcasters were paying separate license fees for literary works and musical works to SCIPL under agreements. While one class of broadcasters including DB Corp (*previously Synergy Media Entertainment Limited*) and HT Music and Entertainment Co. Ltd agreed to pay without requiring any clarification in the agreement, Music Broadcast Limited (*previously Music Broadcast Private Limited*) agreed to pay after a clarification was added in the agreement that the agreement was not an acknowledgment that performance license fee (industry term for license fee for literary works and musical works) is payable for radio broadcast since the matter was being agitated before various Courts.

154. (a) DB Corp (*previously Synergy Media Entertainment Limited*) - Agreement dated 27 May 2006, clause 4.3- DB Corp has agreed to pay performance license fee.

(b) HT Music and Entertainment Co. Ltd. - Agreement dated 12 October 2006, clause 4.2- HT Music has agreed to pay performance license fee.

(c) Music Broadcast Limited (*previously Music Broadcast Private Limited*) - MOU dated 28December, clause 2-MBL has agreed to pay performance license fee, clause 15- clarified that the agreement was not an acknowledgment by MBL that performance license fee is payable for radio broadcast since the matter was being agitated before various Courts and the parties agreed to abide by any Court orders which settle the said issue.

155. Delhi High Court Single Judge order was passed on 28 July 2011 in *The Indian Performing Right Society Ltd. Vs. Aditya Pandey and Ors. CS(OS) No. 1185/2006* ("**Aditya Pandey first decision**") holding that a separate license for underlying works is not required when a

sound recording is communicated to the public by radio broadcast- suit has now been dismissed vide order dated 05 April 2018. Aditya Pandey first decisionaffirmed by Division Bench of the Delhi High Court on 8 May, 2012 in the case of *The Indian Performing Right Society Ltd. Vs. Aditya Pandey and Ors. 2012 (50) PTC 460 (Del.) (DB.)* ("**Aditya Pandey second decision**")

156. **Situation after July 2011 till 20 September 2016**

In this period, the Radio Broadcasters did not pay license fee amounts to SCIPL dueto the pending litigations on the issue however they furnished Bank Guarantees in favour of SCIPL (which were required to be periodically renewedas per the contractual provisions) in relation to the license fee amounts payable under contract for literary works and musical works.

(a) MBL Agreement dated 25 January 2013 - clause 4.2 and clause 4.2A- Performance License Fee disputed and Bank Guarantees furnished in favour of SCIPL.

(b) DB Corp Agreement dated 29 August 2013 - clause 4.2 and clause 4.2A- Performance License Fee disputed and Bank Guarantees furnished in favour of SCIPL

(c) Clear Media (India) Pvt. Ltd. Agreement dated 03 December 2014 -clause 4.2 and clause 4.2A- Performance License Fee disputed and Bank Guarantees furnished in favour of SCIPL

On 20 September 2016, the decision in *International Confederation of Societies of Authors and Composers v. Aditya Pandey &Ors. 2016 (68) PTC 472 (SC)* ("**Aditya Pandey Supreme Court decision**") was passed by the Hon'ble Supreme Court affirming the Aditya Pandey first and second decisions while acknowledging that the 2012 amendments have come into force after the first two decisions and that the said decisions being interim orders are of no legal effect in so far as the merits of the suit was concerned.

157. **Situation after Aditya Pandey Supreme Court decision till present**

The Radio Broadcasters have stopped paying for literary and musical works and the Bank Guarantees have been returned/revoked under agreements with SCIPL. However, the Radio Broadcasters acknowledge under agreement that in case of any monetary claim in relation to underlying works by any author or copyright society,SCIPL will not be responsible for paying monies as it is itself not receiving monies for the same any longer and the claim will have to be dealt with by the Radio Broadcasters as per law.

(a) MBL renewal deed dated 29 January - clause 2(iii)- Bank Guarantees revoked. SCIPL shall not pay for any underlying works and Radio Broadcasters agree to deal with any monetary claims in relation to underlying works as per law. The said clause is reproduced below:

"The Parties agree that if in the meantime, a claim is received by the Licensor from any author, composer or copyright society or other entity in respect of the license fee payable for communication to the public by way of radio broadcast of the underlying literary and musical works, the Licensor shall not be liable to pay any such fee, as the Licensor itself is not receiving or collecting any such fee for underlying works under this Agreement. The Parties also agree that in case a claim is received by the Licensee from any author, composer or copyright society or other entity in respect of the license fee for communication to public by way of radio broadcast of the underlying literary and musical works, the Licensee shall be at liberty to deal with the same in accordance with law. The Parties further agree that the issue concerning chargeability of license fee for communication to public by way of radio broadcast of the underlying literary and musical works in addition to Copyright License Fee is disputed by the Licensee and an identical issue is currently pending adjudication."

(b) DB Corp renewal agreement dated 24 August 2018 @ pgs 135-136 of SCIPL CC, clauses 2(b), (c) and (e)- Bank Guarantees revoked, SCIPL shall not pay for any underlying works as it was not receiving any monies for underlying works any longer and Radio Broadcaster agreed to deal with any monetary claims in relation to underlying works as per law.

(c) HT Media extension letter dated 28 October 2016 – Clauses 2(ii)(a) to (c) - Bank Guarantees revoked,SCIPL hall not pay for any underlying works as it was not receiving any monies for underlying works any longer and Radio Broadcaster agreed to deal with any monetary claims in relation to underlying works as per law. In case of order in proceedings where both SCIPL and broadcaster are parties or in case of a Supreme Court order holding that separate royalties are payable for underlying works, HT Media agreed that such royalty would be payable by it from the date of Copyright Act Amendments in 2012.

158. **THE RATES PROPOSED FOR LITERARY AND MUSICAL WORKS**

Per Needle Hour (PNH) rates proposed for literary works and musical works

Prime Time 08:00 -10:00 and 18:00-20:00	Non-Prime Time 06:00-08:00, 10:00-18:00 and 20:00-22:00	Lean Time 22:00-06:00	Cumulative Average Rate (year 2002)	Cumulative Average Rate after accounting for Inflation @3.26% from the year 2002 to present
1200	**720**	**300**	**660**	**2151.6**

In the alternative and without prejudice to the PNH rates above, in case revenue model also to be considered, the following rates are proposed:

(I) the Per Needle Hour rates for literary and musical works in (a) above Or

(II) 7.5 percent of the Gross Revenue of the FM Radio station in question based on pro-rata usage of literary works and musical works on the said FM Radio station, whichever is higher.

159. **MUSIC INDUSTRY IN INDIA IS SUI GENERIS**

(i) None of the foreign countries have this scheme under Section 31D and Rules 29-31. International rate models cannot apply to the Indian music scenario.

(ii) Music companies have to put money on the table in order to buy the music from the film producers even before things like budget (which determines how much the film will be promoted/marketed) and cast (which draws audiences to the film and in turn, the film's music) are finalized – such is the risk involved in the industry.

(iii) This is a film music driven market, unlike no other in the world. Film music and its overarching popularity among listeners is a phenomenon unique to India. For instance, within the pie chart of music consumption in the country, 50% is taken up by 'Bollywood' music, 30% by regional music which also is film music and the remaining 20% is attributed to international repertoire.

(iv) Music labels such as SCIPL are forced to acquire rights in the music of films sometimes even at highly expensive rates in order to remain competitive with other music labels and retain the popularity, premium nature and quality of its song bank. While SCIPL owns and controls one of the biggest catalogues of Bollywood and Indi-pop music, this however comes at a steep cost, per album. For instance, the cost of acquisition of the music rights in the films 3 Idiots (2009), Raavan (2010) and Ra One (2011) was over ten crores each. This cost of acquisition has seen an average increase in the range of 150-200 percent since the year 2010- the same ten crores for blockbuster film music such as 3 Idiots now costs in the range of 25-30 crores and sometimes even more.

(v) The cast and the budget of the film are relevant in order for a music company to assess what to invest in the project (towards lyricists, music composers, music directors, performers, towards studio time and equipment to record the music and towards promoting/marketing the songs etc) and what risks it may involve. Even in situations where film's cast and budget are decided and the talent for the music has been confirmed and paid for, at the end of the day, the music company still must face the biggest risk of all – the fickle and ever-changing tastes and preferences of the audience, which can turn a seemingly 'safe' project into a commercial sinkhole.

160. **Our view on the positions of SCIL**

We have gone through the documents and the points noted about the position of SCIL prior to 2011 and even later and the proceedings so transpired with SCIL as a party. We have also gone through the agreements entered by SCIL with other radio stations and it is apparent that the radio stations were paying the royalties under both the heads "performance royalties" albeit under protest which were for underlying works as well as the royalties meant for sound recording as a separate work belonging to owners. However, despite the fact the said payments were made under the protest as the position of law at that time was in flux but now we have already delved into the said aspect in great detail and the said right of the underlying works has become a shared right between the owner and authors of the literary works and musical works. Therefore, the said

agreements and payments made previously albeit under the protest go on to show that there has been consistent reckoning of the royalty for both owners of the copyright and performers rights which were earlier merged with the owners right and was not recognized as a separate right of the underlying works involving the payments to be separately provided for communication of the sound recording to the public to the authors. But the said royalties were computed and assessed and paid and the existence of the right was there though disputed by the Radio stations earlier. The said agreements gain relevance to the substantiate the said factual position. Apart from the same, we have already dealt with the submissions of the royalty fixation as canvassed by SCIL while responding to the submissions raised by the other music companies like Sony etc above. Therefore, we do not deem it necessary to repeat the same again here.

161. The other respondents have also addressed the arguments and have referred their pleadings, suggestions, written-submissions and documents. It is not necessary to refer the same they are almost similar and legal issues addressed are identical.

Royalty Fixation Based on various factors.

162. From the entire set of documents filed on behalf of the broadcasters, it has come on record the following:

i) That though the margin of the profits of the radio channel might have impact either due to Covid 19 situation or otherwise though no conclusive opinion can be formed on the same, but it can be safely said that the paying capacity of the Applicants which are major players owning 80 % of the market share in the Radio industry has remained unaffected.

ii) The Applicants are also having other businesses like digital music, broadcasting prominent TV channels and are part of the large media houses and conglomerate. Therefore, the revenue either on advertisement basis or otherwise is not an issue otherwise atleast not to an extent of payment to bring it part with the government controlled radio station which is All India Radio.

iii) All the major broadcasters were paying the royalty to the music companies more than the rate proposed to be fixed by us. They were also paying the royalty towards underline works i.e. literary and musical works earlier albeit under protest.

iv) They have purchased more channels in Phase-II and Phase-III and are also proposed to bid for further channels.The listeners of the FM radio have increased as per the record available.

v) They are allowed by the senior officers on behalf of broadcasters admitting the profits to large extent overall, however, on the last year, no doubt, the margin of profit has been decreased. We have also noticed that the expenses and infrastructure has been increased of the broadcasters of more than 75 percent. This might be one of the reasons for decrease of net profit.

vi) We have already raised reasonable suspicion on the incapacity to pay by the broadcasters in view of the wholistic assessment of the evidence available on record showing contradictory position as sought to be projected by the Applicants.

163. All the applicants and the Respondents havecontented that the international royalty rates cannot be used as a comparator. There is some force in the point. The circumstances, structure and functioning of radio and music industry, as well as the consumer base are vastly different from country to country. The regulatory and rights environment under which the private radio industry operates is drastically different across the markets. The means and methods of determining royalties are specific to the complexities and needs of stake holder environment of the music industry in the respective countries. The peculiarity of Indian radio industry is that there are no radio edits in India and the popular music primarily comprises of content from Bollywood film industry. The creation of songs require greater investments as elite authors, composers, singers and musicians need to be hired to meet the specific requirements and theme of the film songs.

164. Mr. Abhishek Malhotra, the learned counsel representing the host of radio broadcasters have submitted that the rise of newer models of smartphones has adversely affected the listenership of FM radio. Further, the Petitioners' grievance is that the advertisers have also opted for digital platform over FM radio. Whereas, the music companies allege that the advent of digital media has affected the music company more than the radio industry, as there has been no sales of cassettes or CDs, as people have moved on to the readily available options of FM channels and Internet services. The cost of music creation has also risen exponentially with the improvements in recording technology and high-definition equipment. The radio broadcasters do not create sound recordings but simply exploit them, and therefore they do not suffer risks involved in the generation of music. Mr. Amit Sibal, counsel representing one of the Respondents had pointed out that the radio broadcasters' cherry-pick the best available music and relays it.

165. The music companies contend that there is no rational or basis to the arguments of FM radio stations that they have suffered on account of tough competitions from digital platforms. Radio is adding new listenership and it has seen 53% growth in engagement year on year from 2018. The well-known media conglomerates that own and operate radio stations have significant presence in music streaming websites or Apps. ENIL is owned by Bennett Coleman Group, which controls the Gaana music streaming service. Digital platform incentivizes economic investments in the radio arm of many of these media conglomerates. Radio industry had entered into various advertisements, promotions and marketing tie-ups are deals with music streaming websites and Apps. Therefore, digital platform is a boon and not a bane for radio broadcasters. Hence it is baseless and without merit to claim that radio industry has suffered economically on competition from digital music streaming platforms is the case of the music companies.

166. As per IPRS, the radio and digital platforms cannot be compared, as to avail a digital platform, a listener has to incur costs for net connectivity/mobile connectivity; whereas, radio is a 'free-to-air' medium and not subscription based. The nature of broadcast radio and Internet radio services are widely divergent. One is a broadcast service and the other is a telecommunications service. The two services are regulated differently, pay performance royalties under separate schedules, and have wholly differing delivery architectures (broadcast being a one-way, point-to-multipoint service, and the internet being a two-way, point-to-point connection). Regardless of their movement towards parity from the radio listener's perspective, each service offers its respective operators, a different value proposition, cost-per-listener calculation and monetization model. The primary distinction between broadcast and internet radio is one of potential audience reach. Within a given service area, broadcast radio's potential audience is unlimited. On the other hand, while Internet radio's service area is essentially unlimited, its ability to serve individual users is always finite. The basic infrastructure requirements and expenses needed to access broadcast radio remain lower than those needed to access Internet radio. A permanent baseline of broadcast listenership will remain, regardless of the ultimate growth of Internet radio. Regardless of how much infrastructure is developed, it is impossible for Internet streaming services to reach the truly infinite scalability that broadcast radio inherently provides within its service area.

167. Though it may sound bit philosophical, but no one can dispute the fact that change is the law of nature. Yesteryear technologies have become obsolete and newer one has taken its place. The significance in the growth of technology is that it accelerates the impermanence. Digitalization is revolutionizing all kinds of industries and is changing the dynamics of the business, and music industry is no exception to it. Radio industry cannot insulate itself from digital revolution. No matter what in the emerging technological revolution an industry has to skillfully adapt to the growing trends and not cry hoarse. What was considered as an exceptional product few years back has become outdated today. New inventions and business models have taken over the older ones. The forerunner in the media and entertainment industry is the print media. Print media gave way to electronic media and even within electronic media radio gave way to television. Now we have quick and easy access to news and entertainment through computers and other electronic devices. Still better, we can enjoy music and listen to podcast while on the move through the palm held mobile phones. From newspaper to podcast; from theater to OTT; from terrestrial to net streaming we have travelled a long way with the surge of technologies, but in the long run we have not forsaken newspapers or theaters, still they continue to occupy a prominent position in the media and entertainment industry. Thus emerging technologies cannot be a criteria for fixing a low royalty.

168. It is a fact that many music companies have come out of PPL. Both, the music companies and PPL admit to it. It is stated that 35% of the music broadcasted is that of PPL and the

remaining 65% is that of non PPL. Many non-PPL music companies are not adhering to the 2% royalty rate fixed by the Copyright Board. Thus it could be understood that radio companies are paying more money to avail the copyrighted works from non-PPL music companies. Music companies also admit that they receive royalty in lump sum or at a percentage higher than 2. The difficulty in the entire enquiry is that both the parties have not made their complete disclosures. Radio broadcasters have not disclosed as to how much they pay as royalties to non-PPL music companies. Similarly, record labels have not disclosed their value of copyrighted works. Both figures are critical for the determination of the license fee. The contestants have tasked us the onerous duty of extracting the details from the available facts and circumstances. Be that as it may, as per the report of Dr. Praveen Chakravarthy, an eminent public intellectual and scholar the share of royalty paid to PPL and non-PPL music companies is about 5% of overall revenues. PPL music companies get a fixed royalty of 2% of net advertising revenues which translates to less than 1% of gross revenues. If total royalty revenues paid by FM radio companies to both PPL and non-PPL: music companies is 5% of gross revenues and PPL music has 35% share with less than 1% of gross revenue royalty rate, then it can be inferred that royalty paid for non-PPL music content by radio companies is around 6-7%. A mind boggling calculation, and if all the parameters are correct, then there is no reason for not believing that the radio companies have paid around 6-7% as license fee to the non-PPL sound recording companies. Having paid a higher license fee, the radio broadcasters cannot now harp that they are in distress and would not pay anything more than 2%. Radio broadcasters cannot blow hot and cold at the same time.

169. Next comes the methods for the determination of royalties. The two important methods of determining the rate of royalty for the communication of the copyrighted work for broadcasting are 1) revenue sharing method and 2) needle per hour method. Each model has its own merits and demerits. For that matter no model can be said to be fool proof, or that one model is better than the other. What has to be considered is that which of the model balances the interests of both the parties, and commensurate to the factors enumerated in Rule 31 (7) & (8) of the Copyright Rules, 2013..

170. Revenue sharing method is the distribution of the total amount of income generated by the sale of goods or services between the stakeholders. The revenue sharing model is further categorized into net revenue sharing and gross revenue sharing. Radio broadcasters insist for the fixation of royalty on the basis of net revenue sharing. They contend that the revenue sharing model is an agreed method adopted globally while fixing the rate of royalty for broadcasting. Moreover, revenue sharing model is the more pragmatic basis for determination of statutory royalty they contend. The fixation of license fee based on the percentage of net advertising revenue provides a clear correlation between the copyright work and the revenue earned by the Petitioner. They also argue that Rule 31 of the Copyright Rules, 2013 is compatible with revenue sharing model. On the other hand Respondents argued that Rule 31 is in fact compatible with needle per hour model. The fact of the matter is the said rule does not explicitly advocate either of

the models. It only suggests the various factors that have to be considered while fixing the rate of royalty. Mr. Sagar Chandra, the learned counsel for one of the Petitioners has contended that the fixation of royalty on the basis of net advertisement revenue earned by the radio broadcaster has been approved by several stake holders in the industry. Even the Government of India while granting a license to the Petitioner to permit broadcast from its Radio Stations has fixed a rate of 4% of gross revenue of the FM Channel for a Financial Year or at the rate of 2.5% of the one-time entry fee for the city, whichever is higher.

171. It is contended on behalf of the applicants that there is a symbiotic as well as direct co-relation between the radio airplay of the sound recordings owned by the Respondents and the consequent increase in advertisement revenue and resulting growth of the Petitioner's revenue with the increase in net advertisement earnings. The license fee paid to the Respondents also increases proportionately when the license fees calculated in terms of the percentage of the net advertisement earnings. Further, the license fee fixed on the basis of percentage of net advertisement revenue earned by the radio operator is a more objective criterion for the determination of license fee.

172. *Per contra*, the Respondents negated the contentions of the applicants that radio companies' business growth will benefit the music companies' growth; and that is the trend world-wide. The Respondents submitted that there is no factual or historical basis in the statement of the Petitioners, and citing FICCI Report, 2020, they pointed out that radio is responsible for 24.7% of music listening time in India; however, it only returns 2.9% of total label revenue generated by the entertainment and media industry.

173. Respondents argued that the revenue sharing model has caused grave loss and injury to the music companies. The payment made by radio broadcasters *viz.*, ENIL and DB Corp Ltd., if converted to needle per hour, reflects that it is much lower than the rate voluntarily agreed rate between ENIL and PPL in the year 1993; is lower than the rate fixed by the Hon'ble Calcutta High Court by way of interim measure in the year 2001; and is lower than the rate fixed by the Copyright Board on 19/11/2002. The Respondents' case is that even after 27 years, the radio broadcasters wants to subject the music companies to a lower rate than agreed in the year 1993. The Copyright Board order dated 25/08/2010 had stipulated a flat percentage of net advertisement revenue as the royalty. This has given an unfair advantage to the broadcasters. The Copyright Board's order of 2010 has enabled the radio industry to exploit the copyright owner at the rate of 2% of net advertisement revenue, and this has steadily declined the music industry. The said order has made the radio broadcasters immune from the risk associated with the music business. Under the net revenue sharing model, a song played on two different FM stations in the same city would generate different revenues to the music-right holder. Though FM radio constitutes 21.7% of music listening time across radio the return is just 2.9% of the total revenue.

174. The Respondents contend that the creation and acquisition of music lies at the core of revenue generation across the various verticals of entertainment and media industry, and imposition of flat royalty rate based on net advertising revenues will have a cascading effect. The annual payout of royalty to music owners is a paltry Rs. 75 crores – which is a deeply disturbing fact given that Rs. 3,100 crores radio industry is almost three times the music industry. The radio companies are able to drive up their valuation on the back of licensing of music from copyright owners. Being so, it is patently unjust for the radio industry to derive maximization of value using copyrighted works of music owners while refusing to pay fair and equitable money for the usage of such music.

175. The Respondents also vehemently argued that the imposition of flat royalty rate based on net advertising revenue discounts the enormous investments made by the music industry to produce and/or acquire music rights, especially rights in film music which due to the unique cultural matrix of Indians is an indispensable part of their music appetite. Super Cassettes owns and controls one of the biggest catalogues of Bollywood and Indi-pop music. However, this has come at a steep cost, per album. The cost of acquisition of music rights in the films viz., i) 3 Idiots, ii) Ravan and iii) Ra One was over 10 crores each. In such a vicious circle of entrenched consumer taste and rising acquisition costs, imposition of flat royalty rate based on net advertising revenue would be in utter dis-regard to the letter and spirit of Rule 31 of the Copyright Rules, 2013.

176. The Respondents submit that an advertising revenue model is cumbersome as it requires the music owner to look into the books of accounts of the radio company. The radio companies in order to avoid paying more royalty may misclassify the revenue under different heads. It is practically impossible for the copyright owner to ascertain or authenticate the figures cited as advertising revenue by the broadcasters, and this may lead to litigation. The imposition of flat royalty rate is based on the net advertising revenues is impervious to market economics and will dis-incentivize investments by all stake holders in the entertainment and media industry, ultimately harming the consumers.

177. It is more than once submitted on behalf of the Respondents that radio companies' records and statement of accounts are not transparent and it is difficult to verify their log books. As per Section 31D (7) of the Act, a broadcasting organization shall (a) maintain such records and books of account, and render to the owners of rights such reports and accounts; and (b) allow the owner of rights or his duly authorized agent or representative to inspect all records and books of account relating to such broadcast, in such manner as may be prescribed. Further, Rule 30 the Copyright Rules, 2013 details the constitution of the records and about its availability – (1) Records containing the details of the owners in respect of total number of works broadcast, the details of such works and the time slot, duration and period of the broadcast shall be maintained by the broadcasting organisation at its principal place of business and shall be open to inspection on prior notice by the owner of rights or his duly authorized agent or representative in the works during business hours and may obtain copies of relevant extracts from such records at their cost.

The broadcasting organization shall maintain separate records for radio broadcasting and television broadcasting. (2) The broadcasting organisation shall maintain separate books of accounts for communication to public by way of broadcast containing such details as may be determined by the Board at the time of fixing the rate of royalty and render to the owners of rights such reports and accounts. Therefore, it is mandatory under the Act and the Rules that the broadcasters should make available the records and statements of accounts to the music companies and they cannot refuse to comply with it. Falsification of records/statements of account is a criminal offence and the music companies can take to task the broadcasters if they indulge in it.

178. The Respondents further submit that the recent fluctuation in advertising revenues had supported their case that any royalty rate based on advertisement revenues is inherently flawed as it may be adversely impacted due to extraneous reasons which have no relation whatsoever with either the volume of music being aired on the radio stations or the copyright owners of the music.

179. The Respondents as an alternative to net sharing model suggests a gross revenue model. Their case is that the likelihood of dispute is substantially less if gross revenue is taken as the basis for the fixation of royalty. Gross revenues can be ascertained from publically verified records. A model based on gross revenue would include numerous other activities where radio companies utilize music. Non-advertising revenues now form nearly 20% of all revenues for radio companies. It would be unfair to tie music owners to a royalty attached to a specific revenue item (net advertising revenue) when the radio industry is going through a rapid change in terms of where it derives its revenue from. For the ease of administration, gross revenue sharing model should be implemented. That a percentage of gross revenue is advantage to both the Petitioner and the Respondents as the said rate can be uniformly applied. The fixation of multiple rates as per different category of cities is cumbersome for calculation and payment of license fee by the Petitioner (interestingly, the very same Respondents also have contended that different royalty rates should be fixed for different time slots and different categories of cities). Gross revenues earned by radio companies can be ascertained by copyright owners through publically accessible statement of accounts. If the net advertisement revenue is treated as the basis for royalty, the radio companies in order to avoid paying more royalty, may classify the revenues under the heads other than advertising. However, the Petitioners rebut the argument and would submit that the rate based on net advertisement revenue is preferable over the rate based on gross revenue as the prior truly reflects the response of the listeners as well as the receipt in the kitty of the broadcaster. From the forgoing one can easily understand that net revenue sharing model would not suit the interests of the music companies and the gross revenue model would not suit the interests of the radio broadcasters

180. Alternatively, almost all the Respondents insist for the fixation of the rate of royalty on the basis of Needle per Hour model (NPH). Needle power hour essentially means the

royalty rate is calculated at each aggregate of sixty minute of actual broadcast of sound recordings, excluding commercials, advertisements, voiceovers, anchor time etc. Thus the calculation is based on the actual time the music is aired to the public on FM radio stations and thereby there is a rational nexus between the royalties payable and the music being aired on FM stations.

181. **REVENUE SHARE MODEL(NAR) Vs. NEEDLE PER HOUR (NPH)**

There were many arguments advanced by the Broadcasting organizations to show Revenue Share model which was followed earlier by CB order 2010 and that should only be continued, which are summarized below:

a. That all over the world, owners of copyright, charge license fee as a percentage of net advertising revenues and not as a per needle hour rate.

   International practices are not a good comparator for the Indianregime. That it would be incorrect to compare the Music Industry in India with practice in the music industries in other jurisdictions, since the mechanics and functioning of the music industry in India is dependent upon the facts and circumstances unique in India. Therefore data relating to and collected from otherjurisdictions cannot be relied upon. The same was also upheld by the Hon'ble Supreme Court in *Entertainment Network India Ltd. v. Super Cassettes Ltd. 2008(13)SCC30 at para 140.* Every country has different market conditions, consumer demand, product catalogue, pricing levels, economic condition, licensing system and statutory provisions. Comparing data from other countries without going into the details of reasons put forth by the authorities in those jurisdictions would be incorrect

b. That in Phase II and III of licensing of radio stations, the Government of India has also adopted a revenue share model as opposed to an absolute figure model for payment of License Fee and other charges under the Grant of Permission Agreement.

   To quote from para 30.14 of CB Order 2010, License fee charged by the Government, whether under First Licensing Policy or Second Licnsing Policy, is in the nature of a State levy charged by the Sovereign and hence no analogy therefore can be drawn for royalty fixation.

c. That a royalty rate fixed on the basis of percentage of net advertisement revenue earned by the Applicant radio operator is a more objective criteria for determination of royalty payable.

   The purpose of Section 31D is to cut down transaction cost and time in negotiations and also avoid litigation as broadcast of works without a license by Radio Broadcasters would amount to infringement of copyright as can been seen from clause 15.2 and 15.4 of the Parliamentary Standing Committee Report. The NAR sharing model makes it entirely and wholly dependent on broadcaster-

business alone and how efficient or inefficient he is in conducting his business affairs. An efficient broadcaster which garners more revenue is made to pay more, while an inefficient broadcaster with little to no revenue will have to pay very less or nothing. The Content owner's/Music companies' entitlement to receive a fair rate cannot be dependent on broadcasters' business. So here the more objective method should be one which is not prejudicial to both the parties.

d. That the revenue share model has flexibility to adjust during economic periods of either upturn or downturn. It can also adjust for inflation.

   The economic upturn or downturn including inflation all can be addressed irrespective of the NAR or NPH model of royalty calculation through Rule 31(9) by which the Appellate Board can revise the rates annually or once in two years.

e. That the revenue share model takes into account the city wise differential.

   In NAR one rate has to be fixed across the board for all categories including city wise differential as otherwise it would be cumbersome to arrive at NAR for multiple royalty rates.

f. A rate of license fee, based NAR provides a clear co-relation between the copyrighted works used and the revenue earned by the Applicant.

   It is true that NAR has a direct co-relation between the income earned by the Radio Broadcaster through advertisement to the royalty paid for the copyrighted works, however NAR model will not correlate the royalty paid to the nature and the use of copyrighted work.

g. A fixed fee model based on needle hour rate, fails to consider the growth of revenue and/or losses incurred by the radio industry.

   The financial statements produced by some of the applicants for the past 10 years shows only reduction in the profit for the Radio companies and decline in their CAGR, but not losses. Even the applicant filed FICCI – Ernst & Young Report on Media & Entertainment, 2019 states that the radio industry has recorded a growth rate of 7.8%. Further the balance sheet produced by the Applicant Companies also show that their royalty fee, Government license fee and other fixed costs do not exceed 20% and the operating costs contribute to another 70%, which shows that they are nevertheless making profits in the Radio industry but might have reduced/lowered due to various factors like economic downturn, advent of new media like internet streaming.

As opposed to this the Copyright owners/music companies have vehemently opposed the revenue sharing model and canvassed for Needle Per Hour which are accepted by this Board due to following reasons:

a) NPH royalty rates for the statutory license takes into consideration the actual number of times the Content is broadcasted by the radio broadcaster, as verified and substantiated by the logs maintained by the latter in this respect, which is also in compliance with Rule 30 of the Rules.

b) A reasoned basis for using NPH, on account of the fact that the same deals with both the interests of radio broadcasters and content owners by employing a "pay for play" approach. For example if a radio broadcaster is playing a song in tier D city at Lean hour he will be paying lower amount of royalty for the playing the same song by him at peak hour and significantly lower amount of royalty to that of a radio broadcaster paying and playing the same song at peak hour in Tier A city.

c) As such, the NPH is a better approach to royalty fixation than flat percentages of advertising revenue, as the latter does not have any link to the amount of Content that is being utilized by the radio broadcasters and no differentiation is also made with respect to the paying capacity of the Radio broadcaster.

d) The scheme of statutory licensing under Section 31D r/w Rules 29 and 31 of the "Act" and the "Rules" is less compatible with revenue sharing model and highly compatible with Needle per hour model. Rule 31(7) provides for factors to be taken into consideration while fixing royalties. These include time slot variation, geographical location etc. in which the broadcast takes place and different rates for different time slot including repeat broadcast; Therefore, the Act supports the PNH model which is different for different time slots and is incompatible with fixation of a single flat rate which is NAR model.

Section 31D r/w Rule 29 mandates the broadcaster to give prior notice and make an advance payment for the work going to be utilised as per the royalty rate fixed by the Appellate Board. NAR will make this exercise difficult as the Net Advertisement Revenue for the period of utilisation of copyrighted work will not be available. Advance payment of Royalty will also be difficult, however in NPH model of royalty these difficulties are not there.

182. Some Respondents have also suggested a hybrid model. They want the best out of the both worlds. In fact the recently prepared tariff by the PPL has adopted a 'hybrid model' that amalgamates an - either/or - approach between 'per needle hour rate' (PNH) and 'percentage of net advertisement revenue' (NAR), whichever is higher, in order to arrive at an appropriate rate of royalty to the copyrightowners. PPL claims that the hybrid model acts as a perfect model across all cities and stations as it allows the music industry to gain the best possible rate out of the two approaches (whichever ishigher). The hybrid model proposed by PPL levies a higher tariff, and it would not strike a balance between the interests of the radio broadcasters on the one side and that of the music companies on the other.

183. Without dispute it can be said that music is the main content for private FM radio broadcasting. Music for the radio industry is a finished product. Radio broadcasters derive the fruits of the finished product by communicating it to crores of listeners in India, however at a meager compensation to the copyright owners. Though Radio industry does not invest in creation of music content, it devotes 70-80% of average airtime to recorded music. Radio industry is supported by government, as well as by its parent media companies. Nothing restricts FM radio broadcasters to produce content. However, radio broadcasters have limited their investment in content generation. The 2% royalty rate has dis-incentivized radio broadcasters to invest in necessary technology and personal to deliver quality content. Now, the radio companies have the advantage of valuable foreign investment after the Government had permitted 49% FDI in that sector. But the music industry doesn't have the aforesaid advantage of Radio industry, and it has grown on its own strength.

184. Interestingly, it was argued from the side of the music companies that an adequately high statutory rate provides bargaining power to the radio broadcasters to voluntarily negotiate lower than the prescribed rates with the mid-sized/smaller music companies with diverse music catalogues in return ensuring that their content is communicated to the public on the FM radio stations. The said argument cannot be fathomed. It can be converse that if the statutory rates are less it will give a bargaining power to the radio broadcasters to convince the small and mid-sized music companies to agree for a voluntary license at a reasonable rate. Radio industry is peculiar because there are many instances where the copyrighted owners have requested the radio broadcasters to air their content without royalty so as to promote it. There are cases as well where the copyright owners have paid money to radio operators to play their music. It was also noted that the big music companies had paid money to the broadcasters to air their newly released songs, which has fallen in to their kitty, to popularize it.

185. The music companies also vociferously contended that they are required to strategically balance its investments by monetizing the rights of tent-poll films at a greater rate to either set off its tremendous acquisition cost or set off previous losses or to set off risk of investing in the music production of an un-known artist or acquisition of music of a relatively smaller or independent label. The music companies can recoup costs and take creative risks, develop new talent, introduce fresh genres of music and invest in technologies only in a free market. The imposition of flat royalty will upend the market forces and disincentives music owners from carrying out the aforesaid activities. If the royalty is lower, it hurts the entire music industry. low royalty disincentives creativity by stunting the risk taking ability of music companies, which in turn will be detrimental to artists - newer artists may not get 'launched' or promoted and the industry will rely on 'safe bets' in the nature of established artists. In effect, the consumers would be the losers. The said argument of the Respondents can be accepted to some extent, but not fully,

because the music companies have not given the whole picture. Broadcasting of the music is not the only source of income generation for the music companies. There are other mediums/platforms in the market which utilize the music content for communicating it to the public, *viz.*, cellular network providers use sound recording for caller tunes/ring tones; computers stream music using internet; mobile apps also stream music; and public performances can also be carried out. Despite the forgoing, it can still be said that, in India, major portion of consumption of music is through radio.

186. Apart from the above, two other interesting points raised by the Respondents are, 1) that the parties should negotiate for the rate of royalty in a free market and 2) piracy and loss of physical sale affects music companies. Copyright Act, 1957 envisages three types of licensing, v*iz.,* 1) Voluntary licensing, 2) Compulsory licensing and 3) Statutory licensing. The broadcasters always have the right to negotiate with the copyright owners and arrive at the terms and conditions for voluntary licensing in a free market. Only if voluntary licensing did not happen the broadcasters need to approach IPAB, exercising their option either under Section 31(1)(b) for compulsory licensing or under Section 31D for statutory licensing. Piracy and loss of physical sales like CDs and cassettes are part of the business. What applies to goose will equally apply for gander. If digital platform is a cause of concern for radio companies; piracy and loss of physical sales is the cause of concern for music companies. These difficulties are part of every industry and trade. Piracy has to be countered through appropriate proceedings before the criminal courts and there are laws and procedures to tackle it. As far as the loss of physical sales are concerned the business policy should change so as to keep abreast with the changing technologies and business climate. The aforesaid issues cannot be the factors so as to tilt the balance in favour of the music companies in determining the rate of royalty.

187. MANDATE UNDER RULE 31(7)(d)

187.1 Rule 31(7) (d) states that while determining royalty the Board has to contemplate the prevailing royalty standards with regards to the works along with other factors enumerated in Rule 31(7). One such prevailing rate available is the 2% NAR paid by FM Broadcasters to various music companies, which if converted into PNH will vary year to year due to the variation in their advertisement revenue. For the purpose of arriving at royalty calculation we shall take advertisement revenue of the preceding financial year i.e. 2019-2020. One of the Applicant DB Corp. Ltd. in its pleadings have stated that that the needle per hour(NPH) rate conversion of the royalty fee paid to PPL at 2% of NAR for FY 2019-2020 amounts to INR 230. Almost all the other applicants and PPL have also stated that the converted NPH amount is at the same range. Similarly, the needle per hour rates paid to Non-PPL music companies by the Applicant, amounts to around INR 389 to 448 according to the parties. It means 1% roughly comes to INR 115.

187.2 Out of the Compulsory License regime, there were a few music labels with whom Applicant Radio Companies have negotiated voluntary license agreement, which is also to be considered for arriving at prevailing rate of royalty. One of the music companies SCPL has entered into licensing contracts with more than 20 FM Broadcasters including the following applicants (a) Music Broadcast Limited (MBL), (b) DB Corp Limited, (c) HT Media Limited, (d) TV Today Network Limited, (e) Next Radio Limited, (f) Clear Media (India) Pvt. Ltd, (g) Entertainment Network India Limited (ENIL). The contractually agreed PNH rate for sound recordings is as below:

Prime Time 08:00-10:00 and 18:00-20:00	Non-Prime Time 06:00-08:00, 10:00-18:00 a 20:00-22:00	Lean Time 22:00-06:00	nulative Average Ra
1200	**720**	**300**	**660**

187.3 It is also pertinent to note that Rs. 1200 per needle hour was fixed, for prime time for a period of two years, i.e. 2002 to 2004, by the Copyright Board on 19 November 2002.

187.4 Now we have for the purpose of prevailing rate of royalty the 2% NAR which converted comes to INR 230 (paid till 30th September 2020) in one end of the spectrum and INR 1200 (paid till 30th September 2020) from the voluntary agreements entered into between one of the music companies and the Applicants herein at the other end of the spectrum. This makes it abundantly clear that the amicable rate that has to be considered for determination, exists somewhere in-between these two rates.

187.5 It is also pertinent to note the Tariff rates (per needle hour rates) sought by Radio Broadcasters in 2001-02 before the Copyright Board:

S. No	Radio Broadcaster	FM Station	Rate offered and sought by Radio Broadcasters
1	Entertainment Network India Limited (ENIL)	Calcutta, Chennai, Mumbai, Delhi, Ahmedabad. Bhubaneshwar, Cuttack, Hyderabad, Indore, Jabalpur, Lucknow, Pune	Rs. 191 PNH
2	Music Broadcast Pvt. Ltd. (MBPL)	Bangalore Mumbai, Delhi Lucknow, Patna, Nagpur	Rs. 200 PNH Rs. 250 PNH Rs. 125 PNH
3	Radio Mid Day West India	Mumbai	Rs. 101 PNH

4	Millennium Chennai Broadcast Pvt. Ltd.	Chennai	Rs. 77 PNH
5	Millennium Mumbai Broadcast Pvt. Ltd.	Mumbai	Same please and reasoning as Millennium Chennai Broadcast
6	Millennium Delhi Broadcast Pvt. Ltd.	Delhi	Same please and reasoning as Millennium Chennai Broadcast

187.6 Also pertinent to note is the Tariff rates (per needle hour rates) sought by Radio Broadcasters in the year 2008 before the Copyright Board:

S. No	Radio Broadcaster	FM Station	Rate offered and sought by Radio Broadcasters
1	Synergy Music	Indore, Bhopal, Jabalpur, Gwalior, (MP) Raipur, Bilaspur(Chgrh) Jodhpur, Udaipur, Kota, Ajmere(Raj) Ahmedabad, Surat(Guj) Chandigarh, Jalandhar, Amritsar (Punj), Nagpur	Rs. 660 PNH (A+) Rs. 528 PNH (A) Rs. 330 PNH (B) Rs. 99 PNH (C) Rs. 59.4 PNH (D)
2	Entertainment Network India Limited (ENIL)	Bangalore, Jaipur, Hyderabad, Patna, Jallandhar, Panji, Bhopal, Vadodara, Rajkot, Kanpur, Nasik, Varanasi, Aurangabad, Lucknow, Raipur, Jabalpur, Nagpur, Kolhapur, Surat, Visakhapatnam, Vijayawada, Coimbatore, Madurai, Mangalore, Thiruvananthapuram	Rs. 400 PNH
3	Puran Multimedia Pvt Ltd	Agra, Varanasi, Bareilly, Gorakhpur, Ranchi, Hissar and Karnal	Rs. 315 PNH (B) Rs. 135 PNH (C) Rs. 100 PNH (D)
4	Rajasthan Pathrika Pvt	Jaipur, Udaipur, Raipur, Kota	Rs. 660 PNH (A+) Rs. 528 PNH (A) Rs. 330 PNH (B) Rs. 99 PNH (C) Rs. 59.4 PNH (D)

188. One of the Respondent has raised an issue that the "prevailing standards of royalties" required to be considered under Rule 31(7)(d) of the Copyright Rules, 2013 is the voluntary licensing rates, and not the rate fixed by the Copyright Board on 25/08/2010. It is wrong to contend that prevailing standards of royalties mean only the voluntary

licensing rates. Some radio companies pay royalty in lumpsum; some as a percentage of net advertising revenue; some on gross revenue; some on the basis of needle per hours. All these can be encompassed under the category 'prevailing standards of royalties'.

189. Mr. Akhil Sibal, counsel for one of the Respondents had pointed out that the radio broadcasters are repeatedly playing sound recordings so as a saturation is reached in respect of those particular sound recordings, which deters the masses from purchasing music from the music companies, and hampers its business. Mr. Sibal's contention is that the rate of royalty ought to depend on such repeated playing and popularity of the sound recordings. This issue instantly reminds of the age old question, which came first: the chicken or the egg? A song is repeatedly played because it is popular, or is the playing of it makes the song popular? Radio broadcasters have submitted that music companies have paid money to them to broadcast and popularize a newly released song of their repertoire. Thus, music companies should not blow hot and cold. Further, what is the saturation point, one may not know, and it differ from person to person. Who has to gauge the popularity of the song and what is its yardstick; when the song has become popular; does the repeated playing of it had resulted in saturation; does the saturation had hampered the business of the music companies; is the saturation a relevant point under the Act/Rules for the determination of royalty, all these needs to be answered and substantiated. Though, Rule 31(8)(d) envisages that the Board while determining the royalty shall take into consideration the factors like use of the works in excess of the duration, thereby meaning "excess of duration", and not "saturation". It goes without saying that excess use will entail excess payment in whatever method the royalty is calculated. Having said that the IPAB for the time being is not willing to concede different rate of royalty for the repeated playing of the songs.

190. It was also contended that the newer works should get higher royalty compared to older works. Specifically, it was argued that the songs which are released not more than three years to the date of airplay fall into the category of premium and the royalty rate should be higher for that. The justification may be on the premise of popularity, or on the cost of acquisition. As for as the age of the songs are concerned it cannot be decisively said that new songs are popular *vis-à-vis* the old songs. Many old songs are evergreen and popular throughout; whereas, new song disappears after few airplays. The adage 'old is gold' pithily applies to songs. So, the age of the song cannot be the conclusive factor in determining its popularity. The same reasoning can be given in respect of cost of acquisition also. Consumer tastes cannot be easily gauged. A music company would have acquired a song by paying heavy cost but it would not rise to top of the chart, contrary to it, a run-of-the-mill song may become a blockbuster. So, royalties cannot be based on expectations or chances, or on the basis of any strait jacket formula, when the commodity against which it is to be fixed is based on consumer tastes and preferences.

191. The next interesting contention of the Respondents is that the broadcasters play full songs instead of shortened radio versions thereby significantly deterring the masses from accessing music through paid model. The charges for playing the entire song must be higher than the charges applicable for playing radio edits. There should be penal rates for playing a premium song or a newly released song beyond 4-5 times a day. In the West, the songs that are shortened (radio edits) are broadcasted; however in India, full length songs are broadcasted thus causing a level of saturation amongst the listeners, who then will refrain from buying/downloading the said song, thereby causing loss to the music company. This is something similar to what has been dealt and decided in the preceding paragraphs, except for radio edits. The Rules 31(7) & (8) of Copyright Rules, 2013 are not penal in nature; it only adumbrates the factors that are to be considered while determining the royalty. So, therefore, no penalty can be imposed on the broadcasters for playing the song or a newly released song beyond 4-5 times a day. Further, it is not fool proof that playing the entire song compared to radio edits causes a level of saturation amongst the listeners and deters the masses from accessing music through paid model. Broadcasting of radio edits in the west cannot be a justification for doing the same in India. After all, it is the case of the Respondent Music Companies that international comparator cannot be the yardstick for determining the royalty in India. Having said so the Respondent cannot now vacillate when it suits them. The Respondents cannot apocopate and reprobate.

192. Sound recording is not a commodity but an intellectual property right which has drawn significant capital investments by the music company in terms of acquisition cost, maintenance, storage and distribution. Section 31-D of the Copyright Act, 1957 is expropriatory in nature. It has the effect of expropriating the exclusive rights enjoyed by a copyright owner. Being of such a nature, it becomes all the more necessary that such a provision is applied in accordance with due process and keeping in mind the interests of the copyright owner as balanced against the public interest to access music by way of radio broadcast. Thus, giving prominence to the commercial interests of radio broadcasters in fixing royalty rates under the said provision would not only be prejudicial to the copyright owner but would also skew the balance heavily in favour of the radio broadcasters contrary to the letter and spirit of the said provision.

193. The fair value of copyright works cannot be based on loss or profit of the radio broadcasters which is wholly unrelated to the copyright owner and reliance on such extraneous and irrelevant factors to make payments to music owners for their copyrighted works is totally out of sync with basic principles of economics and market functioning. Therefore the rate of royalty based on advertisement revenue or gross revenue is no longer fair and justified. Further, the royalty model to be determined must be sensitive to free market requirements and benefits; else the same will simply be an exercise in subsidizing the private FM radio at the cost of imposing a financial burden upon copyright owners.

194. Considering the facts and circumstances; the pros and cons of each points raised by the parties; the ground realties and feasibility; on the basis of the statutory provisions, it is held that Needle per Hour (NPH) would be the appropriate method for the determination of the rate of royalty (license fee) for the communication of the sound recording through FM radios by way of broadcasting.

195. **Muted Growth of Radio Industry is considered under Rule 31(7) (f).** The radio industry is saddled with humungous input costs by way of fixed costs as mandated by Prasar Bharati and Ministry of Information and Broadcasting (**MIB**) such as license fees for airwaves, Wireless Operating License Fee, Prasar Bharti Tower Rental Fee, Operation and Maintenance of Common Transmission Infrastructure, the One Time Entry Fee under Phase III and percentage of revenue shared with MIB. These costs are absent for the music industry. Furthermore, the Radio Broadcasters also incur costs on various fixed heads including employee cost, equipment cost etc. It is noteworthy that for FY 2019 - 2020, the average cost incurred by the Applicant Radio Companies on fixed heads such as employees, statutory costs and rentals were 40% to 47% of their revenue, which leaves a maximum of 5 to10% of NAR that can be allotted for Royalty for the music companies.

It appears to us that Rule 31(7)(f) is merely exceptional which can be applied under peculiar circumstances to fix the royalty under NAR otherwise the main mandate of the Rule 31(7) is to fix the royalty as per NPH. It is pertinent to mention here that when the Copyright Board on 25.08.2010 fixed the royalty on the basis of NAR. The mandatory provision of Section 31(D) and Rules 29 to 31 were incorporated in the statute only in the month of June, 2012,therefore, the earlier order passed by the Copyrights Board is not binding upon us which is also subject matter of appeal pending before Chennai High Court and the prayer was granted under compulsory license under Section31(b) of the Act. Therefore, the arguments addressed on behalf of the broadcasters are rejected.

196. On the contrary revenue earned/possibility of augmenting their revenue, by way of utilisation of the same music content by the Music Companies on the emerging digital platforms, internet streaming applications etc. especially by way of global licensing deals with entities such as Facebook and Instagram etc., evident from some of the materials produced before us.

197. Importance of radio in a country cannot be undermined. It is submitted that broadcasting of content through FM radio stations aims to achieve a larger public interest by acting as a vehicle of social upliftment and education. Radio stations have been considered as enablers and information providers that not only create awareness among people but also assist in authentic information dissemination. Out of the 1,100 operational radio stations, as of 2019, a total of 33 private FM broadcasters operate only 367 FM radio stations

whereas the public broadcaster i.e., Prasar Bharati's All India Radio operates 470 centers having outreach to across 99% of Indian population.

198. FM radio broadcasting in private sector is free to air, without charging any fee to consumer, unlike non-interactive streaming on internet broadband or DTH music subscribers. The listener is not saddled with any cost except the cost to be incurred for buying a radio set. Private FM radio broadcasting is very restrictive in matters of broadcasting – there are restrictions on broadcasting news and current affairs, sports updates and live commentaries of matches. In the successive Government licencing policies, FM broadcasters in private sector are disentitled to variety of income beneficial broadcasts which are permissible to the state sector broadcaster, that is, All India Radio. This restricts the monetisation avenues for the FM broadcasters.

199. The Applicants have submitted that the financial health of the radio industry is not as rosy as painted by the music companies. The financial statistics submitted and various reports also confirmed the fact that there is a decline of growth for the radio industry for the past few years. This may be due to manifold reasons such as proliferation of digital platforms resulting transition of advertisements from radio to digital platforms, decrease in advertisement revenue on account of economic slow-down, increase in manufacture and use of smartphones without radio chips/ receptors etc.,. The FICCI Reports 2018, 2019 and 2020 as well as KPMG Reports 2019 and 2020 that are submitted also reflects the same.

200. The advertisement revenue of the radio industry is also on a decline for the past few years. It is noteworthy that in the year 2019, radio advertisement expenditure volumes fell by 11%. Furthermore, a perusal of KPMG Report, 2020 shows even central government advertisement spends in FY 2020 is lower than previous years. It is noteworthy that radio industry's revenue has declined from INR 28 billion in 2019 to INR 25 billion in 2020, **recording an 11% decline**. The advertisement revenues earned by the radio industry has witnessed a 13% decline in FY 2020 as per the FICCI Report 2020.

201. In addition to the fact of decline in advertisement revenue of the radio industry, it is also to be considered that the advertisement inventory of the radio operators including the Applicant Radio Companies are limited. As per the IMI Vision Report, 2022, radio channels that opt for advertisement beyond 10 mins per hour, tend to lose listeners. In view of this limitation on ad inventory along with the decline in advertisement revenues of the radio industry, it was submitted by the Radio Broadcasters to fix statutory license fees at a nominal rate within their paying capacity.

202. COVID 19 pandemic is an unusual thing to happen in the year 2020. The lockdown to tackle the Covid crisis had not only affected the radio industry, but every other industry in the country. Vaccines are getting ready, and hopefully the pandemic should come to an

end in the near future. In the Covid crisis all industries are at par. Granting concession to radio industry will prejudice the music industry. It would be worthwhile to record few compelling facts that have been placed across the bar with regard to Covid and radio/music business. The listenership of radio has grown during the lockdown as public engagement with radio has increased. Some CEOs of the reputed radio companies are very positive about the prospects. However, music companies have alleged that they are hit by the pandemic at multiple levels. In the wake of the lock-down and stringent social distancing norms, live events ended overnight bringing an end to all licensing opportunities for the music industry. Ordinarily, music industry recoups its investments in its content by providing licenses for award shows, competitions, music festivals etc., however, due to the pandemic, the said licensing opportunities could no longer be availed. Adding to this uncertainty, the main source for film music has been turned off on account of postponement of theatre releases and closure of cinema halls. All ongoing and fresh shooting of films have been put on hold. Even the few film shootings that are now taking place are inevitably incurring increased costs on account of massive logistical re-configuration and resultant delays at every stage in order to comply with stringent social distancing codes. Nevertheless, PPL, IPRS and some music companies are providing 30% discount to radio industry to mitigate the pressure brought about by Covid lockdown. The counsel for PPL, Mr. Pragyan Sharma went on record to state that his client would continue to provide 30% discount until during the lockdown, and the same is appreciated by the Board.

203. On account of the COVID- 19 pandemic, radio industry's advertisement revenues have further declined on account of decreased advertisement expenditure. During the COVID-19 pandemic as per a research conducted by the radio association AROI, the said increase in listenership has not translated to an increase in advertisement revenues of the radio industry as most segments of the economy, including advertisers on radio, were either shut down completely or suffered a huge business loss. This is evident from the KPMG Report, 2020.

204. Having decided NPH is the appropriate method for determining the rate of royalty, now the crucial issue is the determination of the royalty (license fee). The Respondents have proposed their rates which they wish to collect as license fee from the radio broadcasters. PPL has come forward with a recent tariff. But as stated *supra* the tariff arrived by PPL, and as well as by the music companies are on the higher side and it will skew the scale in their favour, and burden the radio broadcasters. Similarly, what the radio companies paying as per the orders of the Copyright Board, 25.08.2010 is too low a figure. Thus a balance has to be achieved. In that regard the rates paid by All India Radio is taken as the basis.

205. As per an RTI reply, which copy was furnished to us, the AIR is paying royalty on the following basis

TO PPL and NON-PPL (w.e.f. 2017-2018 to 2019-2020)	
Primary Channel	Rs 375 per hour
Vividh Bharti/CBS	Rs. 500 per hour
Metro-FM	Rs. 750 per hour
Non- Metro FM	Rs. 650 per hour

IPRS (w.e.f. 2017-2018 to 2019-2020)	
Only for Foreign Works	Rs. 100 per hour
[Western Music]	
Indian Works	**NO PAYMENTS MADE TO IPRS**

206. Under Rule 31(7) (a) different rates for following different time slots are given.

a) Prime Time between - 8 Am to 10 Am & 6 pm to 8 pm

b) Non prime time between 6 am to 8 am, 10 am to 6 pm & 8 Pm to 10 pm.

c) Lean Time or night time - 12 am to 6 am & 10pm to 12am

207. Under Rule 31 (7) (e), categorisation of cities were made as per Ministry of Information & Broadcasting classification based on Population census of 2011 which forms part of the Grant of Permission Agreement (GOPA) entered between Ministry of Information and Broadcasting and the Radio Broadcaster.

208. Needle Per Hour(NPH) is the internationally accepted term denoting the actual time for which music is played during an hour excluding the advertisements, promotional and the presentation time taken by the radio jockey.

209. As we stated earlier the prevailing rate of royalties are ranging from INR 230 to INR 1200. In order to fix the Royalty for Sound Recording we are considering the royalty rate of All India Radio METRO CHARGES INR 750 AS THE MAXIMUM CAP and from that all the other rates can be derived for all sub categories arrived in compliance with Rule 31. The Royalty for the underlying literary and musical work is to be capped at INR 300.

210. **Royalty rate table u/s 31D for broadcasting Sound Recordings in Private FM Radio valid from 01.10.2020:**

LICENSE BASED CITY CLASSIFICATION OF FM BROADCASTERS	PRIME TIME @100 08.01 hrs to 10.00 hrs 18.01 hrs to 20.00 hrs	OTHER TIME @50% 6.01 hrs to 08.00 hrs; 10.01 hrs to 18.00hrs& 20.01 hrs to 22.00 hrs	LEAN TIME @25% 00.01 hrs to 06.00 hrs 22.01 hrs to 24.00 hrs
TIER A+ FULL RATE SOUND			

RECORDING	INR 750	INR 375	INR 188
TIER A+ FULL RATE UNDERLYING WORKS	INR 300	INR 150	INR 75
TIER A 20% REDUCTION SOUND RECORDING	INR 600	INR 300	INR 150
TIER A 20% REDUCTION UNDERLYING WORKS	INR 240	INR 120	INR 60
TIER B 40 %REDUCTION SOUND RECORDING	INR 450	INR 225	INR 113
TIER B 40% REDUCTION UNDERLYING WORKS	INR 180	INR 90	INR 45
TIER C 60% REDUCTION SOUND RECORDING	INR 300	INR 150	INR 75
TIER C 60% REDUCTION UNDERLYING WORKS	INR 120	INR 60	INR 30
TIER D 80% REDUCTION SOUND RECORDING	INR 150	INR 75	INR 38
TIER D 80% REDUCTION UNDERLYING WORKS	INR 60	INR 30	INR 15

All rates have been rounded off.

211. Considering that the royalty rates being proposed are lesser than rates fixed by the Copyright Board 18 years ago, but significantly higher than rates fixed by the Copyright Board 10 years ago, we believe the proposed rates are fair for both music companies and radio broadcasters, and seeks to achieve a harmonious symbiotic relationship between the concerned parties.

212. The royalty rate of INR 1050 at the TIER A+ peak time from the point of view of Music Companies should be satisfactory as it roughly 9% of NAR based on 2019 financial data of Broadcasters, which is far higher than 2% erstwhile received by them and even higher than 7% NAR demanded by some of the music companies in this proceeding. Similarly, the Applicant Broadcasters should also be satisfactory with the current lower royalty rate range of INR 1050(TIER A+ Prime Time) to INR 15(TIER D Lean Time) as they have earlier paid INR 1200 (For SCPL) to the lowest INR 230 (2% NAR).

213. The royalty income from the radio industry can be enjoyed by the music companies only as long as the radio industry flourishes and grows well. In turn, for the radio industry, nay the entire music industry, to progress, it is essential that the authors of the various works, who constitute the foundation and backbone of the industry, are also appropriately remunerated.

214. The rates set out under Section 31D will become a benchmark for the radio industry and they can simply give notice and make advance payment, as per Rule 29 to start broadcasting the sound recordings. Needless to say, the Music Companies also using the bench mark can negotiate for voluntary license agreements u/s 30 for a lump sum amount or any rate suiting to the convenience of both the parties.

215. We hereby direct that the above mentioned royalty rates set out in para.149 for broadcasting sound recordings payable respectively for the sound recording and for the underlying literary and musical works as envisaged under Section 31D with effect from 1st October 2020 to 30th September 2021. We further direct that :

a. The above royalty rates shall be published in the IPAB Website and Copyright Office website.
b. The new royalty rates comesinto effect from 01.10.2020.
c. The radio broadcasters have to pay the arrears of royalty to the music companies on or before 10.02.2021 for the period of 01.10.2020 to 31.01.2021. As far as royalty fixed by us for underlying works of sound recording is concerned, the same shall be distributed as per the amended provision of proviso 3 & 4 of Section 18 and 19 of the Act. With regard to receipt of royalty from the broadcasters pertaining to sound recording which has been fixed by us, the broadcasters shall pay the same to PPL on behalf of their members, rest of the same shall be paid directly to the respective parties. Similarly, the share of author and composer fixed by us for underlying works shall be fixed by IPRS on behalf of the authors and composers being members to be paid. The non-members of the IPRS shall be entitled to receive the royalty directly from the broadcasters.

d. The radio broadcasters have to comply with Rule 29 of the Copyright Rules, 2013 to obtain statutory license from the music companies, by giving advance notice to the owner of the copyright along with an advance payment as per the above royalty calculation with effect from 01.02.2021. The same notice copy has to be sent to the Registrar of Copyrights for records.

e. In case, the respondents would insist for advance payments as mentioned in the Rules, we are of the view that since COVID 19 pandemic is an unusual thing to happen in the year 2020. The lockdown to tackle the Covid crisis had not only affected the radio industry, but every other industry in the country. Considering the peculiar circumstances till 30.09.2021, we direct all the broadcasters to deposit 25% (twenty five percent) as advance amount under the compliance of Rule 29, subject to adjustment of amount every calendar month.
f. As far as regional songs and small broadcasters having one or two radio stations having total gross income of less than 10 crores, they are free to negotiate with the music companies under Section-30 of the Act as per earlier practise either to play in lumpsum or as per terms and conditions decided by them.

g. The royalty rates shall be reviewed by the Board as per Rule 31(9) at the end of the said period either suo motto or on the application by any interested person.

h. The rate determined under these proceedings will act as a base for future revision/change in the rates, where this entire process need not be replicated, except taking into considerations, change in the financial details, paying capacity of the Radio Broadcasters, the effect of pandemic and all other relevant factors etc. which have been given due consideration.

i. All the Petitions are allowed in terms of the royalty determined hereinabove.

j. Indian Performing Rights Society/Authors (lyricists & music composers) are also entitled to claim their share of royalty from the assignee.

k. No costs.

216. Lastly, we would like to extend our appreciation for all the senior counsels and other counsels appearing from all the parties who have provided their able assistance in this matter by providing their oral and written submissions. We would also like to extend thanks to the artists, lyricists and experts who have appeared before us in order to apprise us with the industrial practice domestically as well as internationally.

-Sd/-	-Sd/-	-Sd/-
Hon'ble Shri N.Surya Senthil **Technical Member (CR)**	**Hon'ble Shri SP.Chockalingam** **Technical Member (CR)**	**Hon'ble Shri Justice Manmohan Singh** **Chairman**

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