



**INTERPRETING
STATUTORY LICENSING UNDER
SECTION 31D OF THE COPYRIGHT
ACT**

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Abstract

The present research article involves a substantial question of law of wide-ranging importance pertaining to the interpretation of Section 31D of the Copyright Act, 1957 as amended by the Copyright Amendment Act, 2012. The question of law arising for interpretation may be stated as under:

- (a) Whether Internet broadcasting is covered under the purview of Section 31D of the Copyright Act, 1957?
- (b) Whether the Government can exercise its powers to come up with an Office Memorandum that goes beyond the statutory law?

The Government of India through the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, vide an Office Memorandum dated 5th September 2016 ('the Memorandum'), issued under the Act, had sought to state that the provisions of Section 31D of the Copyright Act are not just restricted to radio and television broadcasting but cover even internet transmissions. The present article discusses in detail the contents of the said Office Memorandum, F.NO. 14-35/2015-CRB/LU (IPRVII), dated 5th September 2016

issued under the Act, as being contrary to the Act and ultra-vires Section 31D.

Introduction

The object of the Copyright Act, 1957 ('the Act'), enacted on 04.06.1957,¹ is to encourage authors, composers, artists and designers to create original works by rewarding them with the exclusive right for a limited period to exploit the work for monetary gain. It protects the writer or creator of the original work from the unauthorized reproduction or exploitation of his materials. Copyright subsists only in the material form in which the ideas are expressed. Furthermore, the Copyright Amendment Act, 2012 ('the Amended Act')² inserted section 31D by which broadcasting organizations desirous of communicating any work to the public by way of a broadcast or by way of a public performance of a literary or musical work and sound recording which has been already published may do so, subject to the compliance requirements under the Section. The amended section authorizes the Copyright Board to grant licenses to communicate to the public by way of a broadcast or performance of a literary or musical work and sound recording, which has already been published after paying Royalty fixed by the Board.

Power of the Government

The point of discussion of this part of the article is whether the Government had power, competency or jurisdiction to formulate any rules under the provisions of the Copyright Act, 1957 read with the Copyright Rules, 2013 ('the Rules')³ and

¹ The Copyright Act, 1957, accessed through Manupatra.

² The Copyright Amendment Act, 2012, accessed through Manupatra

³ The Copyright Rules, 2013, accessed through Manupatra



whether the provisions of the Memorandum are vague and arbitrary and fail to disclose any objective criteria for including internet transmissions, as opposed to communication to the public by “broadcasting”, both under the purview of Section 31D.

Vide Section 2(ff)⁴, the Act gives out the definition of “communication to public” as hereunder:

“(ff) “communication to the public” means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

Explanation.-For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public”

The drafters of the Copyright Act contemplated the impact of new technologies to broadcasting organizations and the concept of broadcasting. They carefully updated the concept and decided against including internet transmissions within the definition. It can be thus argued that Section 31-D(3), the Copyright rules, 2013 and the legislative

history preceding the passage of the Copyright Act 2012 clearly support the contention that the exercise of a section 31-D license is restricted to television and radio broadcasting and not internet streaming.

Under Rule 31 of the Copyright Rules, 2013⁵ the Copyright Board is obligated to commence the process of fixation of royalty, either *suomotu* or on receipt of a request from “any interested person” (not just a broadcaster). This clearly indicates that on an application being made by any interested person or even *suomotu*, the Appellate Board may fix an industry wise royalty and this royalty, can then be used as the basis for individual broadcasting organizations, giving their respective notices under Section 31-D and Rule 29.

The Office Memorandum dated September 5, 2016.

The office memorandum dated September 5, 2016 (F-No 14-35/2015-CRBLM(IPR VII) issued by the Department of Industrial Policy and Promotion (DIPP), noted that the provision under Section 31D covered ‘internet broadcasts’ as well.⁶ The Department has sought to interpret Section 31D of the Act with respect to Section 2(ff) as stated above, in order to bring internet transmission under the purview of Statutory Licensing u/s 31D. By way of such an office memorandum, the Department has come out with a complete vague and arbitrary interpretation of the said section that directly goes beyond the scope of the statute in place and the rules therein.

⁴ Supra Note 1

⁵ Supra Note 3

⁶ Ministry of Commerce and Industry, Government of India, Office Memorandum,

[https://dipp.gov.in/sites/default/files/OM_Copyright Act_05September2016.pdf](https://dipp.gov.in/sites/default/files/OM_Copyright_Act_05September2016.pdf), accessed on 10th of October



The Copyright Act, 1957 was legislated upon by the Parliament of India and brought into force well accepted legal tenets. Under the constitutional scheme, it is the courts of law that are tasked with the primary duty of interpreting the statutory enactment. That the government agencies may also interpret the various provisions provided that the statute itself provides some scope for them to do so.

Although, such an initiative and interpretation might be necessary to offer guidance to copyright stakeholders, it still might be wrong at law and desolately fall outside the constitutional competence of the Department to issue such a memorandum. Section 31-D clearly does not contemplate a fixation of rates for subjects other than television and/or radio broadcasting. Any doubts *qua* this position are dispelled by the Statement of Objects and Reasons and the 227th Rajya Sabha Parliamentary Standing Committee Report that deliberated on the Copyright Bill, 2010.⁷ The legislative decision to not provide for a statutory license in respect of internet streaming is thus a conscious choice. The Rules merely effect this decision and only prescribe the procedure for determining royalty in respect of television broadcasting and radio broadcasting.

It is an established law that using any such Office Memorandum that over rides the Parent Law is unjustified and tantamount to violating the Law and encouraging further violations. In fact, regularizing such complete violations of the Laws of the Land by issuing Office Memorandums only

encourages more violations of the Copyright Act, 1957 and the subsequent Copyright Rules, 2013. Any such regularisation and weak action directly demeans Copyright governance of the country and the Ministry of Commerce and Industry itself.

The issue here is not whether or not the interpretation put forth by the Government/Department vide the Office Memorandum is the correct one, but whether or not the Government/Department is constitutionally competent to issue such an interpretation in the first place. Section 31D of the Act does not empower the Government/Department to frame rules with relation to matters arising out of issuance of Statutory licenses under it. It is pertinent to mention that the Department of Industrial Policy and Promotion has nothing to do with section 31D of the Copyright Act or the issuance of statutory licenses under it. That power vests with the Appellate Board, which is an independent tribunal, and not an agency of the Government under the purview of the Government/Department.

The provisions of the Act do not empower the Department to formulate rules and regulations with respect to statutory licenses under section 31D of the Act. As per Section 78 (2) (b) and Section 78 (2) (CD), the Central Government can make rules to provide for *'the form of complaints and applications to be made, and the licenses to be granted'* and *'the manner in which prior notice may be given by a broadcasting organization under sub-section (2) of Section 31D'*, respectively. Thus, the Copyright Act solely empowers the Appellate Board, which

⁷ Parliament of India, 227th Parliamentary Report, <http://164.100.47.5/newcommittee/reports/EnglishCo>

mmitees/Committee%20on%20HRD/227.pdf, accessed on 12th October 2019



is an independent tribunal, under Section 12 with regulation of its own procedure with respect to the provisions of the Act including fixing of places and times of its sittings.

Observations

The Office Memorandum of 5th September 2016 is contrary to the statute.

The Memorandum dated 5th September 2016 issued by the Department of Industrial Policy and Promotion is misplaced. This Memorandum is clearly contrary to Section 31-D, Rules 29, 30 and 31 and the legislative history preceding its enactment. Executive instructions cannot prevail or override substantive provisions of the statute or Rules that have been framed pursuant to a rule making power granted under the statute.

Further, through a catena of judgements it is an established law⁸ that using any such Office Memorandum that over rides the Parent Law is unjustified and tantamount to violating the Law and encouraging further violations. *In fact, regularizing such complete violations of the Laws of the Land by issuing Office Memorandums only encourages more violations of the Copyright Act, 1957 and the subsequent Copyright Rules, 2013. Any such regularisation and weak action directly demeans Copyright governance of the country and the Ministry of Commerce and Industry itself.*

It can be thus inferred that the Government/Department vide the Office Memorandum permits “*what is prohibited to be done*” and will not stand legal sanctity. **It is thus clear that such a wide interpretation bringing internet**

broadcasting under the purview of the provisions of Section 31D using the Office Memorandum has no legal sanctity/support and should be subjected to rigorous tests.

The Office Memorandum is vague and arbitrary.

As per settled principles of jurisprudence, if there is a conflict between a norm in a higher layer of the hierarchy and a norm in a lower level of the hierarchy, then the norm in the higher layer prevails, and the norm in the lower layer becomes ultra vires. A statutory law either made by the Parliament or by the State legislature necessarily prevails over rule and regulation and in effect, the Memorandum is falling in the ambit to be held ultra vires.

At the outset the act does not permit the Department to regulate any matter with respect to internet broadcasting under Section 31D of the Act and the subsequent Copyright Rules 2013. An Office Memorandum cannot go beyond the scope of authority conferred by the parent or enabling statute and that the Memorandum does surpass this authority and goes beyond the scope of the Act. In view of the foregoing, the Department has no power to frame rules and regulations with respect to statutory licensing under the Copyright Act and thus the Memorandum is non-est.

It can be now stated that the Office Regulation is completely vague in so far as it goes beyond the statute and states that “*internet broadcast*” comes under the relevant provisions of the Act. The Department.Government has evasively come

⁸ *State of Haryana vs Mahender Singh &Ors* (2007) 13 SCC 606



out with the Office Memorandum, which leads to the possibility of unbridled discretion being exercised by the Government, and the possibility of unequal treatment, which thereby offends Article 14 of the Constitution.

Conclusion

The Office Memorandum in so far as it mandates empowers the Department/Government to frame rules with relation to matters arising out of issuance of Statutory licenses under it and thus asserts that “*internet broadcasts*” be included under the purview of Section 31D of the Copyright Act, is definitely on the lines of being termed as ultra vires. A statutory law either made by the Parliament or by the State legislature necessarily prevails over rules and regulation and in effect, the Office Memorandum must necessarily be held to be ultra vires.

The Government/Department came out with the aforementioned Office Memorandum and that Regulation/Circular/Memorandum cannot go beyond the scope of authority conferred by the parent or enabling statute and that the Office Memorandum cannot go beyond the scope of the Copyright Act.

Rule 29 of the Rules, which provides for the particulars of the notice required under Section 31-D, also only contemplates the furnishing of details for radio and/or television broadcasting. Clearly, the notice requirements of Rule 29 are only in respect of radio broadcasts, television broadcast and performance. Now, “Performance” is defined under section 2 (q) of the Copyright Act to mean, “*in relation to performer’s right, means any visual or acoustic presentation made live by one or more*

performers;”. The Internet broadcasting activity is therefore clearly not a ‘performance’. The fact that this rule only enables the issuance of notice for these three categories buttresses the submission that a Section 31-D licence does not cover the internet streaming activities.

