

M/S. Entertainment Network (India) Ltd vs M/S. Super Cassette Industries Ltd on 16 May, 2008

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Bench: S.B. Sinha, Lokeshwar Singh Panta

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5114 OF 2005

M/s Entertainment Network (India) Ltd. ... Appellant

Versus

M/s Super Cassette Industries Ltd. ... Respondent

WITH

CIVIL APPEAL NOS.5178-5180/2005,

Phonographic Performance Limited ...Appellant

Versus

Millineum Chennai Broadcast (P) Ltd. etc. etc. ..Respondents

WITH

CIVIL APPEAL NO. 5181/2005,

Phonographic Performance Limited ...Appellant

Versus

Entertainment Network (India) Pvt. Ltd. ..Respondents

WITH

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CIVIL APPEAL No. 5182/2005

Phonographic Performance Limited ...Appellant

Versus

Radio Mid-Day West (India) Ltd. ..Respondents

WITH

CIVIL APPEAL No. 5183/2005

Phonographic Performance Limited ...Appellant

Versus

Music Broadcast Pvt. Ltd. ..Respondents

JUDGMENT

S.B. Sinha, J.

INTRODUCTION Interpretation of Section 31 of the Copyright Act, 1957 (for the sake of brevity, hereinafter referred to as, 'the Act') is involved in these appeals.

We may notice the factual matrix of the matter.

BACKGROUND FACTS First respondent is one of the leading music companies engaged in the production and/or acquisition of rights in sound recordings. It has copyright over a series of cassettes and CDs commonly known as T- series. It has copyrights in cinematographic films and sound recordings. Appellant M/s. Entertainment Network (India) Ltd. (ENIL) broadcasts under the brand name "Radio Mirchi". It is a leading FM radio broadcaster. Disputes and differences arose between Bennett Coleman & Co. Ltd., the holding company of the first respondent and Phonographic Performance Ltd. (PPL) as regards the playing of the songs of which copyrights belongs to the first respondent in their FM radio network. Appellant is a company which holds licence for running FM radio stations in various cities across India.

Free-to-Air private FM Radio Broadcasting is a recent phenomenon in India and the basic content of any radio station, presently, is only sound recordings, i.e., songs.

Disputes and differences having arisen between the parties in regard to broadcast of the songs in respect whereof the first respondent holds a copyright as owner thereof or by reason of purchase of the copyright belonging to others.

BACKGROUND FACTS The radio industry was revolutionized by the Government of India as in October 1999 for its first phase of granting license for private FM, broadcasting channel, tenders were invited.

Appellant herein was awarded the license for running a private FM broadcasting service in 12 cities on payment of a hefty license fee. Several other bidders were also granted licenses. Respondent, however, was not a member of the appellant - society. It was found to have been using the broadcasting songs in respect whereof Super Cassettes Industry Limited (SCIL) had an ownership over the copyright. It was a member of the copyright society being Phonographic Performance Ltd. (PPL). Indisputably, there had been an infringement of the copyright of Super Cassettes. Allegedly, appellant was under the belief that it was a part of PPL and whereupon the music belonging to the repertoire of SCIL was played during the period from October 2001 to May, 2002 in its stations at Indore and Ahmedabad. Royalty was paid by ENIL to PPL at the rate of Rs.400/- per needle hour pursuant to the order passed by the Calcutta High Court dated 28.9.2001. Attempts were made to obtain a licence from SCIL when ENIL came to know that it was not a part of the copyright society PPL. Negotiations failed between the parties.

A suit was filed before the Delhi High Court for restraining ENIL from playing and broadcasting the music belonging to SCIL on any of the Radio Stations belonging to ENIL.

COMMUNICATIONS BETWEEN THE PARTIES We may notice relevant parts of some communications between the parties. Super Cassettes through its lawyer by a notice dated 21.1.2002, in view of the said infringement of his copyright called upon ENIL, inter alia, to give an undertaking that it shall not broadcast the sound records of Super Cassettes through its Radio Station without a valid licence and payment of royalty (the terms of which were mutually arrived at). Super Cassettes again by a notice dated 2.4.2002 through its Advocate called upon ENIL to: "a) immediately desist from broadcasting Sound Recording(s) of Super Cassettes clients through its Radio Station;

b) Tender an unconditional apology for the illegal broadcast of Sound Recordings of Super Cassettes clients in past; c) give an undertaking that it shall not broadcast the Sound Recordings of Super Cassettes clients through its Radio Station without a valid licence and payment of royalty (the terms of which can be mutually arrived at), and d) pay a sum of Rs. 50,00,000.00 (Fifty lacs only) as liquidated damages, for the illegal broadcast and acts of infringements committed by it, to Super Cassettes within 15 days of receipt hereof under intimation to Super Cassettes failing which Super Cassettes have positive instruction of its clients to initiate such legal actions both Civil and/or Criminal against you, your directors, and all other persons responsible for the said infringement without any further notice and in that case you shall be further liable for all cost and consequences thereof which may please be noted very carefully".

In response to the said notice, ENIL stated:

"2. Since our clients intend to negotiate with your clients, as was our clients intention from the beginning we have approached your clients and have offered payment of

royalty, the price of which will be mutually convenient to both the parties.

3. It is our clients' contention that music is for general benefit of society at large. Our clients understand that your clients have entered into a contract/Agreement with Media Broadcast Indian Ltd., broadcasting under the channel "Radio City", and our clients are also likewise prepared to popularise your client's music and add value to your clients' content by entering into Agreement/License with your clients.

4. As we have already stated in the aforesaid para music is for general enjoyment and a restrictive practice of a tie up only with Media Broadcast India Ltd. is not in public interest. We, therefore, do not admit any of the allegations made by your clients in your aforesaid letter and further suggest that your clients resolve the issue by entering into a contract beneficial to both parties."

Super Cassettes, however, by another legal notice dated 1.6.2002 stated:

"My client has clearly indicated its willingness to grant your client a public performance license. However, without obtaining such license, your client continues to broadcast songs of our clients.

In the circumstances, your client is once again called upon to :

(a) First immediately cease and desist from such unauthorized broadcast before a formal license agreement is drawn up.

(b) Pay my client a sum of Rs.1,00,00,000/- (Rupees one crore) for past infringement by way of radio broadcast of my client's sound recordings through your client's various FM Radio Stations situated in various cities."

. PPL again to the Holding Company of ENIL, BCCL by a letter dated 6.9.2000 stated:

"As you may be aware, it is a legal requirement to obtain permission (Licence) from the copy-right owners before you can broadcast the copyrighted music (Sound Recordings). As you may further be aware, Phonographic Performance Ltd. (PPL), is the copyright society in respect of sound recordings and is registered with Government of India. We have about 50 member companies including HMV, Universal, Tips, Venus, Sony Music (India), Virgin, Milestone, Magnasound, BMG - Crescendo and others. The broadcasting rights in the music recordings - both of Indian and International music - or our members are administered by us.

It will be essential for your to apply for our licence for broadcasting of our members' existing and future sound recordings, subject to our tariff and terms and conditions as applicable.

We shall appreciate if you kindly confirm to us the centres where you will be setting up your F.M. Broadcasting stations/transmitters, and the estimated date/month from which the said stations/transmitters will start operations.

On receipt of this information, we shall send you the licence application form and the tariff details."

It, however, appears that several broadcasters including ENIL by a letter dated 17.4.2001 addressed to PPL stated as under:

"We acknowledge that you are constituted as the body legally empowered to represent the interests of the owners of music copyrights around the world when performances take place in India. We are, therefore, approaching you to discuss arrangements for the provisions of licensing the broadcast of copyrighted music on our new stations.

We want to begin discussions immediately, since at least some of our stations are all but ready to begin broadcasts now.

We can begin with the agreement that owners of copyrights deserve to be compensated for the use of their music on radio stations. Radio stations play copyrighted music because of its popularity because the music helps build the audience that the stations can offer to advertisers with eventual hope of making an opening profit. We assume that copyright owners desire exposure to their music that is as broad as possible.

The expectations for the future of private radio broadcasting in India are high, and we have the ambition to develop private radio to a level of popularity not unlike what achieves in most other developed countries in the world. Whereas radio currently attracts the average Indian for less than half an hour a day, daily radio listenership in most countries averages something over three hours a day. Uniquely among the media, radio has the ability to provide as entertainment and information services to listeners who do not have to stop everything else they may be doing to take full advantage of the programming. We feel that while radio has been a dismal failure at attracting listenership thus far in this country, we can, with your expectation, build radio listening to the point that music will begin to play a much larger role in the lives of the Indian public than is the case today.

We hope that we can meet at your earliest convenience to begin to discuss a contractual business arrangement, which will be beneficial to both the society and to the new radio industry in India.

We would appreciate if you can get in touch with Mr. Prakash Iyer at 852-3880 extn. 3291 or Mobile : 982- 11-82869 in the next 7 days to set up a date and time for the

meeting."

Indisputably, appellant, in the suit filed by the first respondent having come to learn that it is outside PPL's jurisdiction to give an undertaking not to use the songs copyright whereof belongs to PPL, Super Cassettes. The said suit admittedly has been withdrawn. It may therefore not be necessary to refer thereto the proceedings before the Board.

In a letter to the respondent, appellant stated, "We had no intention to infringe your copyright as in fact we had been regularly paying royalty to PPL including the T-Series needle time played on our station."

The appellant thus contended that it had been all along under a wrong impression that Super Cassettes was a member of PPL and that it had no knowledge that the license was required to be obtained. Super Cassettes, however, contend that such a stand was not correct as would appear from its letter dated 28.5.2002, and that the appellant had intended to negotiate with the respondent from the very beginning. PROCEEDINGS BEFORE THE COPYRIGHT BOARD -

FIRST LICENCE CASE Various Radio Stations including the petitioner filed an application before the Copyright Board at Hyderabad in terms of Section 31(1)(b) of the Act on or about 19.11.2002 for grant of compulsory license to all the radio stations.

The Copyright Board by a judgment and order dated 19.11.2002 fixed the standard rate of:

7 Payment to be made at Rs.1200/needle hour during prime time.

7 For 12 normal hours = 60% of standard rate 7 For 8 lean (night) hours = 25% of standard rate and respondents also directed to furnish a security/bank guarantee of Rs.20,00,000/- per radio station to PPL.

The Board also held that the same shall be operative for a period of 2 years and the matter shall be reconsidered again in September- October, 2004. Super Cassettes was not a party therein. The Board fixed royalties initially for a period of two years. An appeal thereagainst was preferred before Bombay High Court and it is the subject matter of C.A. No. 5181 of 2005.

Appeals were filed before the Bombay High Court by the radio companies and PPL against the order dated 19.11.2002, details whereof are as under:

- "1. PPL V. Music Broadcast 279 of 2003
2. PPL V. ENIL 280 of 2003
3. PPL V. Millennium Chennai 281 of 2003
4. PPL V. Millennium Delhi 283 of 2003

5. ENIL V. PPL 288 of 2003

6. Millennium Chennai V. PPL 291 of 2003

7. Millennium Delhi V. PPL 292 of 2003

8. Music Broadcast V. PPL 294 of 2003

9. Radio Midday V. PPL 421 of 2003 13 Appeals in total were filed before the Bombay High Court. The Bombay High Court by a common judgment and order dated 13.4.2004 in First Appeal Nos. 279-294 of 2003, 421 of 2003 and 1573 of 2003 remitted the matters back to the Copyright Board for reconsideration and for fixation of license fees.

SECOND LICENSE CASE On or about 28.1.2003, appellant filed an application before the Copyright Board at Delhi, which was marked as Case No. 10 of 2003 for grant of compulsory licence in terms of Section 31(1)(b) of the Act against Super Cassettes praying, inter alia, for the following reliefs:

"Grant the applicant a compulsory license of the complete repertoire (present and future) of SCIL on the terms and conditions considered just and equitable by this Hon'ble Copyright Board."

On being noticed, respondents filed an objection contending that as the suit for infringement was pending before the Delhi High Court, no application for compulsory license could be entertained. The High Court, on an application filed by the appellant, clarified that the respondent was free to canvas its submissions before the Copyright Board that the person infringing the Copyright should not be granted compulsory license. The Board directed the parties to come with their respective witnesses. However, when respondent intended to present oral evidence, it was declined. Submissions were directed to be made on or about 20.10.2003. Application No. 10 of 2003 was allowed granting a compulsory license.

Appellant filed an appeal against the said order before the Bombay High Court questioning the rates of compensation only. The said appeal was tagged with various other appeals which had been filed before the Bombay High Court against the order dated 19.11.2002 passed by the Copyright Board at Hyderabad.

Respondents, however preferred two-fold appeals before the Delhi High Court which were marked as RFA No. 848 of 2003. By reason of the impugned judgment dated 30.6.2004, the respondent's appeal has been allowed remitting the matter back to the Copyright Board to reconsider the application of the appellant for grant of compulsory license under Section 31 of the Act after giving adequate opportunity to the parties to adduce evidence and to dispose of the same by a reasoned order. The High Court furthermore directed that the appellant must file an undertaking that it would not broadcast the sound recordings of the respondent. Appellant had filed Petition for Special

Leave to Appeal giving rise to Civil Appeal No. 5114 of 2005 in this Court. PROCEEDING BEFORE US We have two judgments before us; one from the Bombay High Court and another from the Delhi High Court. Whereas the Bombay High Court opined that in terms of Section 31 of the Act, grant of compulsory license on reasonable remuneration is permissible; the Delhi High Court held otherwise.

Both the parties have preferred these appeals before us, the particulars whereof are as under:

Case No.	Parties
1. C.A. No.5114/05	ENIL Vs. SCIL
2. C.A. No.5178-80/05	PPL Vs. Millennium Chennai
3. C.A. No.5181/05	PPL Vs. ENIL
4. C.A. No.5182/05	PPL Vs. Radio Mid-day West
5. C.A. No.5183/05	PPL Vs. Music Broadcast Pvt. Ltd.

CONTENTIONS AND SUBMISSIONS

Mr. H.N. Salve, Dr. A.M. Singhvi and Mr. Sudhir Chandra, learned Senior Counsel appearing on behalf of the appellant would submit:

(i) The said provisions seek to strike a balance between creation of monopoly which is generally considered opposed to public interest and protecting intellectual property rights as a measure to encourage creativity in the respective fields.

(ii) The selective refusal to sell 'goods' which is treated under Indian Law to be an unfair trade practice is discouraged.

Copyright Board, therefore, in terms of Section 31 of the Act must be held to be holding the power to grant a compulsory licence provided the following conditions are satisfied:

(a) the work in question should have been published or performed in public.

(b) the owner of the copyright should have refused to re-

publish or allow re-publication or the performance in public of the work by reason of which the work is withheld from the public; or

(c) has refused to allow a communication by a broadcast of such work on terms which the complainant considers reasonable.

(iii) The term `or' used between clauses (a) and (b) of sub-

section (1) of Section 31 should be read disjunctively and not conjunctively.

(iv) The language of clause (b) indicates that the same is focused on a particular form of communication to the public- namely "Broadcast", which requires a proper construction having regard to the fact that the said word has been brought about by an amendment made by Act No. 23 of 1983. The words used prior to its amendment were `radio diffusion'.

(v) Section 31(1)(b) was designed specifically to enable the Board to intervene where the owner, particularly of a sound recording did not allow its public broadcast.

(vi) The finding of the High Court that no compulsory licence can be granted now would be conferred in the public interest.

(vii) The words `such work' occurring in clauses (a) and (b) do not operate in the same field inasmuch as clause (a) refers to publication or republication of the work in print media. Clause (b) refers to the broadcast alone; the sound recording being a part of it. And in that view of the matter, the finding of the High Court that clause (b) cannot apply so long as somebody has allowed to broadcast it to the public is not correct.

(viii) Properly construed, an owner of a copyright cannot make any discrimination between one broadcaster and another and what can be demanded is equitable remuneration for grant of broadcasting right, as a refusal to grant such a licence may even hit the Government owned free to air channels, which would be manifestly opposed to public interest.

(ix) The Copyright Board not only have the requisite jurisdiction to grant a compulsory licence but also determine the quantum of remuneration payable to him for grant of such licence.

(x) Subject of course to protection of the commercial rights of the owner of the sound recording, no owner of a copyright can refuse to allow broadcast of a sound recording, merely on the ground that the same may affect the profit of the owner inasmuch as the public interest in this behalf is paramount.

(xi) Section 31(1) must be construed having regard to the fact that India is a signatory to various International conventions, such as, Berne Convention, Rome Convention, etc. as would appear from the International Copyright Order, 1999 issued by the Central Government. Section 31(1) must also be construed having regard to the laws indicted by other countries in the light of the said convention. Sub-Section (2) of Section 31, if given literal meaning, would lay to an anomaly and thus its area of operation should be confined to clause (a) of sub-Section (1) of Section 31 only.

(xii) It was urged that as the courts do not themselves lay down the principles for grant of compensation, this Court may lay down the same for further guidance of the same.

Mr. Shyam Divan, the learned Senior Counsel appearing on behalf of the respondents, on the one hand, would submit:

(i) The importance of the Copyright protection for the owners of the copyrights should be the prime consideration for determining the issue. The object of the Copyright Act is to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have access to the works on the other hand and, thus, it is imperative to keep in mind the broad features of the Act which is the owner's freedom to contract his interest by the Act as would be evident from Sections 14, 16 and 30 of the Act.

(ii) The ownership of any copyright like ownership of any other property must be considered having regard to the principles contained in Article 19(1)(g) read with Article 300A of the Constitution, besides, the human rights on property.

(iii) As the Act expressly recognizes the notion of an "exclusive licence" as defined in Section 2(j), a specific right in terms thereof can be conferred only on one person which would include a right to have recourse to civil remedies in terms of Section 55 of the Act, which enables the owner of a copyright to enjoy the fruits of his work by earning an agreed fee or royalty through the issuance of licence.

(iv) The Copyright Board unlike its counterparts of Australia, England or Singapore have a limited jurisdiction and its principal functions are:

"(a) To decide whether a work has been published or as to the date on which the work was published for the purpose of determining the term of copyright under Chapter V of the Act.

(Section 6);

(b) To decide whether the term of copyright or any work is shorter in any other country than that under the Act (Section 6);

(c) To settle disputes arising in respect of assignment of copyright (Section 19A);

(d) To settle disputes arising in respect of a voluntary license issued under Section 30 of the Act (Section 30A);

(e) To grant compulsory licenses in respect of Indian works withheld from the public (Section 31);

(f) To grant a compulsory license to public unpublished Indian works (Section 31A);

(g) To grant a compulsory license to produce and publish translation of literary and dramatic works (Section 32);

(h) To grant a compulsory license to reproduce and publish certain categories of literary, scientific or artistic works for certain purposes (Section 32A);

(i) To rectify the register of copyright on an application of the Registrar of Copyrights or any other person aggrieved (Section 50);

(j) To hear appeals from any decision or whatever the decision of the Registrar of Copyright [Section 72].

(v) Section 31 of the Act must be given its literal meaning, which would mean that the Board can exercise its jurisdiction provided:

(i) There is a refusal by the owner and as a result of which the work is "withheld from the public", or

(ii) In the case of a broadcast, the work has not been "allowed to be communicated to the public"

(vi) As in the instant case, the repertoire of SCIL and PPL are available to the public inasmuch as these copyright owners society have entered into voluntary licenses with All India Radio and some other FM Radio Broadcasters, the provisions of Section 31 of the Act were not applicable.

(vii) As both PPL and SCIL called upon the broadcaster to enter into licenses and were willing to license their repertoire on mutual agreed terms, it cannot be said that there has been a refusal on their part to grant licenses. In the present case, no occasion arose for grant of a compulsory licence inasmuch as the only relief which could be granted by the Copyright Board was to direct the Registrar of Copyrights to grant to the complainant a license to "communicate the work to the public" by broadcast, which is already made available to the public by broadcast through All India Radio and other radio broadcasters.

(viii) The existence of license have been communicated to the public. Section 31(1)(b) does not create any entitlement in favour of an individual broadcaster, but merely provides a mechanism by which an Indian work that has been withheld from the public is made available to the public by broadcast.

(ix) The interests balanced in Section 31 are (i) the interest of the copyright owners and (ii) the interest of the general public. The narrow commercial interests of the broadcasters are not to be reckoned under the scheme of Section 31.

(x) The relative merit and demerit of the complainants in any event being imperative for the purpose of arriving at a finding as to how the interests of the general public is to be best served itself is a pointer to the fact that compulsory license should not be granted to all the radio broadcasters.

(xi) The Board is not expected unlike the statutes of other countries to go into the reasonableness or otherwise of the tariff fixed for grant of licenses.

(xii) The Copyright society not being the owner of copyright, in any event, cannot be subjected to grant of a compulsory license in terms of Section 31 of the Act.

(xiii) The Act, having used different words 'compensation' and 'royalty', Section 3 signifies a lump sum amount to be paid to bring back the work into the public domain. It also goes to show that it is a one time exercise.

CORE ISSUES The core questions which, therefore, arise for consideration in these appeals are:

(i) Whether the Copyright Board has jurisdiction under Section 31 (1)(b) of the Copyright Act, 1957 to direct the owner of a copyright in any Indian work or a registered copyright society to issue compulsory licences to broadcast such as works, where such work is available to the public through radio broadcast?

(ii) Whether in any event such a compulsory license can be issued to more than one complainant in the light of Section 31(2)?

(iii) What would be the relevant considerations which the Copyright Board must keep in view while deciding on;

(a) Whether to issue a compulsory license to a particular person; and

(b) The terms on which the compulsory license may be issued, including the compensation?

STATUTORY PROVISIONS In view of the fact that interpretation of Section 31 of the Act would depend upon the Scheme of the Act, we may notice the relevant provisions thereof. It is also necessary to have a broad overview.

The Copyright Act, 1957 was enacted to amend and consolidate the law relating to copyright. Section 2(d) defines 'author', which reads as under:

2(d) "author means, -

(i) in relation to a literary or dramatic work, the author of the work;

- (ii) in relation to a musical work, the composer;
- (iii) in relation to an artistic work other than a photograph, the artist;
- (iv) in relation to a photograph, the person taking the photograph;
- (v) in relation to a cinematograph film or sound recording, the producer; and
- (vi) in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;"

Section 2(dd) defines 'broadcast' to mean communication to the public-(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or (ii) by wire, and includes a re-broadcast.

Section 2(ff) defines 'communication to the public' to mean:

"making any work 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 copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work 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;"

Sections 2(ffd) defines 'copyright society' to mean a society registered under sub-section (3) of Section 33. Section 2(j) defines 'exclusive licence' to mean a licence which confers on the licensee or on the licensee and persons authorized by him, to the exclusion of all other persons (including the owner of the copyright), any right comprised in the copyright in a work, and "exclusive licensee" shall be construed accordingly.

Section 2(l) defines 'Indian work' to mean a literary, dramatic or musical work, - (i) the author of which is a citizen of India; or (ii) which is first published in India; or (iii) the author of which, in the case of an unpublished work, is, at the time of the making of the work, a citizen of India.

Section 2(m) defines 'infringing copy' to mean (i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film; (ii) in relation to a cinematograph film, a copy of the film made on any medium by any means; (iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means; (iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance, if such reproduction, copy or sound

recording is made or imported in contravention of the provisions of the Act. Section 2(xx) defines 'sound recording' to mean a record of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. Section 2(y) defines 'work' to mean any of the following works, namely:- (i) a literary, dramatic, musical or artistic work; (ii) a cinematograph film; (iii) a sound recording.

Section 3 of the Act defines for meaning of publication. Section 4 deals with when 'work' would not be deemed to be published or performed in public.

Chapter II of the Act deals with Copyright Office and Copyright Board.

Section 11 provides for the provisions relating to 'Copyright Board' Chapter III deals with 'Copyright'.

Section 13 provides for subsistence of copyright throughout India in the classes of works specified therein, which includes (a) original literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) sound recording. Sub-section (4) of Section 13 provides that 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.

Section 14 of the Act provides for the meaning of copyright. Clause (c) of sub-section (1) of Section 14 talks about artistic work. For the purposes of the Act, 'copyright' means the exclusive right, subject to the provisions of this Act, to do or authorize the doing of any act. The acts specified therein in respect of a work or any substantial part thereof and in the case of a sound recording, namely,

(i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the sound recording to the public. Explanation: For the purposes of this Section, a copy which has been sold once shall be deemed to be a copy already in circulation. Section 16 mandates that no person shall be entitled to copyright except as provided for under the Act.

Chapter IV provides for the ownership of copyright and the rights of the owner. Section 17 states that subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein. Proviso (b) appended thereto reads as under:

"(b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration, at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein."

Sections 18 and 19 relate to assignment of copyright and mode of assignment respectively. Section 19 deals with disputes with respect to assignment of copyright. Section 27 provides for the term of copyright in sound recording in the following terms:

"27. Term of copyright in sound recording.- In the case of a sound recording, copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the sound recording is published.

However, only because the term for holding copyright under the said provisions are different, the same would not mean that the right of the copyright owner in sound recording is somewhat inferior.

Chapter VI of the Act deals with licences.

Section 30 provides for the licences by owners of copyright. It, in other words, deals with a situation where licence is granted on a voluntary basis. Section 30A provides for application of Sections 19 and 19A. Section 31A provides for compulsory licence in unpublished Indian works, the relevant portions whereof are as under:

"(1) Where, in the case of an Indian work referred to in sub-clause (iii) of clause (l) of Section 2, the author is dead or unknown or cannot be traced, or the owner of the copyright in such work cannot be found, any person may apply to the Copyright Board for a licence to publish such work or a translation thereof in any language.

(4) Where an application is made to the Copyright Board under this section, it may, after holding such inquiry as may be prescribed, direct the Registrar of Copyrights to grant to the applicant a licence to publish the work or a translation thereof in the language mentioned in the application subject to the payment of such royalty and subject to such other terms and conditions as the Copyright Board may determine, and thereupon the Registrar of Copyrights shall grant the licence to the applicant in accordance with the direction of the Copyright Board."

Section 32 deals with the provisions relating to licence to produce and publish translations. Section 32A deals with licence to reproduce and publish works for certain purposes.

Chapter VII of the Act deals with copyright societies. Section 33 provides for registration of copyright society, relevant portion whereof are as under:

"33. Registration of Copyright Society.-

(1)

(2) Any association of persons who fulfils such conditions as may be prescribed may apply for permission to do the business specified in sub-section (1) to the Registrar of Copyrights who shall submit the application to the Central Government.

(3) The Central Government may, having regard to the interests of the authors and other owners of rights under this Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licences in respect of the relevant rights and the ability and professional competence of the applicants, register such association of persons as a copyright society subject to such conditions as may be prescribed:

Provided that the Central Government shall not ordinarily register more than one copyright society to do business in respect of the same class of works. (4) The Central Government may, if it is satisfied that a copyright society is being managed in a manner detrimental to the interests of the owners of rights concerned, cancel the registration of such society after such inquiry as may be prescribed."

Registration of such copyright society is mandatory in character. Sub-Section (2) of Section 33 provides for that any association of persons who fulfils such conditions as may be prescribed may apply for permission to do the business specified in sub-Section (1) to the Registrar of Copyrights who shall submit the application to the Central Government. Sub-Section (3) of Section 33 empowers the Central Government to grant a licence having regard to the interest of the authors and other owners of rights under the Act, the interest and convenience of the public and in particular of the groups of persons who are most likely to seek licenses in respect of the relevant rights and the ability and professional competence of the applicants, register such association. Section 34 provides for administration of rights of owner by copyright society. The proviso appended thereto prohibit any discrimination in regard to the terms of licence or the distribution of fees collected between rights in Indian and other works. The concept of copyright society appears to be that the interest of the copyright holder can be protected by the said society while granting licence so as to enable all players to have the benefit of a single window; as such a society is entitled to:

- (i) issue licences under Section 30 in respect of any rights under this Act;
- (ii) collect fees in pursuance of such licences;
- (iii) distribute such fees among owners of rights after making deductions for its own expenses;
- (iv) perform any other functions consistent with the provisions of Section 35.

Sections 34A, 35, 50 and 51 of the Act read as under:

"34A. Payment of remuneration by copyright society.- (1) If the Central Government is of the opinion that a copyright society for a class of work is generally administering

the rights of the owners of rights in such work throughout India, it shall appoint that society for the purpose of this section.

(2) The copyright society shall, subject to such rules as may be made in this behalf, frame a scheme for determining the quantum of remuneration payable to individual copyright owners having regard to the number of copies of the work in circulation:

Provided that such scheme shall restrict payment to the owners of rights whose works have attained a level of circulation which the copyright society considers reasonable.

35. Control over the copyright society by the owner of rights.- (2) All fees distributed among the owners of rights shall, as far as may be, be distributed in proportion to the actual use of their works.

50. Rectification of Register by Copyright Board.

-The Copyright Board, on application of the Registrar of Copyrights or of any person aggrieved, shall order the rectification of the Register of Copyrights by-

- (a) the making of any entry wrongly omitted to be made in the register, or
- (b) the expunging of any entry wrongly made in, or remaining on, the register, or
- (c) the correction of any error or defect in the register.

51. When copyright infringed. -Copyright in a work shall be deemed to be infringed-

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) when any person-

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or

(iv) imports into India, any infringing copies of the work :

Provided that nothing in sub-clause (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation.- For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".

Section 63 of the Act provides for offence of infringement of copyright or other rights conferred by the Act. Section 72 of the Act provides for appeals against orders of Registrar of Copyrights and Copyright Board. Section 74 empowers the Registrar of Copyrights and Copyright Board to exercise certain powers of civil courts.

In view of the aforementioned statutory backdrop, we may notice Section 31 of the Act.

"31. Compulsory licence in works withheld from public.- (1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work-

(a) has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or

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

and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of the Copyright Board, on payment of such fee as may be prescribed.

Explanation.- In this sub-section, the expression "Indian work" includes-

- (i) an artistic work, the author of which is a citizen of India; and
- (ii) a cinematograph film or a sound recording made or manufactured in India.

(2) Where two or more persons have made a

complaint under sub-section (1), the licence shall be granted to the complainant who in the opinion of the Copyright Board would best serve the interests of the general public."

RULES Section 78 of the Act provides for power to make rules. The Central Government in exercise of the said power framed rules known as "The Copyright Rules, 1958" (for short "the Rules").

Chapter V of the Rules deals with the provisions relating to Cooperative Societies. Relevant clauses of which are quoted hereinbelow:

"12. Conditions for submission of applications for registration of copyright societies.

(1) Any association of persons, whether incorporated or not, comprising seven or more owners of copyright (hereinafter referred to as "the applicant") formed for the purpose of carrying on the business of issuing or granting licences in respect of any class of works in which copyright subsists or in respect of any other right conferred by the Act may file with the Registrar of Copyrights an application in Form II-C for submission to the Central Government for grant of permission to carry on such business and for its registration as a copyright society.

(2) An application under sub-rule (1) shall be signed by all the members of the governing body (by whatever name called) and the chief executive of the applicant (who need not be a member of the applicant).

14-G. Conditions subject to which a copyright may accept authorization and an owner of rights may withdraw such authorization- (1) A copyright society may accept from an owner of rights or his duly authorised agent, exclusive authorisation to administer any right in a work if such owner or such agent enters into an agreement, in writing, with the copyright society specifying the rights to be administered, the duration for which such rights are authorised to be administered, the quantum of fees agreed to and the frequency at which such fees shall be paid by the copyright society in accordance with its Scheme of Tariff and Distribution. (2) The owner of copyrights shall, without prejudice to the rights under the agreement and subject to the condition of a prior notice of sixty days, be free to withdraw such authorisation in case the copyright society fails to fulfil its commitments as laid down in the agreement.

14-J. Tariff Scheme.- As soon as may be, but in no case later than three months from the date on which a copyright society has become entitled to commence its copyright business, it shall frame a scheme of tariff to be called the "Tariff Scheme" setting out the nature and quantum of fees or

royalties which it proposes to collect in respect of such copyright or other rights administered by it.

14-K. Distribution Scheme. - (1) As soon as may be, but in no case later than three months from the date on which a copyright society has become entitled to commence its copyright business, it shall frame a scheme to be called the "Distribution Scheme" setting out the procedure for collection and distribution of the fees or royalties specified in the Tariff Scheme among the owners of copyright or other rights whose names are borne on its Register of Owners [maintained under clause (i) of rule 14-I] for the approval of such owners.

(2) Any distribution under the Distribution Scheme shall, as far as possible, be in proportion to the income of the copyright society from actual use of the work or works of each owner of rights."

THE FORMS In terms of the Rules, forms have also been prescribed. Relevant clauses of Form IIA appended to First Schedule to the Copyright Rules, 1958 read as under:

"8. Estimated cost of the work to be published.

9. Proposed retail price per copy of the work.

10. Rate of royalty, which the applicant considers reasonable, to be paid to the copyright owner.

11. Means of the applicant for payment of the royalty.

12. Whether the prescribed fee has been paid and, if so, particulars of payment (give Postal Order/Bank Draft/Treasury Challan number).

13. (a) Full name, address and nationality of the person competent to issue a licence.

(b) Whether the applicant after due diligence on his part was unable to find the owner.

(c) Whether the applicant has requested and had been denied authorisation by the said person to produce and publish the translation or reproduce the work or publish the unpublished work.

(d) If the applicant was unable to find the owner, whether he had sent a copy of the request by registered air mail post to the publisher whose name appears on the work. If so, the date on which the copy was sent."

CONVENTIONS Before we embark upon respective contentions of the parties, we may notice some International Conventions to which India is a signatory. The Central Government issued the International Copyright order by a notification published in the Gazette of India on 24.3.1999. It defines 'Berne Convention Country' to mean a country which is a member of the Berne Copyright

Union, and includes a country mentioned either in Part I or in Part II of the Schedule. It defines 'Phonograms Convention Country' to mean a country which has either ratified, or accepted, or acceded to the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, done at Geneva on the twenty-ninth day of October, one thousand nine hundred and seventy-one, and includes a country mentioned in Part V of the Schedule. It defines 'Universal Copyright Convention Country' to mean a country which has either ratified or accepted, or acceded to the Universal Copyright Convention, and includes a country mentioned either in Part III or in Part IV of the Schedule. It defines 'World Trade Organization Country' to mean a country which is a member of the World Trade Organization and which has either ratified, or accepted, or acceded to the Agreement on Trade Related Aspects of Intellectual Property Right, 1994, and includes a country mentioned in Part VI of the Schedule. The countries which have ratified/accepted/acceded to Berne Convention are specified in Part I of the Schedule appended thereto. Part II of the Schedule specifies those countries which are yet to ratify/accept/accede to the 1971 Text of Berne Convention. Part III of the Schedule specifies the countries which have ratified/accepted/acceded to the 1971 Text of the Universal Copyright Convention. Part IV of the Schedule specifies the countries which are yet to ratify/accept/accede to the 1971 Text of Universal Copyright Convention. Part V of the Schedule specifies Phonograms Conventions Countries and Part VI specify the World Trade Organization Countries.

We would refer to only two Conventions, namely, Berne Convention and Rome Convention. The later comes within the purview of the World Trade Organization Convention. The Berne Convention provides for the protection of literary and artistic works. The relevant provisions whereof are Articles 11, 11bis, which reads as under:

"Article 11. (1) Authors of dramatic, dramatico- musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 11bis. (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work. (2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority. (3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation."

Article 3(f) of the Rome Convention defines the term 'broadcasting' as under:

"3(f) 'Broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds."

Article 12 of the Rome Convention reads as under:

"Article 12 If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."

GENERAL PRINCIPLES There cannot be any doubt whatsoever that an artistic, literary or musical work is the brain-child of an author, the fruit of his labour and, so, considered to be his property. A copyright, however, unlike a trade mark is a right created under the Act as is evident from Section 16 thereof. When an author of a copyright and other claims a copyright, it is subjected to the provisions of the Act. The rights and obligations of the author ought to be found out within the four corners of the Act. It is not necessary to dilate more upon these aspects of the matter as the object behind enacting the Act is absolutely clear and explicit. It creates a monopoly in favour of the author. Copyright also creates a monopoly in favour of the copyright society. What requires protection is unlawful reproduction of the author's work by others. It is the long period which encourages the authors to create works of literature, music and art.

In *Gramophone Company of India Ltd. v. D.B. Pandey* [(1984) 2 SCC 534 at 549, this Court held:

"An artistic, literary or musical work is the brain-child of an author, the fruit of his labour and, so, considered to be his property. So highly is it prized by all civilized nations that it is thought worthy of protection by national laws and international conventions relating to copyright."

In Copinger and Skone James on Copyright (15th Ed. 2005, para 2- 05, page 27, Vol. 1), it is stated:

"Finally, it is considered a social requirement in the public interest that authors and other rights owners should be encouraged to publish their work so as to permit the widest possible dissemination of works to the public at large. These four fundamental principles are cumulative and inter-dependent and are applied in the justification of copyright in all countries, although different countries give varying emphasis to each of them. To generalize, it is true to say that in the development of modern copyright laws, the economic and social arguments are given more weight in Anglo- American laws of common law tradition, whereas, in Continental law countries with civil law systems, the natural law argument and the protection of authors are given first place.

`The protection of copyright, along with other intellectual property rights, is considered as a form of property worthy of special protection because it is seen as benefiting society as a whole and stimulating further creative activity and competition in the public interest."

INTERNATIONAL CONVENTIONS AND FOREIGN LAW India is a Signatory to Berne Convention. It is also a signatory to the Rome Convention.

The International Conventions provide for compulsory license. Whereas U.K., Australia, Singapore, U.S.A. have framed laws for grant of compulsory license and also constituted Tribunals for the purpose of overseeing the tariff for licensing, *stricto sensu* the Indian Act does not say so.

BROAD ANALYSIS OF THE PROVISIONS A statute as is well known must be read in its entirety. It is required to be read chapter by chapter, section by section and clause by clause. The definitions of the term `broadcast' as also `sound recording' must be given a wide meaning. Clause (a) of Section 13 protects original work whereas clauses (b) and (c) protect derivative works. It provides for commercial manifestation of original work and the fields specified therein. Clause (a) of sub-Section (1) of Section 14 deals with original work. It is extremely broad. In contrast thereto, the copyright on films or sound recording work operates in restrictive field; they provide for a restrictive right as would appear from the provisions contained in Section 14 (1)(e) of the Act.

For a proper construction of the provisions, will it be necessary to keep in mind the difference between the right of the original work and right of sound recording? Should we also bear in mind that there are various forms of intellectual property rights. Section 16 provides that a right, *inter alia*, in respect of any work must be claimed only under and in accordance with the provisions of the Act unlike Trade Mark and `passing off rights' can be enforced even though they are not registered. It must also be noticed that whereas the term of a copyright in original literary, dramatic, musical

and artistic works not only remains protected in the entire life time of the author but also until 60 years from the beginning of the calendar year next following the year in which the author dies, the term of copyright in sound recording subsists only for 60 years, but as indicated hereinbefore, the same would not mean that the right of an owner of sound recording is in any way inferior to that of right of an owner of copyright on original literary work etc. Chapter VI deals with licence. The statutory licences are required to be granted having regard to the various factors stated therein.

Section 33 is a special provision which provides for registration of a copyright society.

It may, however, be necessary to consider that unlike other countries the broadcasting rights by themselves were introduced in India for the first time by inserting Section 37 in the year 1994. It is true that the rights of free-to-air broadcasters have not been dealt with in a specific legislation unlike some other jurisdiction. It may, however, be of some importance to note that Chapter VII deals with Copyright society, the concept whereof was incorporated in the Act so as to enable an author to commercially exploit his intellectual property by a widespread dispersal in a regulated manner. It for all intent and purport steps into the shoes of the author. The society grants license on behalf of the author, it files litigation on his behalf, both for the purpose of enforcement as also protection of the enforcement of his right. It not only pays royalty to the author but is entitled to distribute the amount collected by it amongst its members. Section 34 providing for administration of rights of owners by a copyright society for all intent and purport creates a virtual agency so as to enable the society to act on behalf of the owner. The civil remedies for infringement of copyright as envisaged under Section 55 of the Act can also be enforced by the society. The Scheme of the statute governing the field in other countries is vast and wide. The jurisdiction of the Tribunal is indisputably very wide. No such legislative changes have been made in India presumably because until recent times, the Copyright in musical work was owned by a cooperative society, namely, IPRS and PPL.

The third party granting license on a prescribed fee of a musical work was contemplated under the Act. As a general rule for administering such copyrights, there are about 300 radio stations now. Monopoly in respect of sound recording is, as it appears from the tariff supplied to us by the respondent embrace within its field, Pop/Music Quizzes, Mobile DJ, Jukeboxes, Dance Teachers, Dance Centre/Studio, Exercise, Amateur Operatic & Dramatic Societies, Theatrical Productions, Temporary Camps/Shacks, Banquet Halls, Background Music- Guest Houses & Lodges, Hotels, Background Music- Public Houses & Cafes & Non AC Restaurants, Bankground Music - AC Restaurants, BARS, Background Music - Shops & Stores Premises, Background Music - Hairdressing Salons & Beauty Parlours, Background Music - Clinics, Background Music - Nursing Homes & Hospitals, Background Music - Factories & Offices/Banks, Background Music - Waiting Rooms/Reception Areas, Background Music- Telephone Music on hold, Puppet/Magic Shows, Background Music- Theatres, Background Music - Cinemas, Background Music- Museums & Art Galleries, Background Music- Ten Pin Bowling Centres/Bowling Alleys, Background Music- Amusement & Pleasure Parks, Background Music - Amusement Arcades, Background Music - Casinos, Background Music - Gymnasiums, Background Music - Swimming Pools.

The right of the author of a copyright vis-à-vis the Society, thus, may be exercised in almost all walks of life from the 'Radio Stations' to a small 'Hairdressing Salon'.

If the right of an author/society is so pervasive, is it necessary to construe the provisions under Section 31 of the Act having regard to the International Covenants and the laws operating in the other countries? The answer to the said question must be rendered in affirmative. Interpretation of a statute cannot remain static. Different canons and principles are to be applied having regard to the purport and object of the Act. What is essential therefor is to see that the expanding area in which the copyright will have a role to play is covered. While India is a signatory to the International Covenants, the law should have been amended in terms thereof. Only because laws have not been amended, the same would not by itself mean that the purport and object of the Act would be allowed to be defeated. If the ground realities changed, the interpretation should also change. Ground realities would not only depend upon the new situations and changes in the societal conditions vis-à-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions. APPLICATION OF INTERNATIONAL CONVENTIONS IN INDIA It is for the aforementioned limited purpose, a visit to the provisions of International Conventions would be necessary.

In interpreting the domestic/municipal laws, this Court has extensively made use of International law inter alia for the following purposes:

- (i) As a means of interpretation;
- (ii) Justification or fortification of a stance taken;
- (iii) To fulfill spirit of international obligation which India has

entered into, when they are not in conflict with the existing domestic law;

(iv) To reflect international changes and reflect the wider civilization;

(v) To provide a relief contained in a covenant, but not in a national law;

(vi) To fill gaps in law.

Beginning from the decision of this court in *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225], there is indeed no dearth of case laws where this Court has applied the norms of international laws and in particular the international covenants to interpret domestic legislation. In all these cases, this court has categorically held that there would be no inconsistency in the use of international norms to the domestic legislation, if by reason thereof the tenor of domestic law is not breached and in case of any such inconsistency, the domestic legislation should prevail.

In *Jagdish Saran and Ors. v. Union of India* [(1980) 2 SCC 768], it was observed:

"It is also well-settled that interpretation of the Constitution of India or statutes would change from time to time. Being a living organ, it is ongoing and with the passage of time, law must change. New rights may have to be found out within the constitutional scheme. Horizons of constitutional law are expanding."

In the aforementioned judgment, this Court referred to a large number of decisions for the purpose of interpreting the constitutional provisions in the light of the international treaties and conventions.

Yet again in *Indian Handicrafts Emporium and Ors. v. Union of India* [(2003) 7 SCC 589], this Court considered the Convention on International Trade in Endangered Species (CITES) and applied the principles of purposive constructions as also not only the Directive Principles as contained in Part IV of the Constitution but also Fundamental Duties as contained in Part IVA thereof.

Referring to *Motor General Traders and Anr. v. State of Andhra Pradesh and Ors.* (1984) 1 SCC 222, *Rattan Arya and Ors. v. State of Tamil Nadu and Anr.* (1986) 3 SCC 385 and *Synthetics and Chemicals Ltd. and Ors. v. State of U.P. and Ors.* (1990) 1 SCC 109, this Court held:

"There cannot be any doubt whatsoever that a law which was at one point of time was constitutional may be rendered unconstitutional because of passage of time. We may note that apart from the decisions cited by Mr. Sanghi, recently a similar view has been taken in *Kapila Hingorani v. State of Bihar* (supra) and *John Vallamattom and Anr. v. Union of India*(supra)."

These judgments were referred to in the decision of *Liverpool and London S.P. and I Asson. Ltd. v. M.V. Sea Success I and Anr.* [(2004) 9 SCC 512], wherein this court observed that as no statutory law in India operated in the field, interpretative changes, if any, must, thus be made having regard to the ever changing global scenario.

Liverpool also referred to the decision of the court in *M.V. Elisabeth* [1993 Supp. (2) SCC 433] as an authority for the proposition that the changing global scenario should be kept in mind having regard to the fact that there does not exist any primary act touching the subject and in absence of any domestic legislation to the contrary.

Concurring with the said decisions, it was however opined that the same could not mean that it restricted the jurisdiction of the Indian High Courts to interpret the domestic legislation strictly according to the judge made law.

Liverpool and London S.P. and I Asson. Ltd. (supra) has been followed by the Supreme Court in a plethora of cases inter alia *The State of West Bengal v. Kesoram Industries Ltd. and Ors.* [(2004) 10 SCC201]. In *Pratap Singh v. State of Jharkhand and Anr.* [(2005) 3 SCC 551] wherein this court directed to interpret the Juvenile Justice Act in light of the Constitutional as well as International Law operating in the field. {See also *Centrotech Minerals and Metal Inc. v. Hindustan Copper*

Limited [(2006) 11 SCC 245]; State of Punjab and Ors. v. Amritsar Beverages Ltd. and Ors. [2006 (7) SCALE 587]; State of Punjab and Anr. v. Devans Modern Breweries Ltd. and Anr. [(2004) 11 SCC 26] and Anuj Garg and Ors. v. Hotel Association of India and Ors. [(2008) 3 SCC 1]}.

However, applicability of the International Conventions and Covenants, as also the resolutions, etc. for the purpose of interpreting domestic statute will depend upon the acceptability of the Conventions in question. If the country is a signatory thereto subject of course to the provisions of the domestic law, the International Covenants can be utilized. Where International Conventions are framed upon undertaking a great deal of exercise upon giving an opportunity of hearing to both the parties and filtered at several levels as also upon taking into consideration the different societal conditions in different countries by laying down the minimum norm, as for example, the ILO Conventions, the court would freely avail the benefits thereof.

Those Conventions to which India may not be a signatory but have been followed by way of enactment of new Parliamentary statute or amendment to the existing enactment, recourse to International Convention is permissible.

This kind of stance is reflected from the decisions in PUCL v. Union of India, [(1997) 3 SCC 433], John Vallamattom v. Union of India, [(2003) 6 SCC 611], Madhu Kishwar v. State of Bihar [(1996) 5 SCC 125], Kubic Darusz v. Union of India, [(1990) 1 SCC 568], Chameli Singh v. State of U.P., [(1996) 2 SCC 549], C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil, [(1996) 8 SCC 525], Apparel Export Promotion Council v. A.K. Chopra, [(1999) 1 SCC 759], Kapila Hingorani Vs. State of Bihar [(2003) 6 SCC 1], State of Punjab & Anr. Vs. M/s. Devans Modern Breweries & Anr. [2003 (10) SCALE 202] and Liverpool & London S.P. & I Asson. Ltd. Vs. M.V. Sea Success I [2003 (10) SCALE 1].

Furthermore, as regards the question where the protection of human rights, environment, ecology and other second-generation or third-generation rights is involved, the courts should not be loathe to refer to the International Conventions.

LAW IN OTHER COUNTRIES Reference to laws to other jurisdictions *stricto sensu* may not be apposite, where the scheme of the Act/Statute is different. Where the statute is differently worded, same or similar interpretation may not be possible.

We have noticed the laws operating in other countries only to highlight that broadly it is in two forms, namely:

(a) free to air broadcasting does not require a copyright licence;

(b) a free to air broadcaster requires a licence - however to commence broadcast all that he has to do is to give an undertaking to pay a reasonable sum which in the event of dispute will be decided by a competent tribunal.

Australian Law Under Section 109 of the Australian Copyright Act, the form adopted is in the same form as in (b) above. The additional feature of the law is that the royalty for broadcasting of published sound recording is frozen at a ceiling of 1% of the gross earnings of the broadcaster during the specified period. There are also provisions for compulsory licensing. China has the form (a) above for domestic recordings. They however, follow the Berne Convention for International recordings. These domestic recordings can be broadcasted on the radio or television without any licence or payment. Even a commercial broadcast is in form

(b) above.

Japan Japan has form (b) above. The Director General of the Cultural Affairs Agency will determine the compensation required to be paid by a Broadcaster. Non-profit transmission of works already made public is exempted from paying any royalty.

United Kingdom In U.K. statutory licensing and compulsory licensing exists. Copinger & Skone James clearly says :

`....In the case of a statutory licence the rate is fixed by law, in the case of a compulsory licence the rate is left to be negotiated, but in neither case can use be refused or prevented....'."

[Emphasis supplied] It is of some significance to note that although it has been contended by Mr. Divan that the Scheme of English Statute is different, reliance has been placed by him on some English decisions to which we may refer to a little later.

ESSENTIAL FEATURES OF THE COPYRIGHT ACT The Act seeks to maintain a balance between the interest of the owner of the copyright in protecting his works on the one hand and the interest of the public to have access to the works, on the other. The extent to which the owner is entitled to protection in regard to his work for which he has obtained copyright and the interest of the public is a matter which would depend upon the statutory provisions.

Whereas the Act provides for exclusive rights in favour of owners of the copyright, there are provisions where it has been recognized that public has also substantial interest in the availability of the works. The provisions relating to grant of compulsory license must be viewed having regard to the aforementioned competing rights wherefor an appropriate balance has to be struck. For the said purpose, we may notice the broad features of the Act.

Section 16 of the Act provides that no person shall be entitled to copyright otherwise than under and in accordance with the provisions of the Act. Section 14 defines the expression "copyright" to mean the exclusive right to do or authorize the doing of specific things in respect of a work, as detailed in that section.

The primary method that an owner of copyright employs to exploit the copyright and to make this work available to the public is through the vehicle of voluntary licenses in terms of Section 30 of the Act.

The freedom to contract is the foundation of economic activity and an essential aspect of several Constitutional rights including the freedom to carry on trade or business guaranteed under Article 19(1)(g) and the right to property under Article 300A of the Constitution of India. But the said right is not absolute. It is subject to reasonable restrictions.

Section 30 enables the owner of the copyright to grant any interest in the copyright by a license in writing signed by him or by his duly authorized agent.

The underlying philosophy of the Copyright Act is that the owner of the copyright is free to enter into voluntary agreement or licenses on terms mutually acceptable to him and the licensee. The Act confers on the copyright owner the exclusive right to do the various acts enumerated in Section 14. An infringement of copyright occurs if one of those acts is done without the owner's license. A license passes no interest, but merely makes lawful that which would otherwise be unlawful. The Act also expressly recognizes the notion of an "exclusive license" which is defined in Section 2(j). But, that does not mean, as would be noticed from the discussions made hereinafter, that it would apply in all situations irrespective of the nature of right as also the rights of others. It means a license which confers on the licensee, to the exclusion of all other persons (including the owner of the copyright) any right comprised in the copyright in a work. An exclusive licensee has specific rights under the Act such as the right to have recourse to civil remedies under Section 55 of the Act. This Scheme shows that a copyright owner has complete freedom to enjoy the fruits of his labour by earning an agreed fee or royalty through the issuance of licenses. Hence, the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right, to repeat, is not absolute. It is subject to right of others to obtain compulsory licence as also the terms on which such licence can be granted.

COPYRIGHT SOCIETY The provisions with respect to Copyright Societies are contained in Chapter VII of the Act which in its present form was introduced by the Copyright (Amendment) Act, 1994. Section 33 of the Act provides for the registration of a Copyright Society. Section 34 of the Act empowers a Copyright Society to accept from the owner exclusive authorization to administer any rights in any work by issue of licenses or collection of license fee or both. A Copyright Society may issue voluntary licenses under Section 30, collect fees in pursuance of such licenses, distribute such fees amongst owners of rights, and perform any other functions consistent with the collective control of the owners whose rights it administers.

The Copyright Society is required to frame a scheme to determine the quantum of remuneration payable to individual copyright owners having regard to the number of copies of the work in circulation. [Section 34A(2)] Chapter V of the Copyright Rules, 1958 makes detailed provisions with respect to the conduct of business by Copyright Societies. Rule 14J requires that a Copyright Society shall frame a scheme of tariff to be called a "Tariff Scheme" setting out the nature and quantum of fees or royalties which it proposes to collect in respect of such copyright or other rights administered by it. Rule 14K requires a Copyright Society to frame a "Distribution Scheme" setting out the procedure for collection and distribution of royalty specified in the Tariff Scheme among the owners of copyright. Any distribution under the Distribution Scheme is required to be in the proportion to the income of the Copyright Society from actual use of the work or works of each owner of rights." **COMPULSORY LICENCE** The scheme of the Act affirms the freedom to contract as being the primary machinery by which the copyright owner publishes his work through a voluntary license regime in terms of Section 30. Compulsory licenses are an exception to the general freedom of the copyright owner to contract.

Section 31 deals with compulsory license in works withheld from the public and the submissions relating to this provisions are set out in detail in the next section of this outline of submissions.

Section 31A empowers the Copyright Board to issue a compulsory license in respect of an unpublished Indian work or a translation thereof in any language, whose author is dead or unknown or cannot be traced or the owner of copyright in such work cannot be found. Section 31A(4) empowers the Board to hold an enquiry and direct the Registrar of Copyrights to grant to the applicant a license to publish the work or translation, subject to the payment of such royalty and subject to such other terms and conditions as the Copyright Board may determine.

Section 32 empowers the Copyright Board to issue a compulsory license to produce and publish a translation of literary or a dramatic work in any language after a period of 7 years from the first publication of the work.

Section 32A empowers the Copyright Board to grant a compulsory license where after the expiry of the relevant period from the date of the first publication of an edition of a literary, scientific or artistic work, copies of such edition are not made available in India.

Section 32B provides for the termination of a compulsory license where it is issued under Section 32(1A) or Section 32A, on the fulfillment of the conditions mentioned in that Section.

Rule 9 of the Copyright Rules prescribed the manner in which the Copyright Board shall determine royalties payable to the owner with respect to a compulsory license

for a translation under Section 32. Rule 11D provides for the manner in which the Copyright Board shall determine royalties payable to the owner of the copyright in respect of compulsory licenses issued under Section 31A, Section 32 and Section 32A.

Rule 11C (4) provides that where there are more applicants than one seeking a compulsory license for translation of a work or for reproduction of the work or for publication of an unpublished work, then the Copyright Board make grant the compulsory license to such one of the applicants, as in the opinion of the Board, would best serve the interest of the general public.

Chapter VI relate to grant of licence, which can be divided into two parts; licences by owners of copyright and compulsory licenses. Compulsory licences can be granted by the Copyright Board subject to the limitations contained therein. It cannot be said to be an exception to the general rule in the strict sense of the term as the provisions relating to grant of license by owners of Copyright and compulsory licenses operate in different fields. It may be true that while passing an order for grant of compulsory licenses, the relevant factors as laid down therein must be kept in mind which would include the right of the owner of the copyright as a part of the right of property, but where a statute is to be construed as a balancing statute, the situation may be different. CONSTRUCTION OF SECTION 31 OF THE ACT The broad requirements of Section 31 are as under:

- "(a) The subject work must be an Indian work whose term of copyright is subsisting;
- (b) The Indian work must be one that has been published or performed in public;
- (c) The owner of the copyright in the work must have
 - (i) refused to republish or allow republication of the work or have refused to allow the performance of the work and by reason of such refusal the work is withheld from the public; or
 - (ii) refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable; and
- (d) The Copyright Board is satisfied that the grounds for refusal are not reasonable."

Significantly, in between the clauses (a) and (b), the word `or' has been used. It must be read disjunctively and not conjunctively. Even otherwise, reading the said provision, conjunctively is not possible. Clause (a) refers to republication or allowing republication of the work, etc. Clause (b) refers to refusal to allow communication to the public in the case of a broadcast or in the case of the sound recording.

What is the meaning of the word 'refusal' The dictionary meaning of 'refusal' whereupon reliance has been placed by Mr. Divan may, at the outset, be noticed.

"refusal. 1. The denial or rejection of something offered or demanded< the lawyer's refusal to answer questions was based on the attorney-client privilege>.

2. an opportunity to accept or reject something before it is offered to others; the right or privilege of having this opportunity <she promised her friend the first refusal on her house> (See Black's Law Dictionary, Seventh Edition) The meaning of a word must be attributed to the context in which it is used. For giving a contextual meaning, the text of the statute must be kept in mind. An act of refusal depends upon the fact of each case. Only because an offer is made for negotiation or an offer is made for grant of license, the same per se may not be sufficient to arrive at a conclusion that the owner of the copyright has not withheld its work from public. When an offer is made on an unreasonable term or a stand is taken which is otherwise arbitrary, it may amount to a refusal on the part of the owner of a copyright.

When the owner of a copyright or the copyright society exercises monopoly in it, then the bargaining power of an owner of a copyright and the proposed licensee may not be same. When an offer is made by an owner of a copyright for grant of license, the same may not have anything to do with any term or condition which is wholly alien or foreign therefor. An unreasonable demand if acceded to, becomes an unconstitutional contract which for all intent and purport may amount to refusal to allow communication to the public work recorded in sound recording. A de jure offer may not be a de facto offer.

Although the term 'work' has been used both in clauses (a) and (b) of sub-Section (1) of Section 31, the same has been used for different purpose. The said term 'work' has been defined in Section 2(y) in different contexts. It enumerates the works which are: (a) a literary, dramatic, musical or artistic work; (b) a cinematograph film; (iii) a sound recording. Thus, a literary work ex facie may not have anything to do with sound recording.

There are indications in the Act particularly having regard to Sections 14(1)(a) and 14(1)(e) thereof that they are meant to operate in different fields. They in fact do not appear to be operating in the same field. Clause (a) refers to publication or republication of the work. It may be in print media or other medias. Clause (b), however, refers to broadcast alone. Sound recording is a part of it. Sub-clauses (i) to (vii) of sub-clauses (a) of sub-Section (1) of Section 14 and sub-clauses (i) to

(iii) of sub-clause (e) conferred different meanings of the word copyright.

Whereas clause (a) refers to work in general, clause (b) refers to work recorded in such sound recording, which in turn means the recording of sounds from which such sounds may be reproduced

regardless of the medium on which such recording is made or the method by which the sounds are produced. Clause (b) ex facie does not fit in the scheme of clause (a).

Interpretation of clause must be given effect to having regard to the limitations contained therein, namely, unless context otherwise requires.

Communication to the public is possible by way of diffusion. Explanation appended to Section 2(ff) clearly shows the extensive meaning of the said term. Publication and republication of a work in general may be different from communication of a work recording in sound recording. The use of words 'such work' also assumes significance. The said words must be understood having regard to the fact that the sound recording is also a work. If it is accepted that voluntary licenses have been entered into by the owners with All India Radio and some other Radio Broadcasters, then it is sufficient for closing the doors on another person to approach the Copyright Board. One may as well say that if it is provided to a satellite channel or a space radio, the same also would subserve the purpose for refusing to grant an application under Section 31 of the Act.

A contextual interpretation of the provisions would lead us to consider the ground realities. F.M. radios are played for every city. The word 'work' in the context of broadcast must be understood having regard to the fact that there are 150 F.M. licenses out of which about 93 are working. There are 300 broadcasters working in almost all the big cities in India. The word 'public' must be read to mean public of all parts of India and not only a particular part thereof. If any other meaning is assigned, the terms 'on terms which the complaints considers reasonable' would lose all significance. The very fact that refusal to allow communication on terms which the complainant considers reasonable have been used by the Parliament indicate that unreasonable terms would amount to refusal. It is in that sense the expression 'has refused' cannot be given a meaning of outright rejection or denial by the copyright owner.

PPL and SCIL might have been called upon the broadcasters to enter into licenses and were willing to license their repertoire. But their contention was that if such terms are unreasonable, it amounted to refusal which would attract Section 31 of the Act. The word 'communicate the work to the public by broadcast' is of significance. It provides for a mode of communication. Thus, only because a Registrar of a Copyright would be directed to grant a licence to communicate the work to the public by broadcast would not mean that only a single licence shall be granted. The Board acting as a statutory authority can exercise its power from time to time. It is therefore not correct to contend that having regard to the provisions of sub-section (2) of Section 31, compulsory licence can be granted only to one and not to more than one broadcaster. We would deal with this provision at some details a little later. In response to a query as to whether when an application for compulsory licence is filed any publication thereof is made or not; we are informed that no such rule or practice exists. Apart from the fact that application for grant of compulsory licence in the matter of sound recording may be by different persons; the wide range of it has been noticed by us hereinbefore. It may for different parts of the country nay different cities. If a compulsory licence is granted only once covering every single part of the country, the same cannot be lead to a conclusion that no other person can approach the Board.

Section 31(1)(b) in fact does not create an entitlement in favour of an individual broadcaster. The right is to approach the Board when it considers that the terms of offer for grant of license are unreasonable. It, no doubt, provides for a mechanism but the mechanism is for the purpose of determination of his right. When a claim is made in terms of the provisions of a statute, the same has to be determined. All cases may not involve narrow commercial interest. For the purpose of interpretation of a statute, the court must take into consideration all situations including the interest of the person who intends to have a licence for replay of the sound recording in respect whereof another person has a copyright. It, however, would not mean that all and sundry can file applications.

The mechanism to be adopted by the Board for determining the right of a complainant has been provided under the Act.

Explanation appended to Section 31 also plays an important role as it seeks to make a distinction between an artistic work on the one hand and a cinematographic films or sound recording on the other. We are not concerned therewith at this stage.

Admittedly in terms thereof the principles of natural justice are required to be complied with and an enquiry has to be held. The extent of such enquiry will depend upon the facts and circumstances of the case. A finding has to be arrived at that the grounds of refusal by an owner of a copyright holder is not reasonable. Only upon arriving at the said finding, the Registrar of copyright would be directed to grant a license for the said purpose. The amount of compensation payable to the owner of the copyright must also be determined. The Board would also be entitled to determine such other terms and conditions as the Board may think fit and proper. Registration is granted only on payment of such fees and subject to compliance of the other directions. RIGHT TO PROPERTY - IS THE CONCEPT APPLICABLE An owner of a copyright indisputably has a right akin to the right of property. It is also a human right. Now, human rights have started gaining a multifaceted approach. Property rights vis-à-vis individuals are also incorporated within the 'multiversity' of human rights. As, for example, any claim of adverse possession has to be read in consonance with human rights. The activist approach of the European Court of Human Rights is quite visible from the judgment of *Beaulane properties Ltd. v. Palmer* [2005 EWHC 817(Ch.)] and *J. A. Pye (Oxford) Ltd. v. Graham* [(2002) 3 ALL ER 865].

This Court recognized need of incorporating the same principle for invoking the rule of strict construction in such matters in *P.T. Munichikkanna Reddy and Ors. v. Revamma and Ors.* [(2007) 6 SCC 59] stating:

" Adverse possession is a right which comes into play not just because someone loses his right to reclaim the property out of continuous and willful neglect but also on account of possessor's positive intent to dispossess. Intention to possess can not be substituted for intention to dispossess. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession."

Further, in *Peter Smith v. Kvaerner Cementation Foundations Ltd.* [[2006] EWCA Civ 242] the court allowed the appellant to reopen the case despite a delay of four years as he had been denied the right to which Article 6 of the European Convention on Human Rights ("the Convention") entitled him - to a fair hearing before an independent and impartial tribunal.

But the right of property is no longer a fundamental right. It will be subject to reasonable restrictions. In terms of Article 300A of the Constitution, it may be subject to the conditions laid down therein, namely, it may be wholly or in part acquired in public interest and on payment of reasonable compensation.

PUBLIC INTEREST - PUBLIC POLICY What would be a public interest? Would it depend upon the facts and circumstances of each case and the provisions of the statute?

General meaning of the word "public policy" has always been held to be an unruly horse by this Court. [See *Gherulal Parakh v. Mahadeodas Maiya and Ors.* [1959 Supp (2) SCR 406]. This case was referred to in the recent decision of this court in *Devinder Singh and Ors. Vs. State of Punjab and Ors.* [AIR 2008 SC 261] The right to property, therefore, is not dealt with its subject to restrict when a right to property creates a monopoly to which public must have access. withholding the same from public may amount to unfair trade practice. In our constitutional Scheme of statute monopoly is not encouraged. Knowledge must be allowed to be disseminated. An artistic work if made public should be made available subject of course to reasonable terms and grant of reasonable compensation to the public at large.

ROYALTY AND COMPENSATION Are the terms "royalty" and "compensation" are not synonymous?

"Royalty" means the remuneration paid to an author in respect of the exploitation of a work, usually referring to payment on a continuing basis (e.g. 10 per cent of the sale price) rather than a payment consisting of a lump sum in consideration of acquisition of rights. May also be applied to payment to performers. (See 'World Copyright Law' (2nd Edn) by J.A.L. Sterling).

The word 'compensation', however, must have been used keeping in view the fact that if it is a statutory grant; it is a case of statutory licence. We are not unmindful of the fact in cases of other statutory licenses, the word 'royalty' has been used. Even the word 'usually' has been used. Mr. Divan himself has referred to Rule 11A and Form IIA appended to the Rules of 1958. Clauses (10) and (11) of the Form which have validly been made used the word 'royalty'.

"10. Rate of royalty, which the applicant considers reasonable, to be paid to the copyright owner.

11. Means of the applicant for payment of the royalty"

The legislature therefore for all intent and purport equates 'compensation' with 'royalty'. In the context of the Act, royalty is a genus and compensation is a species. Where a licence has to be granted, it has to be for a period. A 'compensation' may be paid by way of annuity. A 'compensation' may be held to be payable on a periodical basis, as apart from the compensation, other terms and conditions can also be imposed. The compensation must be directed to be paid with certain other terms and conditions which may be imposed. MARGINAL NOTE It was urged that for proper construction of Section 31 of the Act, reference to marginal note is permissible. Strong reliance has been placed by Mr. Divan on K.P. Varghese v. Income-tax Officer, Ernakulam [(1981) 4 SCC 173] to contend that the marginal note to a section can be relied upon for indicating the drift of the section or to show what the section is dealing with. It is however, also well settled that where the statute is clear, marginal note may not have any role to play. {See Bhinka & ors. v. Charan Singh [1959 Supp. (2) SCR 798] . PARLIAMENTARY INTENT The intention of the Parliament, it is trite, must be ascertained from the plain reading of the Section. The intention is to treat works, which have been "withheld from the public" differently from the "right to broadcast". The right to broadcast is a ephemeral right. It requires special treatment as it confers upon every person, who wishes to broadcast a work or the work recorded in a sound recording, the right to do so is either by entering into a voluntary agreement to obtain a licence on such terms which appear to be reasonable to him or when the term appears to be unreasonable to approach the Board.

We wish the statute would have been clear and explicit. But only because it is not, the courts cannot fold its hands and express its helplessness.

When such a complaint is made, it confers the jurisdiction upon the Board. It may ultimately allow or reject the complaint but it cannot be said that the complaint itself is not maintainable. INTERPRETATION OF SECTION 31(2) This takes us to the interpretation of Section 31(2). It is attracted in a case where there are more than one applicants. The question of considering the respective claim of the parties would arise if they tread the same ground. The same, however, would not mean that only one person is entitled to have a licence for all time to come or for an indefinite term even in perpetuity. A licence may be granted for a limited period; if that be so another person can make such an application. Sub-section (2) of Section 31 would lead to an anomalous position if it is read literally. It would defeat the purport and object of the Act. It has, therefore, to be read down. Purposive construction therefor may be resorted to.

In New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr. [2007 (14) SCALE 556, (2008) 3 SCC 279], this court opined:

"With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that literal interpretation, if given, may give rise to an anomaly or absurdity which must be avoided. So as to enable a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/ author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act fulfilled; which in turn would lead the beneficiary under the statutory scheme to fulfill its constitutional obligations as held by the court inter alia

in Ashoka Marketing Ltd. (supra)."

Barak in his exhaustive work on 'Purposive Construction' explains various meanings attributed to the term 'purpose'. It would be in the fitness of discussion to refer to Purposive Construction in Barak's words:

"Hart and Sachs also appear to treat 'purpose' as a subjective concept. I say 'appear' because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator's shoes, they introduce two elements of objectivity: First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that members Page 0184 of the legislative body sought to fulfill their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably."

(See Aharon Barak, Purposive Interpretation in Law (2007) at pg.

87) In Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli and Ors. [(2007) 6 SCC 81], this Court held:

"The Parliament moreover is presumed to have enacted a reasonable statute (see Breyer, Stephen (2005): Active Liberty: Interpreting Our Democratic Constitution, Knopf (Chapter on Statutory Interpretation - pg. 99 for Reasonable Legislator Presumption)."

The provisions of the Act and the Rules in this case, are, thus required to be construed in the light of the action of the State as envisaged under Article 14 of the Constitution of India. With a view to give effect thereto, the doctrine of purposive construction may have to be taken recourse to. [See a;sp Oriental Insurance Co. Ltd. v. Brij Mohan and Ors [(2007) 7 SCC 56]"

Furthermore, the court while interpreting a statute will put itself in the armchair of the reasonable legislature, all statutes must be presumed to be reasonable. It is now a trite law that literal interpretation should be avoided when it leads to absurdity. If it is to be held that once the compulsory licence is granted in respect of a sound recording, the Board loses its jurisdiction for all time to come, it will lead to an absurdity. The statute does not contemplate such a position. The statute on the one hand not only in terms of General Clauses Act but also having regard to the individual complaints which a person may have as regards the unreasonableness of the terms impose upon him by the owner of the copyright must be held to be entitled to approach the Board as and when any cause of action arises therefor. It therefore must be held that sub- Section (2) of Section 31 is relatively directed to clause (a) and not clause (b).

Mr. Divan relied on Indian Administrative Services (SCS) Association, U.P. & ORS. v. Union of India & ORS. [1993 Supp. (1) SCC 730] wherein it has been held that:

"9. Thus it is settled law that where the intention of statutory amendment is clear and expressive, words cannot be interpolated. In the first place they are not, in the case, needed. If they should be added, the statute would more than likely fail to carry out the legislative intent. The words are the skin of the language which the legislature intended to convey. Where the meaning of the statute is clear and sensible, either with or without omitting the words or adding one, interpolation is improper, since the primary purpose of the legislative intent is what the statute says to be so. If the language is plain, clear and explicit, it must be given effect and the question of interpretation does not arise. If found ambiguous or unintended, the court can at best iron out the creases. Any wrong order or defective legislation cannot be righted merely because it is wrong. At best the court can quash it, if it violates the fundamental rights or is ultra vires of the power or manifestly illegal vitiated by fundamental laws or gross miscarriage of justice. It could thus be held that the legislature intended that the First Amendment Rules would operate prospectively from February 3, 1989, the date of their publication in the Gazette of India. Its policy is explicit and unambiguous. Rule 3(3)(ii) intended to remedy the imbalances while at the same time the proviso intended to operate prospectively to avert injustice to the officers recruited/promoted earlier than the officer promoted later to that date. The proviso carved out an exception to ward off injustice to the officers that became members of I.A.S. earlier to those dates."

In this case, however, the meaning of the Statute is neither clear nor sensible. It is a statute where a purposive construction is warranted. It is a case where sub-Section (2) should be kept confined to clause (a) for that purpose. The statute has to be read down. It is not a case of improper interpolation so as to take away a primary purpose of the legislative intent. It is expedient to give effect to the intent of the statute. This itself says that creases can be ironed out. While undertaking the said exercise, the court's endeavour would be to give a meaning to the provisions and not render it otiose. We are, therefore, of the opinion that Section 31(2) refers to case falling under clause (a) of Sub-section (1) of Section 31 and not clause (b) thereof.

PRINCIPLES OF VALUATION 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.

DISCRETIONARY JURISDICTION The other question which arises is as to whether the discretionary jurisdiction should have been exercised in favour of the appellant. It was urged that keeping in view the fact that ENIL infringed the copyright, it was not entitled to an injunction.

Reliance has been on Phonographic Performance Ltd. vs. Maitra [(1998) Fleet Street Reports 749 at 770- 773]. The general principle of grant of injunction came up for consideration before the Court of Appeal. Therein, it was held that an owner may exercise and exploit his proprietary right by licensing some and not others. He may charge whatever he wishes. Such is not the position in India. Therein, the defendant did not take part in the proceedings. It was, inter alia, from that angle, held that the court could still exercise discretion.

The court of appeal held:

"Use of an injunction by PPL to obtain money to which they are not entitled would be an abuse, but there is no evidence that that ever occurs. Where unauthorized use of PPL's copyright is taking place, we do not believe it is an abuse to refuse to licence that copyright without an appropriate payment for past use and an agreement for future use. Nor do we consider it an abuse for PPL to require compliance with an injunction either by the person refraining from using the repertoire or by payment for such use that has taken place and will take place."

Apart from the fact that we are not dealing with a case where an order of injunction is required to be issued; as indicated hereinbefore, the question before the Board was as to whether there was an abuse in the sense that unreasonable amount was being claimed by way of royalty. CONCLUSION As it was a case of abuse, the Board had the jurisdiction to entertain any application for grant of compulsory licence. How far and to what extent appellant has infringed the right of the respondent is a matter which may be taken into consideration by the Board. A suit was filed and injunction was granted. Apart from the fact that the appellant offered to take a license held negotiations with the respondents in the suit as soon as it came to know that Super Cassettes is not a member of PPL, it gave an undertaking. Each case must be considered on its own facts.

However, we do not approve the manner in which the Board has dealt with the matter. It has refused to examine the witnesses. It took up the matter on a day for hearing which was fixed for production of witnesses. We, therefore, are of the opinion that the order of the Board should be set aside and the matter be remitted to the Board again for the consideration of the matter afresh on merit.

These appeals are allowed with the aforementioned directions. In the facts and circumstances of the case, the parties shall pay and bear their own costs.

.....J. [S.B. Sinha]

...J. [Lokeshwar Singh Panta] New Delhi;

May 16, 2008