IAMAI Submission on "Review of the Intellectual Property Rights Regime in India" by the Department Related Parliamentary Standing Committee

The Internet and Mobile Association of India ("IAMAI") is a not-for-profit industry body and we play a key role in ensuring the growth and sustainability of the digital industry.

The Department Related Parliamentary Standing Committee (DRPSC) has recommended amendments in Section 31D of the Copyright Act. IAMAI on behalf of its members would like to thank the Department for Promotion of Industry and Internal Trade (DPIIT) for giving us the opportunity to share our inputs on the proposed amendment. We welcome the proposed amendments recommended by DRPSC.

IAMAI on behalf of its members would like to share feedback on the Section 31D. Our comments and inputs have been set out below.

Background

Section 31 D of the Copyright Act, 1957 that was added by way of Copyright (Amendment) Act, 2012 provides for a mechanism to deal with the public interest vis-a-vis the private interest. Section 31D has its genesis in the 27th Report of the Parliamentary Standing Committee on the Copyright (Amendment) Bill, 2010. The objective behind including an administrative route for licensing was to ensure that the public would be able to enjoy Musical Works over various modes of broadcasts, without diminishing the royalties accruing to the owner of copyright. The provision facilitates the access to the works for the broadcasting industry by providing statutory license for broadcasters. Prior to the introduction of Section 31D through the Copyright (Amendment) Act, 2012, radio stations invoked Section 31, which laid down a compulsory mechanism to license copyrighted works, when negotiations failed. Section 31 allowed compulsory licensing in cases where a prospective licensee was unable to access a work to communicate it to the public. Under this provision, the licensee could approach the Copyright Board [1] and access the work upon payment of a predetermined royalty.

Clause 1 of Section 31D states that "Any broadcasting organisation desirous of communicating to the public by way of a broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so subject to the provisions of this section"[2].

[1] *The Intellectual Property Appellate Board (IPAB) replaced the Copyright Board. The Tribunal Reforms Act, 2021 abolished the IPAB.*

[2] CHAPTER VI (copyright.gov.in)

In 2016, the Department for Promotion of Industry and Internal Trade (DPIIT) issued an Office Memorandum (OM)[3] stating that Section 31D can be applied for broadcasting on the internet as well. DPIIT OM said that *the words "any broadcasting organization desirous of communicating to the public[4]" may not restrictively interpreted to be covering only radio and TV broadcasting as definition of 'broadcast' read with 'communication to the public' appears to be including all kind of broadcast including internet broadcasting. Thus, the provisions of Section 31D are not restricted to radio and television broadcasting organizations only, but cover internet broadcasting organizations also."*

However, judgment of Bombay High Court in Tips Industries v. Wynk Music[2] rejected the DPIIT's interpretation of Section 31D. Court observed that "*the interpretation given by the Department of Industrial Policy and Promotion on behalf of the Govt. of India, is contrary to the interpretation of Section 31-D, drawn under the Act and the Rules which I have observed hereinbefore. The said Memorandum does not seem to be drawing its power from any legislation*"[5]. However, this judgment by His Lordship Mr. J. S. J. Kathawalla dated 23rd April, 2019 has been stayed by the Hon'ble Division Bench JJ. Mr. S. C. Dharmadhikari and Mr. G. S. Patel on June 25, 2019. It is pertinent to note that Hon'ble Court is yet to decide the matter based on merits of the case.

The Department Related Parliamentary Standing Committee (DRPSC) has recommended amendments in Section 31D of the Copyright Act. DRPSC seek to amend Section 31D and incorporate "internet or digital broadcasters" such as Over the Top (OTT) platforms, music apps etc. under the benefit of statutory license along with traditional broadcasters.

IAMAI Submission

IAMAI Position on the Incorporation of Internet or Digital Broadcasters under Section 31 D

1. Difference in Radio, TV and Internet Broadcasting is blurring:

With the advancement of technology both TV and Radio are available through the internet. Just like internet broadcasting even television (including Doordarshan available through the set top boxes) gives viewer a choice today. On various TV channels you can see a live match when you want. You can rewind and fast forward, you can switch content anytime. You can download a program or a movie and watch it when you like. You can select your program or even parts of the program. Similar interactivity to facilitate viewer/listener choice is available on TV and internet. These ancillary services are included with the primary service of 'broadcast' and are a part of the subscription fees which is charged by these broadcasters. TV is included clearly in Section 31D of the Act. Then why not internet broadcasting - it's just another medium of broadcast.

[3] The Office Memorandum is accessible at: https://dpiit.gov.in/sites/default/files/OM_CopyrightAct_05September2016.pdf
[4] Section 31 D of the Copyright Act, 1957
[5] pdf_upload-360750.pdf (livelaw.in)

Hence, internet is trying to ensure that they get the same protection that is already given to other mode of broadcasts- TV and Radio.

2. Definition of "broadcast" includes wire and wireless diffusion, which would include 'Internet':

By giving the statutory license option to a set of broadcasters and not to others, Internet is being put at a disadvantage even though the definition of "broadcast" clearly includes wire and wireless diffusion, which would include 'Internet'. Further, changing the definition of "communication to public" also ought to be considered so as to include Internet broadcasting, as had been covered in the draft rules, and should also include new age technologies like all modes of broadcast, streaming, download to own, offline availability, etc. Only permitting broadcasting of content which is only in line with old technologies of consumption of content will make Section 31D obsolete and without teeth.

3. Present system is cumbersome and not equipped to address requirements of the industry:

The present requirement of applying for a statutory licensing in advance makes it cumbersome for anyone, other than radio broadcasters (who play songs back-to-back i.e., songs being a form of evergreen content), to use the tool of statutory licensing since, programs / shows / serials are created on a daily basis and the time to decide which music to be used in which program / show / serial is a window of not more than 15 hours to 24 hours. The statutory licensing provisions presently is not equipped to address such requirements of the industry. There are several instances where during the broadcast of a live show, an actor or a participant may sing a song for which a license may have not been taken by the broadcaster. This may expose the broadcaster to be subjected to harassment and humongous claims for damages / compensation. Provisions of Section 31D in respect of broadcasters may be amended in such a manner that instead of applying for a statutory license in advance, the broadcasters may be allowed to periodically report the usage of the works and simultaneously pay license fees. Doing this will allow the broadcasters to use songs on an impromptu basis and thereby not hamper creativity in any manner. The royalty rates can be paid appropriately at a later stage as per applicable provisions of the Copyright Act and Copyright Rules. The tariff for such usage should be set up at the earliest after consultation with the stakeholders. For clarity, in consultation with stakeholders, sufficient safeguards too can be built in to ensure that there is no misuse of statutory licensing provisions by unscrupulous platforms.

4. Robust statutory licensing regime is required to protects broadcasters:

Robust statutory licensing regime is required to protect broadcasters and enable them to use sound recordings and literary and musical works in different programs at reasonable and commercially viable rates. The absence of such mechanism is putting the music labels in a dominant position and that too without any checks and balances. Consequently, this is leading to increase in license fee, which is sometimes even in the range of 50% to 100% within a year itself.

If the current situation continues as is, internet broadcasting organisations employing a significant number of people and contributing substantially by the way of taxes may be forced to shut down. Statutory licensing is beneficial to the public at large as a major part of the service is "free to air" just like in the case of FM Radio.

5. Statutory Licensing will reduce uncertainty:

The concept of statutory licensing was introduced to provide access to works in a fair and equitable manner. The diversity in the music industry, combined with the lack of organized licensing mechanisms and failure of copyright societies to effectively license works, led to Statutory Licensing provisions. It is also pertinent to highlight that the addition of Section 31D by way of the Copyright (Amendment) Act, 2012 reflects the legislative intent that certain exploitation of works should be accessible to broadcasters and ultimately to the general public at reasonable rates, particularly to start ups and nascent industry like the internet broadcast industry. It is abundantly clear that the legislature did not want refusal of the copyright holder resulting in withholding of the work from the public, in the field of broadcast. So far as broadcast is concerned the legislature sought to make provisions for grant of an automatic license to broadcasters who are willing to pay reasonable royalty.

However, due to the existing uncertainty and confusion, Internet Broadcasters are worried that if they invoke Statutory License, and there is lack of complete clarity, music companies will continue to threaten legal action. The music industry has not been able to establish a well-organized system of licensing music and facilitating public access. The demands from the music companies are exorbitant and tends to exceed any logical economic rationale. Voluntary licenses often fail as one is at the mercy of what the music company will demand both in terms of monetary value and restrictions on various terms and conditions. For example, music companies continue to harass Internet broadcasters by way of multiple frivolous legal notices and law-suits. Statutory License will protect internet music broadcasters and streaming platforms from frivolous infringement suits and threat of frivolous litigation that is thrown at them for no reason whatsoever.

6. Suggested principles for implementing a statutory license:

Statutory licenses provide a net benefit to all stakeholders, they reduce the possibility of infringing content being available on an Internet platform by giving platforms an option for licensing when the applicable rightsholder cannot be found, they ensure money flows back to rightsholders, and they enable platforms to have a wide catalogue of licensed music available for users. The government should consider implementing a statutory license that embodies the following principles:

a) Designating a copyright society to administer the licence.
b) Clarifying that copyright society has a non-exclusive right to administer the licence. Licensees should retain the option to obtain rights directly from a rightsholder.
c) Mandating the copyright society be authorized to grant licences on a "blanket" basis, provided that the copyright society must also be able to administer carve-outs to that blanket licence (for example, where a licensee gets some rights directly from a rightsholders and the rest from the copyright society).

d) Authorizing the copyright society to licence works for which the author is unknown, and collect the applicable royalties for distribution when the author comes forward. In exchange for a licensee paying those royalties, the licensee must be indemnified against claims brought by the unknown author for infringement.

7. Clarification should be supplemented regarding the process for issuance of notice and payment of royalties:

The application of Section 31D, read with Rule 31 of the Copyright Rules, 2013 ("**Rules**") provides sufficient opportunity to both, broadcasters, as well as owners of the music content, to provide suggestions in respect of the setting of royalty rates. Therefore, the inclusion of internet broadcasters within the ambit of Section 31D will also remove the process of time-consuming negotiations, largely at the mercy of owners of music content owner. Accordingly, rates of royalties that will be fair to both sides can be safely expected.

However, a clarification should be supplemented, in respect of statutory licensing under Section 31D, specifically in relation to the process for issuance of notice and payment of royalties. Presently, the Act, read with Rule 29, provides that a notice is to be issued to the Registrar of Copyright and the owner of the published sound recording, literary, or musical works, 5 days before the communication to the public of such work by the broadcaster, and that such broadcaster shall pay the amount of royalties as may be prescribed by the relevant authority in this regard. Rule 29 clarifies that such notice may be issued only after the rates have been prescribed. However, the contents of such notice (i.e, specifically, the details of time slots, duration, and period of programme in which the works are to be included) are currently, onerous and impracticable, and an advance notice stating the works proposed to be used is unworkable in the internet and digital space. Further, the internet and digital works on a pull mechanism, and it is impossible to know in advance the sound recordings, literary, and/or musical works' usage/consumption, as the same is dependent on the user/subscriber. To elaborate, it is practically impossible to estimate that an individual will watch a particular cinematographic film leading to performance / communication to the public of sound recordings, literary, and/or musical works. Consequently, an advance notice anticipating/estimating the usage in advance shall be impossible to achieve.

For effective and accurate data, the details as sought to be mentioned in notice, as specified and explained above, to be issued under Section 31D read with the Rule 29 should not be insisted to be provided.

IAMAI Recommendation:

The concept of statutory licensing under Section 31 D was introduced to provide access to works in a fair and equitable manner. Given the fact that the majority of users in India today access music via on demand services, the exclusion of 'Internet or Digital Broadcasters' from the applicability of Section 31D would render the same ineffective. IAMAI welcomes the proposed amendments recommended by DRPSC. Amendments will ensure that 'Internet or Digital Broadcasters' avail the

statutory licensing facilities. It is necessary for ensuring a level playing field but more importantly to ensure wider access of copyrighted work to the public.

Note:

Some of our members have highlighted certain issues that are not captured in our above recommendations. These are listed below as follows:

a) Under international copyright treaties such as TRIPS, WCT and WPPT, rights holders have exclusive rights to deal with their copyright rights subject only to limitations and exceptions which meet the requirement of the Berne three-step test. There is no clear policy objective that would be achieved here, besides benefitting the users of copyright licenses at the expense of creators. In other words, there is no "special case" to be made for extending Section 31D.

b) Section 31D was meant to be very limited in scope, to address only traditional linear radio and TV broadcasting services. There are crucial differences between traditional and newer services. However, the DRPSC recommendation does not address these differences and appears premised on the assumption that they operate on a similar basis (and earn similar revenue).

c) There are certain provisions of the present royalty determination mechanism under Section 31D that are redundant for the digital sector. For example, parameters like geographical coverage, detail of time slots or duration or period of programme transmission are parameters applicable to conventional 'push' based services but do not apply to 'pull' based services.