

VOLUME 1| ISSUE 1

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

CASE STUDY ON TIPS V. WYNK- Mahima Khandelwal¹**ABSTRACT**

This case study on Tips v. Wynk² is an initiative to provide a detailed analysis on statutory licensing under section 31D of Copyright Act³. It was a much awaited judgment as it centers around the question that has been a subject of many simmering debates. People from the legal fraternity were divided on the issue of Statutory Licensing of music on Internet. This judgment has put rest to all of them. In the present case, court has answered several questions related to easy and quick access to music on Internet.

INTRODUCTION

From education to entertainment, today technology has surged in all the spheres of life. With such widespread impact of technology, it would be surprising if it had not touched the music industry. Be it from a recording studios to amusicophile sitting at home, the impact is palpable everywhere. Undoubtedly, technology has made our everyday tasks easier and quicker. However, you cannot deny there are two sides of everything. While internet and technology been a boon to musicophiles as it provides quick access but it has also been misused by some miscreants.

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² Tips Industries Ltd. v. Wynk Music Ltd. &Anr Notice of Motion (L) No. 197of 2018

³ Copyright Act 1957

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In the past few years, many online music streaming apps like Wync, Gaana, Saavan made entry in the Indian market. While they have been gaining popularity at a face pace, there has been lack of sufficient legislations and clarity regarding them. This long running legal dispute between Tips and Wync has provided clarity on statutory licensing.

FACTS

The plaintiff i.e. The Tips industry Ltd is a music label which claims to have the copyright of over 25,000 songs. The defendant Wync Music Ltd. owned by Airtel is an online music streaming service which provides access to its users to popular music. Upon payment of a fixed subscription fees, Users have access to popular music albums. The defendant had bought the license of plaintiff's repository under a written License Agreement dated 22nd August 2014 which expired in 2017.

The plaintiff contended that in 2017 in a meeting between the plaintiff and the defendant amount of Rs 4.5Crore was agreed by both the parties for a term of 2 years. However, the defendant contended that this was not true and the said amount was never accepted by the defendant as it was excessive.

Plaintiff and defendant tried to renegotiate but failed. Following which the plaintiff send notice to defendant to discontinue the use of plaintiff's repertoire. The defendant took refuge of Section 31D of the Copyright Act.

Section 31D of Copyright Act, 1957 which was added in 2012⁴, provides for the Statutory License for broadcasting of literary and musical works. According to Section 31D, any broadcasting organization which is desirous of communication to the public by way of broadcast or by way of performance or musical work may do so provided they give prior notice in the prescribe form and royalty to the owner. The appellate board has been given the power to fix the rate of royalty.

⁴ Copyright Amendment Act, 2012 http://copyright.gov.in/Documents/CRACT_AMNDMNT_2012.pdf

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In its contention, the defendant claims itself as broadcasters and that under section 31D they are entitled to communicate to the public by way of broadcast Plaintiff's repertoire. In its response, the Plaintiff filed suit against the defendant seeking permanent injunction restraining the defendant from using his repertoire.

WHAT IS SECTION 31D?

Section 31D was introduced in 2012. It is an exception to the copyright. The general rule of copyright is that no person can exploit the copyright without the permission of the owner. However, section 31D introduced the concept of statutory licensing.

It states that any broadcaster organization or broadcaster can communicate the literary work or sound recording or music to the public which has already been published on payment of royalty fixed by the appellate board. They don't need prior permission from the owner of copyright.

ISSUE

- 1. Whether Defendant has infringed Plaintiff's Copyright provided in Section 14(1)(e) of The Copyright Act?**
- 2. Whether the Defendant can invoke section 31D in respect of the services provided like downloading on the app?**
- 3. Whether the use by the Defendant of Plaintiff's repertoire falls within the scope of fair use under 52(1)(a)(i) of The Copyright Act?**

Arguments raised by Plaintiff

Issue 1: Services provided by the Defendant through its apps are infringing Plaintiff's copyright provided in Section 14(1)(e) of the act.

Sec 14(1)(e) of Copyright act confers on the plaintiff 3 special powers. First is to make any sound recording which includes the storing of it. Second is to sell or make an agreement to sell or give on rentals his work. Last is to communicate his sound recording to the public.

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Plaintiff contended that the services provided by the defendant are infringing upon Plaintiff's copyright. Services provided by Wynk are of two types. First, downloading it for the offline use and second purchase. Through the former, a user can keep the offline copy of a particular song

on defendant's platform. The offline copy of the song which is downloaded by the user can be accessed only on Wynk. They are available only for the paid subscription period. On the other hand, the purchase option lets a user to purchase a song which is saved in the purchased songs tab.

Issue 2: Invocation of section 31D not valid

Plaintiff disputed the defendant's right to seek protection under Section 31D of the act. It was submitted on behalf of the plaintiff that section 31D only contemplates to communicate the work to the public. It does not entitle the plaintiff to commercially sell or rent out the sound recording. Further they claimed that the statutory licensing provided under section 31D is only restricted to television and radio. On demand streaming service like Wynk, Gaana, Saavan which is provided by internet is not covered under 31D.

Issue 3: Fair use not a valid contention

Plaintiff's counsel contended that the use of the copyright by the defendant was not fair and thus defense of fair dealing could not be taken by the defendant. As per the submissions made on behalf of the plaintiff, defendant's use of copyright commercially competes with the owner's work. It provides substitute to the users by providing them access to plaintiff's music recordings on his own platform. Wynk provides two options to its users. Either to download the music recordings which they have access for the paid subscription period or purchase. In this way, the defendant competes with the plaintiff by providing substitute to the users.

Arguments given by Defendant

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Issue 1: It is submitted on behalf of the Defendant that the Defendant's platform lets the user to keep only an electronic copy of the song. It does not let the user to make multiple copies out of it.

Issue 2: Claimed itself as broadcasting organization

The Defendant in its defence invoked section 31D of the act and claimed itself as a broadcasting organization or broadcaster. It contended that it is a broadcasting organization and entitled to statutory licensing under section 31D of the act.

In addition to this, Wync claimed invocation of section 31D on the basis of a memorandum issued in 2016 by the Department of Industrial Promotion and Policy. Vide the memorandum the government department declared the inclusion of Internet Broadcasting organization in Section 31D of the Copyright Act,

This means that the copyright owners couldn't fix the rate of royalty for the internet broadcasting services. The rate decided by the appellate board was binding on them.

Issue 3: Defendant raised a defence on the basis of fair use. They contended that the electronic copy of the sound recording or the song was provided to the user which was used by them only for personal use which falls under the purview of Fair use.

JUDGMENT

Internet broadcasting not covered under Section 31D

Whether Internet broadcasters falls under the purview of section 31D, was a primary question to be decided in this case. Court while deciding the scope of Section 31D relied on the interpretation of statutory scheme, the rules framed under it, judgments and legislative intention.

Court held that Section 31D is an exception to the Copyright and thus there should be strict interpretation of this provision.

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With the plain and simple reading, it is clear that section 31D covers only radio and television broadcasting. It does not include internet broadcasting.

As clarified by the court,

“... the provisions of Section 31-D read with Rules 29 to 31 coupled with the legislative history preceding the passage of Copyright Amendment Act, 2012 clearly support the submission that Section 31-D contemplates only television and radio broadcasting and not internet broadcasting.”⁵

Moreover, the court considered the legislative intention also. Court held that while formulating Section 31 D the makers were fully aware of the technological advancements, trends and digital technology like streaming and downloading. So if internet broadcasters were not included in the section 31D, it was done so with the legislative intention.

Defendant’s use of Plaintiff’s repertoire not under the purview of Fair use

Court pointed out

“The defence of fair use may be available in a given case, to an individual user. The activities of the Defendants [*Wynk*] can never be termed as ‘private’ or ‘personal use’ or ‘research’. The Defendants are clearly selling and /or commercially renting sound recordings including, inter alia, the Plaintiff’s Repertoire for their own commercial benefit. Thus, the Defendants use of the Plaintiff’s Repertoire cannot be termed as fair dealing for the purpose of private personal use or conducting research.”⁶

Wynk’s service amounted to infringement of exclusive rights of Tips provided under section 14(1)(e)

⁵ Supra

⁶ Supra

Court held that bare perusal of Section 14(1)(e) would mean that the owner of the Copyright had the exclusive right to sell his recording and communicate the same to the public. The defendant has provided its users a platform to access the plaintiff's repertoire on the payment of a subscription fees which is a clear infringement of exclusive rights of plaintiff provided under Section 14(1)(e).

Memorandum passed by Government of India office lacked statutory authority

Defendant claimed the invocation of Sec 31D on the basis of a memorandum passed by a Government department which declared inclusion of internet broadcasting in section 31D. The court rejected the contention of the defendant and held that the memorandum lacks statutory authority and should be considered as guidelines.

CONCLUSION

This judgment delivered by the Bombay High Court is a landmark judgment on statutory licensing as it puts to rest many questions related to statutory licensing. It was held by the court in this long running legal dispute that section 31D does not apply to internet broadcasters.

Court preferred the strict interpretation of the scheme as it is an exception to the copyright. The court believed that at the time of making this law, the makers were fully aware of the technological advancements. This means that they had the legislative intention behind exclusion of internet broadcasters. Moreover, Wynk's defence of 'Fair Use' was also rejected by the court. The court held that the services provided by the defendant did not come under the purview of Fair Use and thus it violates the copyright of Defendant.

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