

## **1 CMET (2014) 1**

### **The Music Industry in India 360° of Separation from the Rest of the World?**

*by*  
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It is generally accepted by the International music fraternity that the Indian music market is unique. To everyone but an Indian it would appear that we are 360° removed from the rest of the world.

Unlike any other country (except perhaps our neighbours in the Indian sub-continent), over 70% of the music composed in India originates from, and is created only for films in the form of original compositions (of three-to-six-minutes in length). Also, the artists who perform the songs do not generally write those songs. Accordingly, the record deals are entered into, between the producers of the films and the music Companies.

It is important to highlight the basis for the division of rights between the creators of music and the owners of the rights in it under Indian law. While the Copyright Act, 1957 deems that the creator (author) of the work is the first owner of it, this "default" position may be displaced in various circumstances. The Supreme Court of India, in a landmark decision in 1977 involving the Indian Performing Rights Society (IPRS) and the association of cinema hall exhibitors, held that whenever music is composed or lyrics are written for a film, the ownership in these works automatically becomes vested in the producer of the film. The Supreme Court made a presumption in this case that all such engagements of musical composers and lyricists are employment arrangements, contracts of services, and the proceeds of those services, (i.e. the composition and/or the lyrics) are owned by the employer (i.e. the film producer).

This presumption has been watered down by the High Courts in a couple of other cases. The decision itself and the extent of its application is currently under review and may soon be taken up by the Supreme Court for re-consideration. The IPRS is, in this new round of litigation, arguing that the 1977 decision was given in the context of public performance of musical works and lyrics in a film exhibited at the cinema, and hence the right to authorize any other public performance or exploitation of such works is retained by the authors unless there is a specific contractual stipulation to the contrary. The effect of this 1977 decision has, however, resulted in a

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stagnation of creative exploitation of various rights in the music business, lasting at least till the late-1990s.

However, an opinion given by one of the judges in the IPRS case gives a glimmer of hope to the creators by allowing them to retain all the rights to exploit the songs they created, except where the song is exploited as part of the soundtrack of the film. This part of the IPRS decision is now being used by the IPRS and its members in many a forum in India, against a host of users of music, including the radio industry, to seek a share of public performance royalties.

360° or multiple rights deals in India have been around for as long as the movies, because following the judgment in the IPRS case, the understanding in the industry is that the film producer owns everything by virtue of the presumption that such

engagements with these songwriters are employment agreements (akin to the work-made-for-hire concept). However, the exploitation of these rights, until very recently has been limited to making and selling sound recordings. Even the music publishing rights business is virtually non-existent. This is because there was no awareness of the potential for exploiting or monetizing the rights, either by the songwriters themselves or the presumed owners of the rights (the film producers).

Further, the recording industry comprised of only a couple of players who were probably not very adept at exploiting these rights either. This lack of creativity in exploiting music and other associated rights in India, helps to explain why the breadth of the rights secured by the film producers were never really challenged by the artists or the courts. The artists composed and wrote the music, got a fixed fee and credit in the film.

The question is: how did the recent trend towards exploitation of multiple rights begin?

It took a company, branded a pirate by the rest of the music industry, to revolutionise the Indian film music business. Today, this company, Super Cassettes Industries Limited, is the biggest music company in India. It has set up a rival body to PPL India, and has the wherewithal to take on and restrain YouTube from using its content. Super Cassettes was the first music company to promote performers and songwriters and make them stars in their own right. Songwriters and artists engaged by this company won the best singer, best composer and lyricist award for six consecutive years at the most prestigious awards ceremony for the Indian film industry. In return for the fame and opportunities it provided, Super Cassettes secured all recording and publishing rights under the Copyright Act from these creators and performers, and also the right to control their live performances. Merchandising and endorsement rights are still left out as these are not considered to be commercially relevant for songwriters/performers.



The approach adopted by Super Cassettes has led to the other record companies striking similar deals. The latest trend, however, is for the bigger producers/production houses (of films) to launch their own record label vehicles to retain this extra source of revenue. As mentioned above, all film-related deals are and have ostensibly been multiple rights deals. I say ostensibly because, until very recently, the rights have not been exploited to their full potential. However, with the film producers entering the music business and the new generation taking over from the creatively oriented older producers, we are now witnessing a greater number of agreements where the producer retains all rights and exploits them more effectively. Merchandising, live performance rights and endorsements are yet to be really lucrative for the artists and songwriters, perhaps because most of the creators and performers remain behind-the-scenes. TV, through music-based reality shows (such as the Indian version of American Idol), is providing the creators and performers with a platform to emerge from the shadows of their more famous actor colleagues.

### **SPECIFIC RIGHTS**

Performers' rights (in respect of live performances) only came into existence after amendment to the Copyright Act in 1994. Thus, there was no reason before this to decide who owned these rights. Interestingly, while the amendment to the Copyright Act was being debated, a record company, Magnasound, introduced a provision in its

recording contract stating that it would own all of the performers' rights as well. While the performers' rights seems, from a bare reading of the Copyright Act, to be limited to live performances only, a decision of the Delhi High Court in 2006 opened the debate as to whether a performance given by a singer in a recording studio could also be protected under the Copyright Act.

The case was settled before going to trial, so the point is still undetermined. In any case, since performers' rights do not apply to a performance which, with the consent of the artist, has been incorporated in an audio-visual work, performers rendering their performances for films do not have any rights in such performances. This provision applies to non-film music as well. Given this, it may appear that the right to control an artist's live performances is not commercially-significant to film producers. However, given that performers of both film and non-film music earn most of their income from live performances, certain record companies have started inserting clauses in non-film music deals that enable them to share in revenues generated from live performances.

Artists were not involved in merchandising and endorsements until the late-1990s, because the music industry was, and to a large extent still is, integrated with films. Hence, the songwriters and performers were always

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behind-the-scenes. The songwriters never performed their songs and the performers only dubbed their voices for the actors who mimed on screen. However, during the last decade we have seen some endorsement deals for both the songwriters and performers being done. Merchandising has only been associated with one performer, Daler Mehndi, who is primarily from the non-film stream, but occasionally sings for films as well.

The effective exploitation of all these rights and the attendant conflict between the stake holders has only recently started gaining prominence in India. This is due to the recent explosion of multiple media exploitation and the economics involved, especially with the backdrop of declining sales of the physical music media and the spiralling costs of acquisition of content from the film producers, During the previous 12 months, music has generated close to 30 Billion Rupees (approximately US\$600 million) in revenues for telecommunication companies alone. It is no wonder then that Super Cassettes recently sued a leading mobile content aggregator and a leading film producer over a disagreement as to the ownership of "mobile-rights" in respect of the music for the film.

### **NON-FILM MUSIC**

In the much smaller non-film music category, songwriters (who in most cases are also the artists themselves) have, for a very long time, been giving away all their rights in their songs to the music companies. A lot of these decisions are made by the songwriters without them knowing what they are giving away. However, in many cases, simply because the non-film music business is not very big, these artists part with their rights in order to have some chance of releasing an album in India. In a lot of these agreements, the artists have consistently been parting with their publishing rights, rights to exploit their likeness and even the statutory performer's rights under the Copyright Act. Importantly, hardly any of these deals provide for any royalty to be paid to the artist/songwriter. They are buy-outs.

In view of the abysmal reporting standards of record companies in India, the focus of the negotiations is usually to secure as big an advance as possible and move on to the next album. Though the performers/songwriters, who are aware of their rights,

usually do not permit the music companies to take a share in the live performances or the writer's share of performance income, the music companies are increasingly driving harder bargains to include a share of such revenues as well.

The Copyright Act, 1957, contains a provision that not many creators are aware of. This is the right for an assignor to seek to cancel an assignment of rights after a period of a minimum of five years if the assignor is able to demonstrate to the Copyright Board that the assignee has not effectively



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exploited the rights assigned during this period. So there is a risk that companies will lose their rights if they do not exploit them.

The non-film music industry is currently going through a phase where record companies, like their counterparts internationally, are seeking a greater slice of the pie, over and above the right to sell the records and to exploit the publishing rights. However, on the other hand, artists are slowly but increasingly becoming aware of their contribution to the success of the record companies and the multiple and alternate avenues to earn revenues for such contribution.

### **CONCLUSION**

We are looking at some very interesting times in the developing field of film music and non-film music jurisprudence in India. In future, we may see Indian music industry along with the legal fraternity, taking a lead in the development of concrete legal principles governing the field. While it may be challenging to achieve absolute balance between the rights of artists and record companies, one may see Artists gaining some ground against the companies with government and music fraternity support. In any case, the future of the music industry is bound to be legally refreshing and invigorating.

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\* Founding Partner of TMT Law Practice.

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