Singh, Manveen. (2013). KIIT Journal of Law and Society, Vol 3: 178-195.

COPYRIGHT PROTECTION WITH REFERENCE TO MUSIC INDUSTRY IN THE LIGHT OF AMENDMENTS IN THE INDIAN COPYRIGHT ACT, 2012

"Music is spiritual. The music business is not."

-Van Morrison

INTRODUCTION

Music is a quintessential copyright industry resting on the pillars of creative talent and highly specialized assets. Although the modern music industry can be traced back to the turn of the twentieth century when breakthroughs in recording technology meant that live performance was in line to be replaced by reproduction as the heart of the industry, its existing shape can be attributed to the soaring incomes and personal experimentation in the post-war globalized era.[1]

The entertainment industry dating back to 1896 in New Orleans, (Louisiana) in the USA has come a long way. The first permanent movie theatre in the world, the Vitascope Hall remained open for two years. That was followed by China in the form of Daguanlou movie theatre in Beijing which is still in operation; thereby making it the world's longest running theatre. India too, within the first decade of the twentieth century, had a bourgeoning music industry.[2] The entitlement of music composers being initially limited to the live performances of their work changed over the course of twentieth century with the technological developments taking shape.[3] Neighbouring copyrights were issued in the form of sound recordings and the musical copyright having been originally designed to accord protection to sheet music expanded to embrace mechanical rights in sound recordings and synchronization rights in cinematograph films and video soundtracks, in addition to performance rights. It is these neighbouring rights that form the basis for the collection of royalties.

The exclusive control over the reproduction and distribution rights in a musical copyright usually vests in the author but it might be subject to a transfer. A musical

[1] Birgitte Andersen, Zeljka Kozul-Wright and Richard Kozul-Wright, 'Copyrights, Competition and Development: The Case of the Music Industry' (2000) UNCTAD/OSG/DP/145 <http://unctad.org/en/docs/dp_145.en.pdf > accessed 10 July 2013

[2] Jon M Garon, 'The Heart of the Deal: Intellectual Property Aspects in the Law and Business of the Entertainment' (2012) 17 Journal of Intellectual Property Rights 443

[3] Andersen, Kozul-Wright and Kozul-Wright (n 1) accessed 10 July 2013

composition therefore, might see a transfer ownership in the original composition to a publisher or in the case of a sound recording, to a record company. The future income flows are contingent upon the popularity of the musical composition. Copyright in music therefore, is reflective of a complex case of joint ownership involving the authors or music composers, the publishers, the record labels and other similar entities leading up to the commercialization of the musical product. Although such an arrangement might aid in maximizing rents, it also gives rise to problems with regard to the unequal sharing of benefits.[4]

More often than not, the creative minds behind musical works are deprived of their fair share of royalties and revenues generated via means of incorporation of their works in cinematograph films or via live performances. This is attributable to the assignment of copyright in such underlying works in cinematograph films and sound recordings by the lyricists and the composers.[5]

The copyright laws of most nations have long been favouring the film producers and the record labels as opposed to the lyricists and the song composers; India being one of them up until recently when it amended its Copyright Act in the year 2012, bringing it in line with the World Intellectual Property Organization (WIPO) copyright treaties as well as declaring the song creators as owners of copyright; in the process putting an end to the practice of assignment of copyright in the underlying works in films and sound recordings.[6] The latest amendment in the Indian Copyright Act, 2012 in terms of the distribution of royalties and the introduction of the Digital Rights Management (DRM) protection measures forms the main focus of this paper.

This paper seeks to examine and explain the existing state of copyright protection for the creative artists in the Indian music industry, in the light of the amendments in the Indian Copyright Act, 2012 with the provisions relating to royalty distribution and Digital Rights Management being at the heart of the analysis.

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[4] *ibid*

[5] Vidhi Agarwal and Annu Sharma, 'The Copyright (Amendment) Act, 2012 < http://www.legalera.in/news-deals/articles-of-the-week/item/6853-the-copyright-amendment-act-2012> accessed 13 August 2013

[6] Nyay Bhushan, 'Indian Copyright Act Amendments Give Music Artists Ownership Rights' (*billboardbizz*, 25 May 2012) <http://www.billboard.com/biz/articles/news/global/1095517/indian-copyright-act-amendments-give-music-artists-ownership-rights> accessed 10 July 2013

INDIAN COPYRIGHT LAW AND MUSICAL WORKS

India is home to one of the oldest and the biggest music industries in the world with an estimated size of almost Rs. 1000 Crores. Despite its huge size and hefty revenues, the financial turnover of the industry has witnessed a rampant decline in recent times, largely attributable to the piracy plaguing the industry. The music industry's revenues in 2007 were to the tune of $ 606 million, in stark contrast to the Indian film industry which is valued at a reported $2 billion. The two industries combined form the backbone of the entertainment industry and also, are interlinked amongst themselves. Within the music industry, operate lyricists and composers who come up with songs that form the lynchpin of Indian films. Up until the latest amendment in the Copyright Act, composers and lyricists received a negligible share of the royalties for the work they did for Indian films. In the landmark case *IPRS* v. *Eastern Indian Motion Pictures Association and Ors.*[7] (also known as the "*Eastern Indian Motion Pictures Judgment*"), the Supreme Court of India had held that: "*the producers of a cinematograph film are the first owners of the copyright in the musical and lyrical works and no copyright subsists in the composer of the lyric or music so composed, unless there is a contract to the contrary between the composer of the lyric or music and the producer of the cinematograph film."* The authors had not been getting their dues and neither was their work being accorded the recognition that it deserved. Besides hiking the royalty rate for authors, composers and lyricists, this latest amendment also comes in conformity with the international treaties so that Indian Copyright stands to be protected abroad.

Though there had been amendments brought about in the Indian Copyright Act in the past to keep up with the technological changes, some of the biggest names in the Indian film and music industry, most notably, renowned lyricist and screenwriter Javed Akhtar[8], had expressed their discontent at the way music copyright infringement had been dealt with. With the growing passage of time, the top brass in the Indian music and film industry became more aware of the copying of previously

[7] 1977 AIR 1443

[8] Javed Akhtar is a member of India's Upper House of Parliament and has been instrumental in lobbying for the amendments.

copyrighted songs and peers no longer seem to be holding back from voicing their concern regarding the increasing violations. The coming to light of the fact that existing works are being infringed by collaborators casted a negative shadow of the creative output of the Indian composers and further strengthened the view that profit is more important than producing an original and creative piece of work. The increasing awareness regarding copyright infringement in the Indian film industry triggered the need to inject some originality in Indian film music.[9]

It was felt that the growing awareness of copyright infringement in the Indian film and music industries would give some much needed impetus to the importance of copyright protection and thereby allow the law enforcement officials and agencies to safeguard the artists' interests but it failed to yield the desired outcome. Furthermore, the producers' lobby has been standing in continuous opposition of the 2012 Amendment. Even though the latest amendment has been successful in bringing about positive effects for the creative artists as well as confirming to international standards, the term "equal rights" to lyricists and composers and with respect to royalties when there are different owners to a single piece of work has been defined very vaguely by the amendment. Not only are there problems with respect to the 2012 Amendment but also the Indian legal structure which does not enforce the copyright laws in the most stringent of ways.

The monitoring of copyright infringement is one of the most important aspects of copyright protection but more often than not the copyright infringers have been successful in escaping from the clutches of criminal enforcement agencies. Furthermore, the courts in India consider IPR cases as low-priority offences and the entertainment industry is at liberty to do business on its own terms. That has caused major impediments in the government's efforts to enforce intellectual property rights and even though copyright infringement is enlisted as a criminal offence under the Indian Copyright Act, the ineffective enforcement of property rights has halted the entire process.[10] It shall, therefore, be pertinent here to undertake a detailed analysis of this latest amendment in the Indian Copyright Act and how it stands to effect the

[9] Harini Ganesh, 'The Need for Originality: Music Infringement in India' (2011) 11 John Marshall Review of Intellectual Property Law 169

[10] *ibid*

existing state of things in the Indian entertainment industry and more so the Indian music industry.

INDIAN COPYRIGHT ACT- THE AMENDMENT OF 2012

Digitization was a global phenomenon and by the end of the twentieth century, India too felt its impact. Developments in information technology coupled with the availability of digitized works made it necessary for copyright owners to protect their works by resorting to new and effective mechanisms.[11] In the light of the fact that songs have for long dominated the Indian Film Industry, the Copyright (Amendment) Act, 2012 aims to correct the imbalance in the existing copyright law which has long been favouring film producers and record labels as opposed to the song creators and bringing it in harmony with international as well as World Intellectual Property Organisation (WIPO) norms. In other words, bring it in conformity with the "Internet treaties", that is, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Over the course of history, film producers in India had been working on a work-for-hire basis and the song-writers, composers and singers were hired for set fees which deprived them of the revenues and income from other supplementary sources such as cover versions and ringtones. However, under the Amended Act, the authors or song creators have been declared as owners of the copyright and it can no longer be assigned to the producers. Furthermore, each time a work of art is broadcasted, the radio and TV broadcasters are to mandatorily pay a royalty to the copyright owners.[12]

The amendments also had the backing of CISAC- the International Confederation of Societies of Authors and Composers, with its President, the late Robin Gibb issuing an appeal to the Indian Government. In a statement issued in 2010, Gibb said-

"Movie music in India is a big business and it's unacceptable that the composers and lyricists who make the music don't benefit from the success of their works because of an out-dated system. Indian producers and record companies clearly don't want to

[11] Arathi Ashok, 'Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment' (2012) 17 Journal of Intellectual Property Rights 521

[12] Bhushan (n 6) accessed 10 July 2013

share their royalties with creators, but the Indian Parliament needs to know that this is not the norm elsewhere."

Commenting on the latest amendment in the existing copyright law, the President of Sony Music for India and the Middle East said in a statement-

"This Amendment is an extremely positive move and we are very supportive of this bill[13]. We are delighted that going forward the composers and lyricists will get a share in royalties. This was long awaited and we believe this will help the overall artist development and align us with global practices… This is a matter between two businesses and should be negotiated between themselves."[14]

The scope of the latest amendment extends well beyond the internet treaties and is bound to have a revolutionary impact on the music and film industry.[15] The music-related amendments can be classified into the following categories:

- Amendments relating to rights in cinematograph films and sound recordings.
- Amendments relating to WCT and WPPT.
- Amendments pertaining to authors' rights with respect to mode of assignment of copyright and the right to royalties.
- Amendments relating to the protection of technological measures.
- Amendments relating to protection of Digital Rights Management Information.[16]

The above changes brought about by the latest amendment in the Copyright Act are dealt with in detail below.

(A) RIGHTS IN CINEMATOGRAPH FILMS AND SOUND RECORDINGS

[13] The Copyright Amendment Bill, 2010

[14] Bhushan (n 6)

[15] Agarwal and Sharma (n 5) accessed 22 August 2013

[16] Zakir Thomas, 'Overview of Changes to the Indian Copyright Law' (2012) 17 Journal of Intellectual Property Rights 324

The amendment has affected a lot of changes lending clarification to the rights in cinematograph films and sound recordings. Under Sections 14 (d) (i) and 14 (e) (i) of the act, it has been made clear that the right to make copies includes 'the storing of the work in any medium by electronic or other means.' The right with respect to the storage of work becomes even more relevant in the present state of digital technology that involves transmitting digitized works over the internet resulting in the creation of transient copies at several different locations including in the user's computer. In essence, the 'right to storing' of works has been brought under the scope of copyright protection.[17]

Another significant change incorporated in the existing Act has been the addition of the word 'performance' to the definition of 'communication to the public'[18]. It flows as a consequence of the new rights granted to the performers and is instrumental in protecting works on the web and this protection has now been extended to performances as well.

(B) AMENDMENTS RELATING TO WIPO COPYRIGHT TREATY AND WIPO PPT

Under Section 14 of the Amended Copyright Act, the word 'hire' has been replaced by 'commercial rental' in the provisions relating to cinematograph films and sound recordings so as to allow the 'meaning of copyright' to include within its ambit, both selling and rental rights of copies of films and sound recordings. 'Commercial Rental' rights have been provided for under the various treaties; Article 11 of the TRIPS Agreement, Article 7 of the WCT and Article 9 of the WPPT, had all made it obligatory to provide for 'commercial rental' rights. Up until the latest amendment, Section 14 of the Copyright Act provided only for the commercial rental of computer programmes. The term has now been extended to both sound recordings and cinematograph films. The insertion of the term 'commercial rental' has elucidated the fact that this right does not stand applicable to non-commercial activities of giving on 'hire'. This has proved to be instrumental in providing better access to works.[19]

[17] Thomas (n 16)

[18] Indian Copyright Act 1957, s 2(2)(ff)

[19] Thomas (n 16)

(C) ASSIGNMENT OF COPYRIGHT AND THE RIGHT TO ROYALTY

It has been well documented by the Amendment that the film performers as well as authors of some of the underlying works utilized in cinematograph films and sound recordings shall possess a non-assignable right to receive continuing royalties for any use that that is made of their work or in case of live performances irrespective of the fact that the copyright in those works might have been assigned or that they might not be entitled to any enjoyment of the performers' rights.[20]

(i) SECTION 17 AND THE NEW PROVISO

Section 17 of the Copyright Act of 1957 enunciates the author of a work as also the owner of the copyright vesting in the work. There are several exceptions to this general rule, mentioned under the first proviso to the Section. A second proviso has been inserted by the Amendment, granting immunity to the "right" of the authors of literary, dramatic, musical and artistic works incorporated in cinematograph films from clauses (b) and (c) of Section 17[21]. Since the proviso has not been numbered therefore, it seems that the intention of the drafters was to make it applicable to the first proviso in its entirety rather than solely to Sub-section (e) of the first proviso. There is a certain level of ambiguity with regard to the language used in the newly added proviso as the word "right" has been used not specifying as to which right of the author has been referred to. This leaves room for various interpretations; the most feasible one being that the word "right" referred to in the second proviso does not imply right to receive royalties, rather it stands for the copyright itself or the "ownership" right. A closer look at the proviso makes it clear that the "right" of the author of a work incorporated in a cinematograph film is immune from the impact of clauses (b) and (c). In order to ascertain the "right" as mentioned in the second proviso, it is essential to identify the manner in which clauses (b) and (c) are likely to impact the right of the author.[22]

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[20] *ibid*

[21] Clause (b) is applicable to literary, dramatic or artistic works while clause (c) applies to all kinds of works

[22] Udit Sood, 'The Touch of 'Jadoo' in the Copyright (Amendment) Act, 2012: Assessment of the Amendments to Sections 17, 18 and 19' (forthcoming)

In the case of *Indian Performing Rights Society* v. *Eastern India Motions Pictures Association*[23] (The EIMPA Case), the provisos (b) and (c) of Section 17 were interpreted by the Supreme Court as being applicable to cinematograph films as well as the works incorporated in the film with the effect that the default ownership of copyright would shift from the author to the producer. Thus, adherence to the ruling would vest the ownership of copyright even in the underlying works with the producer instead of the creator. It shall be pertinent here to discuss the EIMPA case since it has been instrumental in the interpretation of the new proviso.

(ii) THE EIMPA JUDGEMENT

Upon its incorporation in 1969, the Indian Performing Right Society or the 'IPRS', had claimed royalties from cinema halls by way of publication of its tariffs for the exhibition of films embodying lyrics as well as music created by its members. To this end, the right to ownership over the literary and musical works was asserted by the producers (while acting through Eastern India Motion Pictures Association (EIMPA) and other associations) based on the commissioning of works and consequently the tariff stood challenged before the Copyright Board. Furthermore, the producers were supported in their claim by the cinema hall owners.

The Copyright Board, in 1973 upheld the tariffs while at the same time maintaining literary and musical works as not being covered under Section 17(b). Furthermore, the authors were to retain their copyrights in the absence of lack of substantial evidence in favour of the producers being assigned the authors' copyright.[24] However, the decision of the Copyright Board was reversed by the High Court of Calcutta in 1974[25] and the authors were held not to be the owners of the copyright in the underlying work and thereby precluded from assigning their copyright. The Court in its ruling vested the producer of a cinematograph film with the ownership rights in all works allied with the film under Section 17(b). Furthermore, the Court held that the copyright in literary and musical works as incorporated in the cinematograph films was not owned by IPRS and it could not lay its claim to royalties.

[23] AIR 1977 SC 1443

[24] Sood (n 22)

[25] *Eastern India Motion Pictures Association* v. *Indian Performing Right Society*, AIR 1974 Cal 257

On the matter being brought before the Supreme Court of India, it was argued on behalf of the producers and cinema halls that despite the works being commissioned for incorporation in the soundtrack of the film, the authors (acting through IPRS) were not subject to payment of any royalties and that the application of Section 17(b) extended to the component parts of the film and was not restricted to copyright in the film alone. Since there were no executed assignment deeds for interpretation, the Supreme Court was faced with the scenario of determining copyright ownership between the producer and the author in the underlying works. The Court, relying on Sections 17(b) and (c) pronounced its decision in favour of the producers and held that the producer was the owner of the copyright in the literary and musical works incorporated in a cinematograph film. However, a license shall have to be availed from the author in order to exploit the literary or musical works otherwise than as part of the film. The ruling left the legal community as well as the industry baffled, to the extent that the Standing Committee Report on the Copyright Amendment Bill, 2010 acknowledged that wrongful exploitation of the authors' works by the producers was encouraged by the judgment.[26]

The upshot of the ruling for the industry was that absolute ownership over copyright was asserted by the producers of cinematograph films in the works commissioned by them. All that the authors of commissioned works incorporated in films received was an initial commission and were deprived of the independent commercial exploitation of their works. The problem posed by this judgment was sought to be rectified by the Amendment to Section 17 and as per the observations of the Standing Committee Report[27], the objective of the Amendment was to ensure that the authors of underlying works in cinematograph films were not deprived of their ownership rights in such works by an erroneous reading of Section 17, as was the case in the EIMPA judgment.[28]

[26] Sood (n 22)

[27] The Standing Committee Report on The Copyright Amendment Bill, 2010

[28] Sood (n 22)

Thus, the latest Amendment will go a long way in resurrecting the ownership rights of the authors of certain kinds of underlying works incorporated in cinematograph films that had so far been divested of their rights.

(iii)THE NEW PROVISOS TO SECTION 18

The authors' right to royalty in terms of underlying works in films and sound recordings has been dealt with in the new provisos that have been inserted in Section 18 of the Act which deals with the right to assign copyright in an existing work by the owner or in a future piece of work by the prospective owner.[29] The first of the three provisos added to Section 18(1) provides that no assignment of the exploitation rights of works incorporated in films and sound recordings shall have application to any mode of exploitation that was not in existence or was unknown at the time of assignment. Under the second proviso, an author of a literary or musical work incorporated in a film is prohibited from assigning or relinquishing the right to receive royalties at par with the assignee. Similar to the case of cinematograph films in the second proviso, under the third proviso, authors of literary or musical works incorporated in sound recordings are prohibited from assigning or relinquishing the right to receive royalties at par with the assignee.[30]

These newly inserted provisos to Section 18 of the Amendment Act have been effective in strengthening the position of authors in the case of new modes of exploitation of work being discovered. Gone are the times when only video cassette recorders used to be played. The dawn of internet technology has witnessed new modes of exploitation being adopted which have made the exploitation rights of the authors more vulnerable than ever.

(iv) SECTION 19: THE ADDITION OF SUB-SECTIONS (8), (9) and (10)

The requisites of a valid assignment of copyright are detailed under Section 19 of the Act. Three new sub-sections related to assignment of copyright with regard to copyright societies, cinematograph films and sound recordings have been incorporated in the section by the Amendment.

[29] Thomas (n 16)

[30] Sood (n 22)

Under Section 19(8), copyright societies have been afforded protection against any further assignment in copyright already assigned to such societies by rendering such an assignment as void. The objective of the legislature was the establishment and protection of a separate channel for the flow of royalties with regard to literary or musical works incorporated in a cinematograph film through the medium of a copyright society.

Sections 19(9) and 19(10) incorporated by the Amendment stand complimentary to the provisos inserted in Section 18(1) and provide that the right of the author to claim royalties in case of utilization of the work other than by means of its incorporation in a film or sound recording, shall remain unaffected by the assignment of copyright in such work for making a cinematograph film or sound recording respectively. With the introduction of these sub-sections, the author of any work included in a cinematograph film or sound recording shall be entitled to an equal share of royalties and the consideration payable for the utilization of the work. It shall be pertinent to mention here that 'royalties' and 'consideration payable' have been clearly distinguished by means of the Amended Section 19(3).[31]

(v) PERFORMERS' RIGHT TO ROYALTY

In addition to the authors' right to receive royalties in respect of underlying works in cinematograph films and sound recordings, the 2012 Amendment has introduced a new Section 38A dealing with the right of the performers to receive royalties in case of the performances being made for commercial use. This shall entitle performers in films and sound recordings, predominantly the scriptwriters, lyricists and music composers who were earlier denied the fair share of revenues, to receive continuing royalties.[32]

(vi) CALCULATION OF ROYALTY

The other issue which has generated considerable amount of concern is the determination of the royalty payable. The 2012 Act is silent as to the entitlement of

[31] *ibid*

[32] Nandita Saikia, 'New Film and Music Royalties under the 2012 Copyright Act' (*Blogger*, 25 May 2012) <http://copyright.lawmatters.in/2012/05/new-film-and-music-royalties-under-2012.html> accessed 17August 2013

performers. It may be argued that Section 38A (dealing with the grant of right of royalties to performers) together with Section 39A (which provides for the application of licensing and assigning provisions to performers' rights) and Sections 18 and 19 (under which the authors of underlying works in films and sound recordings are granted a continuing right to royalties) give rise to the conclusion that performers, like the authors of underlying works, are entitled to an equal share of royalties. It however, remains to be seen whether or not this is the case.

With regard to the authors of underlying works, there is lack of unambiguity as to the exact manner of calculation of royalties. Although the 2012 Act mandates that the royalties be shared on an equal basis between the assignor and the assignee of copyright, it offers little clarity as to the meaning of the same and there are several viable options for the distribution of royalties. The author of an underlying work in a cinematograph film or sound recording shall be entitled to a share of the total royalty received for the performance of the work. As such, royalty shall only be payable for the performance rights of the underlying work. For instance, if royalties accruing from the songs alone were to be considered, there could be two possible scenarios:

1) There could be a possibility that the rights within a work are inseparable and the revenues generated by the song are indivisible. In such a situation, two options exist:

    (a) The royalties would be shared equally between the assignee, the lyricist and the composer. The entitlement of each would be to the tune of 33.33% subject to the number of lyricists and composers; an increase in the number of people would inevitably bring down the shares of assignees and the authors.

    (b) The other possible interpretation of the provision could result in the assignee being entitled to a 50% share while the underlying authors jointly entitled to receive the remaining 50% of the music revenues. Thus, on the assumption that there is one lyricist and once composer, each shall be entitled to a 25% share of the royalties; an increase in the number of lyricists and composers bringing down the shares of both the lyricists and the composers.

It shall be pertinent to mention here that the royalties attributable to the music in the film shall be exclusive of the royalties from the film in which the song is incorporated or the sound recording of the song; each of which would be separate from the underlying works.

2) The second possibility could be that the rights within a work are separable and the revenues generated by the song are divisible with regard to the rights. In such a situation again, two options exist:

   (a) In the case of music rights: if there was a single composer, the assignee and the composer each would be entitled to a 50% share of the total revenue from the music right. In case of two composers, each of the two composers and the assignee would be entitled to a 33.33% share; an increase in the number of people bringing down the shares of both the composers and the assignees.

   While determining the shares with respect to the lyric rights, similar calculations would be made.

   (b) In the case of music rights: the other possible interpretation could be that in case there was a single composer, the assignee and the composer each would be entitled to a 50% share of the total music revenue. In case of two composers, the assignee would be entitled to a share of 50% while each of the composers would be entitled to a share of 25%; an increase in the number of people bringing down the share of the composers alone.

   While determining the shares with respect to the lyric rights, similar calculations would be made.[33]

Despite the existence and entitlement of a continuing right to royalty of the performers as well as the authors of underlying works in films and sound recordings,

[33] Saikia (n 32) accessed 17 August 2013

what is debatable is the mechanism for the distribution of this royalty and the amount payable.[34]

(D) PROTECTION OF TECHNOLOGICAL MEASURES

Technological measures were adopted with the purpose of curbing the unauthorized use of copyright works created through the medium of internet technology. The WIPO Copyright Treaty (WCT) as well as the WIPO Performances and Phonograms Treaty (WPPT) provide for the protection of technological measures at the International level.[35] In order to bring the Indian Copyright Law in line with the provisions of the WIPO treaties, a new Section 65A was introduced by the latest Amendment in order to afford protection to the technological measures adopted by copyright owners for safeguard their rights over the work. Under the newly inserted Section, any person circumventing a technological measure shall be punishable with imprisonment as well as liable to a fine. The provision is not absolute and certain exceptions have been provided under Sub-section 2, most notably that the prohibition shall not apply to acts done for a purpose not prohibited by the Act.

The above addition to the Copyright Act is symbolic of Articles 11 and 18 of the WCT and the WPPT respectively. The technological measures are aimed at reducing the risk of infringement in the digital media. In order to counter the effect of technological measures, popularly known as TPMs or technological protection measures, certain circumvention techniques were developed. Such circumvention has been held to be a criminally punishable offence. The use of TPMs had a regulatory effect on the use of works permitted by law since the only way of making fair use of the works in the absence of the consent of the owner of the works was the circumvention of technology. In the aftermath of the prohibition on circumvention of technology, it was felt that the public interest might suffer as a result and hence, circumvention was allowed for certain specified uses under Sub-section (2) of Section 65A. It was stated in the Standing Committee Report on the Copyright Amendment Bill, 2010 that some of the terms in the newly added Section have been left undefined on purpose

[34] *ibid*

[35] Arathi Ashok, 'Technology Protection Measures and the Indian Copyright (Amendment) Act, 2012: A Comment' (2012) 17 Journal of Intellectual Property Rights 521

considering the difficulties faced by the developing countries in lending a definition to these terms.[36] It was further stated that the legislative approach followed in regard to Section 65A is to reduce the effect of legislative guidelines and enable the judiciary to evolve the law considering practical scenarios whilst at the same time keeping in mind the interests of the masses and facilitating public access to the work. What remains to be seen is what interpretation the judiciary will give to these terms.

(E) PROTECTION OF DIGITAL RIGHTS MANAGEMENT INFORMATION

The term 'Digital Rights Management' (DRM) refers to the use of techniques for limiting access or control over protected intellectual property post its sale by the copyright holder. The introduction of DRM protection measures via the latest Amendment in the Indian Copyright Act has been largely attributable to the need to bring India's Copyright regime in line with the WCT and the WPPT.[37] The 2012 Amendment has inserted a new Section 65 B for the protection of Rights Management Information or RMI which includes within its ambit any information inclusive of the names of the performers, information related to copyright and the ISBN number, which is primarily used for the identification or authentication of copies of a work or performance. The offence of removal or alteration of the RMI in a work has been dealt with under Sub-section (1) while Sub-section (2) provides for the liability of a person involved in the unauthorized distribution, broadcast or communication to public or marketing copies of the copyright work with the knowledge of the removal or alteration of the RMI. Such a person is held equally liable as the person involved in the removal or alteration. Unlike the Technological Protection Measures (TPMs) referred to in Section 65 A, there are no exceptions to this provision.[38]

The Amendment with respect to the introduction of Section 65 B in the Copyright Act is in conformity with Articles 12 and 19 of the WCT and the WPPT respectively, dealing with the rights management information. The developments in digital

[36] Thomas (n 16)

[37] Tarun Krishnakumar and Kaustav Saha, 'India's New Copyright Law: The Good, the Bad and the DRM' (2013) 8 Journal of Intellectual Property Law and Practice 15

[38] Thomas (n 16)

technology have led to the management of copyrights by way of online contracts. Since these can be removed, the intention of the legislature while amending the Act was to prevent the unauthorized removal of RMI and the subsequent distribution of the work, performance or phonogram sans the RMI. The introduction of provisions safeguarding the technological measures and rights management information, in line with the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) was with the objective of averting copyright infringement in the digital world. The film and music industry is likely to benefit from the introduction of Sections 65 A and Section 65 B in its fight against piracy.[39]

CONCLUSION: THE DAWN OF A NEW ERA AND THE ROAD AHEAD

The modern day music industry, based on creative expression, stands to offer substantial growth and the potential to become one of the most prolific export sectors of the developing world; Indian music industry being no different. In this regard, the constant evolution and implementation of copyright protection measures ensuring adequate protection to the contributing artists has become imperative. The Indian Copyright (Amendment) Act, 2012 is a step towards achieving that end. In what can be termed as a major victory for the lyricists, composers and musicians plying their trade in the Indian film and music industries, these artists now have a superior ownership control over their works courtesy of the latest amendment.[40] It is heartening to see that the lyricists and composers having so far suffered at the hands of music companies and producers shall finally be getting their fair share of the royalty pie[41]. This coupled with the changes made in the provisions relating to the assignment and grant of licences, are likely to aid in streamlining business practices.

Besides the stipulations in terms of the distribution of royalties, the other important change brought about by the Amendment has been in terms of the DRM. Amidst constant developments in internet technology, the introduction of the DRM protection is no doubt a step in the positive direction but its enforcement on a larger scale might

[39] *ibid*

[40] Bhushan (n 6) accessed 10 July 2013

[41] Agarwal and Sharma (n 5) accessed 22 August 2013

be hampered by an undertrained, overworked and ill-equipped criminal justice system. Thus, whether or not it actually ends up stanching the levels of internet piracy in India remains to be seen. After all, a case of homicide is more than likely to be given priority over a case under Sections 65A or 65B by a police force that is already under-staffed.[42]

A year on and most of these amendments are yet to witness practical results. The biggest stumbling block in their path is the matter of- *Indian Performing Right Society* v. *Aditya Pandey &Anr.*[43], currently pending before the Supreme Court of India. What is sought to be determined by the judgment is whether or not the right of exploitation of derivative works in the form of cinematograph films and sound recordings carries with it the right of exploitation of underlying original works in the form of literary, dramatic, musical or artistic works and furthermore, whether such underlying original works require licences for their exploitation. The Amended Ss. 17, 18 and 19 are also likely to be dealt with by the Court and it is strongly believed that the lyricists and composers are unlikely to gain from these amendments in any real way up until the ruling.[44]

One could argue that the latest amendments in the Indian Copyright Act, 2012 effectively make it a social justice driven legislation and although it might not survive judicial scrutiny, for the authors and the composers, it is odds on certain to mark the dawn of a new era; an era wherein they possess greater bargaining power even *de hors* statutory protection.

[42] Tarun Krishnakumar and Kaustav Saha, 'India's New Copyright Law: The Good, the Bad and the DRM' (2013) 8 Journal of Intellectual Property Law and Practice 15

[43] SLP (C) 21082-83/2012

[44] Sood (n 22)