

**MUTING PARTY-TIME – CAN HOTELS, PUBS AND EVENT MANAGERS DEFEND THE USE OF  
COPYRIGHT PROTECTED WORKS AT EVENTS AND PARTIES?**

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*ABSTRACT*

*In December 2019, collecting agencies claiming to represent authors/copyright owners obtained interim injunctions against hotels/pubs from playing any of the copyrighted works they claim to manage, during Christmas/New Year parties. These reports relate to various orders of the Madras High Court and the Bombay High Court. This article endeavours to critically examine these orders in the context of the Copyright Act, 1957 and to analyse the larger issue concerning the interpretation of the term “communication to the public”, which is one of the exclusive rights granted to copyright holders. This critical examination includes an analysis of the above-mentioned orders to decipher their reasoning (or lack thereof) and a comparison with the law in the European Union, which has a (relatively) more robust jurisprudence on this topic. Apart from attempting to apply such jurisprudence to the factual context arising from the above orders, the article also examines whether such collecting agencies possess the standing, i.e. the legal right, to initiate such copyright infringement actions.*

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## I. THE RECENT COURT ORDERS

It was widely published in the media in December 2019 that certain collecting societies/Copyright societies successfully obtained interim injunctions against hotels and others, preventing them from using Copyright-protected music for their New Year and/or Christmas parties.<sup>1</sup>

The Madras High Court's order in this respect was passed in the case of *Phonographic Performance Ltd. v. the Accord Metropolitan and Ors.*<sup>2</sup> The Plaintiff was an association comprising various music labels and its case for copyright infringement under the Copyright Act, 1957 (“Copyright Act”) was directed against 50 different hotels/bars/inns. Vide the order dated 19.12.2019, the Madras High Court directed the Defendants to seek a license to play the songs/sound recordings and enjoined them from playing the same without such license.<sup>3</sup> This order, unfortunately, does not record any reasons for the grant of this direction/injunction. There is, instead, a reference to an earlier order dated 22.12.2019 in the same case,<sup>4</sup> in which the Court was apparently “inclined” to grant an injunction, which was also confirmed on appeal (albeit with the modification).

There seems to be a typographical error in that order as no order dated 22.12.2019 could have been passed before 19.12.2019 and it is perhaps a reference to an order of the same date but in the year 2017. This seems logical since there was an appeal order by the Division Bench of the Madras High Court on 28.12.2017.<sup>5</sup> Unfortunately, no order dated 22.12.2017 is available on the Madras High Court website for this case and therefore, the reasoning contained therein, if any, could not be analysed.

On the very same date, another order was passed by the Madras High Court in the case of the *Indian Performing Right Society Ltd v. K Murali and Ors.*<sup>6</sup> This case was filed by a non-profit body comprising of lyricists and composers, who had assigned their works in its favour. The first defendant was alleged to be someone who organised live events using playback singers,<sup>7</sup> and the

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<sup>1</sup> Swati Deshpande, *Party's over for pubs flouting rules on copyrighted songs*, TIMES OF INDIA (Dec. 26, 2019), [https://timesofindia.indiatimes.com/city/mumbai/partys-over-for-pubs-flouting-rules-on-copyrighted-songs/articleshow/72974444.cms?fbclid=IwAR2OpIjBJg2tmMLsho2SmKbPP\\_XwKqlupJRqtZcyoaFQpfj4ciEM0Y6vA04&from=mdr](https://timesofindia.indiatimes.com/city/mumbai/partys-over-for-pubs-flouting-rules-on-copyrighted-songs/articleshow/72974444.cms?fbclid=IwAR2OpIjBJg2tmMLsho2SmKbPP_XwKqlupJRqtZcyoaFQpfj4ciEM0Y6vA04&from=mdr); Swati Deshpande, *At Christmas dos, don't let music play sans licence: Bombay high court*, TIMES OF INDIA (Dec. 22, 2019), <http://toi.in/vzTN3b52/a28gj>.

<sup>2</sup> *Phonographic Performance Ltd. v. the Accord Metropolitan and Ors.* (Original Appeal No. 1116 & 1117 of 2019 in Commercial Suit No. 975/2017), Order dated 19.12.2019, Madras HC [hereinafter “Phonographic Performance, Mad HC”].

<sup>3</sup> *Id.* ¶¶ 4-5.

<sup>4</sup> *Id.* ¶ 2.

<sup>5</sup> *Id.* ¶ 3.

<sup>6</sup> *Indian Performing Right Society Ltd v. K Murali and Ors.*, (Original Appeal No. 1146 & 1147 of 2019 in Commercial Suit No. 723/2019), Order dated 19.12.2019, Madras HC.

<sup>7</sup> *Id.* at 1.

other Defendants appeared to be travel companies. On 19.12.2019, an injunction was granted against the Defendants from using the music/sound recordings for a proposed New Year event.<sup>8</sup> The order is primarily based on the Defendants' earlier conduct in promising to pay royalty for another event in the past, but only making a part payment with the remaining payment not being honoured.<sup>9</sup> The order contains almost no reasoning as to how a *prima facie* case was made out under the Copyright Act.

The Bombay High Court order on this issue is in six connected matters, one of them being *Phonographic Performance Ltd v. Hotel Hilton & Ors.*<sup>10</sup> However, a perusal of this order demonstrates that no injunction was passed on that date. Instead, it appears that there was previously an ad-interim injunction order passed by the Division Bench of the Bombay High Court on 22.12.2017,<sup>11</sup> which was confirmed by the Division Bench of the Bombay High Court on 21.01.2018.<sup>12</sup>

The order of the Division Bench of the Bombay High Court dated 22.12.2017<sup>13</sup> was in an appeal from an order of the Single Judge refusing interim injunction in favour of Phonographic Performance Ltd. The Single Judge had denied an injunction because the court *prima facie* felt that Phonographic Performance Ltd. did not have the *locus standi* (since it was not a registered Copyright Society).<sup>14</sup> The Division Bench of the Bombay High Court overturned the decision

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<sup>8</sup> *Id.* at 2.

<sup>9</sup> *See id.*

<sup>10</sup> Common Order dated 27.11.2019 as modified/corrected by Speaking to Minutes Order dated 04.12.2019 in *Phonographic Performance Ltd v. Hotel Hilton & Ors.* (Commercial Suit No. 306 Of 2019), *Phonographic Performance Ltd v. Orbis The Passion Hotels & Ors.* (Commercial Suit No. 304 Of 2019), *Phonographic Performance Ltd v. Hotel Madhuban & Ors.* (Commercial Suit No. 292 Of 2019), *Phonographic Performance Ltd v. Balaji Agora Mall & Ors.* (Commercial Suit No. 145 Of 2019), *Phonographic Performance Ltd v. Welcom Hotel Rama International (ITC) & Ors.* (Commercial Suit No. 123 Of 2019) and *Phonographic Performance Ltd v. The Vision Group (The Crown) & Ors.* (Commercial Suit No. 914 Of 2018).

<sup>11</sup> *Id.* ¶¶ 3-4.

<sup>12</sup> *Id.* ¶ 5.

<sup>13</sup> Common Order dated 22.12.2017 in *Phonographic Performance Ltd v. Avion Hospitality Pvt. Ltd. & Ors.* (Commercial Appeal (L) No. 100 Of 2017), *Phonographic Performance Ltd v. Deligent Hotel Corporation Pvt. Ltd. & Ors.* (Commercial Appeal (L) No. 99 Of 2017), *Phonographic Performance Ltd v. City Organisers Pvt. Ltd. & Ors.* (Commercial Appeal (L) No. 101 Of 2017), *Phonographic Performance Ltd v. Nyati Hotels & Resorts Pvt. Ltd. & Ors.* (Commercial Appeal (L) No. 102 Of 2019), *Phonographic Performance Ltd v. The Vision Group (The Crown) Bairo Alto Dos Pilotos & Ors.* (Commercial Appeal (L) No. 103 Of 2019) and *Phonographic Performance Ltd v. Hotel Babylon International & Group & Ors.* (Commercial Appeal (L) No. 104 Of 2017).

<sup>14</sup> *Id.* ¶ 5. (This issue of the standing of copyright societies arises due to a combined reading of Sections 54 and 33-34 of the Copyright Act. Only the owner of a copyright protected work is entitled to seek civil remedies for infringement and Section 54 defines the term "owner" to include an exclusive licensee. Section 33 of the Copyright Act prohibits any association of persons (e.g. copyright societies) from carrying out the business of licensing except under or in accordance with the registration under Section 33(3). Section 34 allows such registered societies to "administer" the rights of authors etc. and no express right to sue is granted. Thus, the questions arise whether an association not registered under Section 33(3) can seek civil remedies and even then, a further question arises whether such rights to administer includes the right to sue in order to seek license fee/injunction (which is to be distinguished from collecting license fee from voluntary licensees). A further discussion on this limited topic is

rendered by the Single Judge on the issue of *locus standi*,<sup>15</sup> however, while granting the injunction, it did not provide any reasoning justifying the injunction order. As a matter of usual course, the order dated 22.12.2017 ticks the checkboxes of *prima facie* case, the balance of convenience and irreparable injury, without elaborating on how each of these ingredients was fulfilled in the case.<sup>16</sup>

In sum and substance, it is clear that these orders of 2019 directed against persons from playing lyrics/music/sound recordings protected by Copyright do not independently justify the requirements of an interim injunction; instead, they rely on earlier orders of 2017/2018, which also, unfortunately, do not discuss how and why a *prima facie* case was made out.

The fundamental question, therefore, is whether there is any legal basis to injunct the playing of music/sound recordings at such specific events if no license is taken. A connected question is also whether the answer to the above issue would be different if the event organiser calls upon a live band/playback singer to recreate the music/sound recording.

#### **A. The statutory provision in India**

Presumably, each of these hotels/event organisers legitimately procured/purchased a copy of the music/sound recordings in question and/or had access to a legitimate copy (e.g. such a subscription to a music streaming service) but was playing them through loudspeakers/music systems to make it audible to a large crowd. With this assumption in mind, whether the impugned conduct amounts to copyright infringement would depend on whether it amounts to “communication of the work” to the “public”. “Communicating” a Copyright protected work to the “public” is one of the exclusive rights granted to Copyright holders under the Copyright Act. This is true for a literary work such as lyrics,<sup>17</sup> a musical work such as a music composition created by a music director,<sup>18</sup> a sound recording such as the final song owned by the music label,<sup>19</sup> or a cinematographic film such as the movie in which the song becomes a part thereof.<sup>20</sup>

The phrase “*communication to the public*” is defined in Section 2 (ff) of the Copyright Act.<sup>21</sup> This definition is extracted herein below:

“ “*communication to the public*” means making any work or performance 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 physical copies

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beyond the purview of this article.)

<sup>15</sup> *Id.* ¶ 7.

<sup>16</sup> *Id.* ¶ 8.

<sup>17</sup> Copyright Act, No. 14 of 1957, Gazette of India, Extra pt. II sec. 3 (Jan. 21, 1958), § 14(1)(a)(iii) (India).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* § 14(1)(e)(iii)..

<sup>20</sup> *Id.* § 14(1)(d)(iii).

<sup>21</sup> *Id.* § 2(ff).

*of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.”*

This definition makes it clear that the mode or mechanism used for the communication is irrelevant (distribution of copies is anyway excluded from the definition); it is also irrelevant whether any member of the public has actually seen, heard or otherwise enjoyed the work. The operative part of the definition makes it clear that it is intended to cover any act which makes the work ‘available’ for being seen or heard or otherwise enjoyed by the public. Emphasis is to be placed on the word ‘available’ and the word ‘public’.

The Copyright Act grants the same right to performers as well. ‘Performers’ are defined to include singers and musicians.<sup>22</sup> One of the exclusive rights granted to ‘performers’ under Section 38A(1)(a)(iii) of the Copyright Act<sup>23</sup>, is the exclusive right to “broadcast” or “communicate” the performance to the “public”.

On a side-note, one may also refer to the term ‘broadcast’ defined in Section 2 (dd) of the Copyright Act,<sup>24</sup> which is a subset of the term “communication to the public” and is limited to certain specific means being used to undertake communication to the public.

Unfortunately, there does not appear to be any definitive judgment in India on the meaning and scope of the term “communication to the public” and in particular, what constitutes making the work ‘available’ and who constitutes ‘public’.

## **B. Position of the law in the European Union (“EU”)**

### *1. Infosoc Doctrine*

The corresponding provision under the EU law is contained in Directive 2001/29, which is also popularly called as the “Infosoc Directive”. Under Article 3(1) of this Infosoc Directive, authors are provided with the exclusive right to authorise or prohibit any "communication to the public" of their works. Under Article 3(2) of this Infosoc Directive, performers, phonogram producers, film producers and broadcasting organisations are also given the exclusive right to authorise or prohibit "the making available to the public" of fixations of their respective performances, phonograms, films and broadcasts.

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<sup>22</sup> *Id.* § 2(qq).

<sup>23</sup> *Id.* § 38A(1)(a)(iii).

<sup>24</sup> *Id.* § 2(dd). [“Broadcast” means 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;]

2. *Locus classicus: The SGAE case and the “new public”.*

The scope and meaning of the phrase "*communication to the public*" in Article 3(1) of said Infosoc Directive has been discussed in a series of judgements by the European Court of Justice (“ECJ”). The *locus classicus* is the judgement issued by the ECJ in the *SGAE* case in 2006.<sup>25</sup> *SGAE* was the body responsible for the management of intellectual property rights in Spain (similar to the Copyright societies contemplated under the Copyright Act) and it took the view that use of television sets and the playing of ambient music within a hotel amounted to "*communication to the public*" of the works managed by this entity. As such, *SGAE* took the view that this required a license and therefore, brought an action for compensation.<sup>26</sup> The case was referred to the ECJ by the Spanish Court for a preliminary ruling on certain questions of law.<sup>27</sup>

After noting that the Infosoc Directive did not define the phrase "*communication to the public*", the ECJ believed that this phrase must be interpreted broadly.<sup>28</sup> The Court also held that the term 'public' refers to "*an indeterminate number of potential*" persons,<sup>29</sup> taking into account that the purpose of the Infosoc Directive was to establish a high level of protection to the subject matter to allow authors to obtain an appropriate reward for the use of the subject matter. The Court concluded that in the circumstances of the case a "*fairly large number of persons*" would be involved in hearing/benefiting from the ambient music.<sup>30</sup> The Court made specific reference to the fact that hotel customers quickly succeed each other and the fact that apart from the hotel guests, even customers who were present in the common areas of the hotel (who were not guests in the hotel rooms) were able to make use of the television sets installed in such common areas.<sup>31</sup>

According to the ECJ, the clientele of a hotel formed what is called a "*new public*".<sup>32</sup> This is a phrase adopted by the ECJ from the non-binding "*Guide to the Berne Convention*" prepared by the World Intellectual Property Organisation.<sup>33</sup> This is a reference to such persons who were not direct users authorised by the author/copyright holder, but was not intended or not known to the author/copyright holder to be enjoying the work. In these circumstances, the ECJ also held that the private nature of hotel rooms does not necessarily preclude from a finding that

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<sup>25</sup> Judgment of the European Court of Justice (Third Chamber), Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, decided on Dec 7, 2006, ECLI:EU:C:2006:764.

<sup>26</sup> *Id.* ¶¶ 20-22.

<sup>27</sup> *Id.* ¶ 23.

<sup>28</sup> *Id.* ¶ 36.

<sup>29</sup> *Id.* ¶ 37.

<sup>30</sup> *Id.* ¶ 38.

<sup>31</sup> *Id.* ¶¶ 38-39.

<sup>32</sup> *Id.* ¶¶ 41-42.

<sup>33</sup> *See id.*

transmission of musical work or any other work would amount to "*communication to the public*".<sup>34</sup> Interestingly, this is directly covered by the explanation to Section 2 (ff) in the Indian Copyright Act, which was substituted in 2012.

Subsequently, the same issue arose in the *OSA* case<sup>35</sup> but in the context of a spa operator. The ECJ referred back to the *SGAE* case and concluded that the spa operator was effectively making available the work to a new public.<sup>36</sup>

### 3. *The progression and refinement of the principles in SGAE: The Svensson case.*

The principles set out in the *SGAE* case have undergone further refinement through subsequent judgements of the ECJ and this is particularly the case for the concept of 'new public'. For instance, in the *Svensson* judgement,<sup>37</sup> the issue before the ECJ was concerning the operation of a website that provided its clients with a list of clickable internet links to articles published by other websites, where the original links were anyway freely accessible.<sup>38</sup> Even after concluding that this constituted an act of 'communication' and that the target audience was potentially an "indeterminate number" / "a fairly large number of persons",<sup>39</sup> the ECJ did not find in favour of the plaintiff because the target audience did not constitute 'new public'.<sup>40</sup> Primarily, the ECJ noted that the content was originally available on the internet on certain sites that were accessible freely to all internet users without any restrictive measures and thus, all internet users were considered to be the 'public' taken into account by the copyright holders when they authorise the initial publication.<sup>41</sup> Therefore, through the links on the other website, the very same Internet users were given a second mode of access to the very same content. This led the ECJ to conclude that the target audience of the alleged infringer did not constitute 'new public' and accordingly, authorisation of the Copyright holders was held not to be required in that case.<sup>42</sup>

### 4. *Stichting Brein and the four complementary criteria for determining "communication to the public"*

Another judgement of importance is the case of *Stichting Brein v. Jack Frederik Wullems* ("*Stichting*

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<sup>34</sup> *Id.* ¶¶ 51-54.

<sup>35</sup> Judgment of the European Court of Justice (Fourth Chamber), Case C-351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v. Léčebné lázně Mariánské Lázně a.s.*, decided on Feb. 27, 2014, ECLI:EU:C:2014:110.

<sup>36</sup> *Id.* ¶¶ 24-32.

<sup>37</sup> Judgment of the European Court of Justice (Fourth Chamber), Case C-466/12, *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB*, decided on Feb 13, 2014, ECLI:EU:C:2014:76.

<sup>38</sup> *Id.* ¶ 8.

<sup>39</sup> *Id.* ¶¶ 19-23.

<sup>40</sup> *Id.* ¶¶ 24-32.

<sup>41</sup> *Id.* ¶¶ 26-27.

<sup>42</sup> *Id.* ¶ 28.

*Brein case*)<sup>43</sup> This case concerned a seller of multimedia players that included add-ons allowing users to stream content from websites containing illegally uploaded Copyright protected works, i.e. websites hosting/streaming Copyright protected content without the consent of the copyright holders.<sup>44</sup> The ECJ, in this case, held that to determine whether this amounted to "communication to the public", one must account for "*several complementary criteria, which are not autonomous and are interdependent*".<sup>45</sup> These complementary criteria are listed below:

- a. The role played by the alleged infringer, that is, whether he is an active intervener in making the content available to the users<sup>46</sup>;
- b. Whether the case involves an indeterminate number of potential persons/ fairly large number of people<sup>47</sup>;
- c. Whether the protected work is communicated to public using technical means different from those previously used, or, failing that, to a 'new public' (a public that was not already taken into account by the copyright holders when they are authorised the initial communication of their work)<sup>48</sup>;
- d. Whether the communication in question is of a profit-making nature<sup>49</sup>.

The ECJ in the *Stichting Brein* case, after applying these factors, found in favour of the plaintiff/copyright holder on the first two factors. The court also found in favour of the plaintiff/copyright holder on the last factor. On the issue whether the target audience constituted 'new public', the entire focus of the judgement was on the fact that the websites that the player linked to contained illegally hosted Copyrighted content. Thus, when access is given to work illegally placed, by default, the target audience was considered 'new public'.<sup>50</sup>

##### 5. *The final refinement: The GS Media Case.*

There is one further refinement of this concept worth mentioning, arising from the judgment of

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<sup>43</sup> Judgment of the European Court of Justice (Second Chamber), Case C-527/15, *Stichting Brein v. Jack Frederik Willems*, decided on Apr. 26, 2017, ECLI:EU:C:2017:300.

<sup>44</sup> *Id.* ¶¶ 14-18.

<sup>45</sup> *Id.* ¶ 30.

<sup>46</sup> *Id.* ¶ 31. [citing Judgment of the European Court of Justice (Grand Chamber), Case C-117/15, *Reha Training Gesellschaft für Sport-und Unfallrehabilitation mbH v. Gesellschaft für musikalische Aufführungs-und mechanische Vervielfältigungsrechte eV (GEMA)*, decided on May 31, 2016, ECLI:EU:C:2016:379, ¶ 34 & ¶ 36 & Judgment of the European Court of Justice (Second Chamber), *GS Media BV v. Sanoma Media Netherlands BV & Ors.*, decided on Sept. 8, 2016, ECLI:EU:C:2016:644, ¶ 35.

<sup>47</sup> *Id.* ¶ 32.

<sup>48</sup> *Id.* ¶ 32.

<sup>49</sup> *Id.* ¶ 34.

<sup>50</sup> *Id.* ¶¶ 47-52.

the ECJ in the *GS Media* case,<sup>51</sup> which was also a case concerning the issue of whether hyperlinking to other websites amounted to “communication to the public”. The facts in that case also involved hyperlinking to content on websites that were freely available to an Internet user, however, such websites were hosting the content without the consent of the copyright holder.<sup>52</sup> Emphasising on the consent of the copyright holder, the ECJ held that one must account for whether the defendant who hyperlinks to such websites knew or ought to have known that the websites contained such infringing content.<sup>53</sup> A rebuttable presumption is made to this effect when it comes to defendants who hyperlink for profit.<sup>54</sup> This would also be the case where the hyperlinking is intended to circumvent certain restrictions that restricted access to the original content, for instance, only to subscribers.<sup>55</sup>

A more recent judgement on the interpretation of this phrase is the case concerning the notorious website Pirate Bay – *Stichting Brein v. Ziggo BV* (“*Ziggo case*”).<sup>56</sup> The principles set out in the judgement mirror those set out in the earlier *Stichting Brein* case noted above. Apart from noting that the website in question gave access to the Copyright protected works to an indeterminate number of people and a fairly large number of people,<sup>57</sup> the ECJ in the *Ziggo case* also held that the target audience was a ‘new public’ since it gave access to illegally uploaded/shared copies of the Copyright protected works and the defendant knew/ought to have known this to be the case.<sup>58</sup>

## II. IS A PRIMA FACIE CASE FOR INFRINGEMENT MADE OUT?

### A. “Communication to public”

This brings us back to the fundamental inquiry of this article – would the playing of copyright music/sound recordings at specific events through loudspeakers/music systems amount to “communication to the public”? Given the lack of authoritative pronouncements in India on the interpretation of this phrase, it seems prudent to consider the jurisprudence outlaid above, from the EU. Undoubtedly, the music/song is made ‘available’ to the audience through music systems/speakers and the audience can hear and enjoy the same.

The issue then turns to whether the audience at such events constitutes ‘public’. To determine

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<sup>51</sup> *G.S. Media BV*, *supra* note 47.

<sup>52</sup> *Id.* ¶ 25.

<sup>53</sup> *Id.* ¶¶ 43-53.

<sup>54</sup> *Id.* ¶ 51.

<sup>55</sup> *Id.* ¶ 50.

<sup>56</sup> Judgment of the European Court of Justice, Case C-610/15, *Stichting Brein v. Ziggo BV and XS4All Internet BV*, decided on 14 June, 2017, ECLI:EU:C:2017:456.

<sup>57</sup> *Id.* ¶¶ 27-42.

<sup>58</sup> *Id.* ¶¶ 44-45.

this, the ECJ jurisprudence noted above suggests at least a four-factor test<sup>59</sup>:

- a. The role played by the alleged infringer, that is, whether he is an active intervener in making the content available to the users;
- b. Whether the case involves an indeterminate number of potential persons/ fairly large number of people;
- c. Whether the protected work is communicated to public using technical means different from those previously used, or, failing that, to a 'new public' (a public that was not already taken into account by the copyright holders when they are authorised the initial communication of their work);
- d. Whether the communication in question is of a profit-making nature.

The first and fourth factors are clearly in favour of the Plaintiffs/Copyright holders. There is an active intervention by the hotels/bars/event managers in having the music/sound recording communicated to the audience/users and in most cases, presumably, it is a profit-making exercise since hotels/pubs/event managers typically charge for such events.<sup>60</sup>

As regards the second factor, since there is no *per se* bright-line rule, there is scope for debate. In the *SGAE* case, for instance, it is evident that the ECJ focussed on the fact that hotels tend to have a fluctuating crowd in the lobby and rooms, and the audience tends to quickly succeed each other because of the regular inflow/outflow of people. The “cumulative effect” of all this was considered by the ECJ. The ECJ applied this “cumulative effect” factor in circumstances where at a given point in time the infringing communication was made available to few individuals and yet, because of the commercial setting, as well as the continuous and repetitive nature of the alleged communication, ‘cumulatively’, the infringing communication was made available to a large and disparate audience. This is not necessarily true in the facts at hand.

Certainly, there would be a large number of people – at each venue, one could consider perhaps 100s (or more). There is also a high likelihood of the audience quickly succeeding each other. However, the “cumulative effect” the ECJ was considering in the *SGAE* case is perhaps significantly more muted here because the situation involves a time-specific (e.g. an event confined to 3-4 hours on New Year’s Eve) and date-specific event (e.g. an event confined to New Year’s eve). These are not activities that take place throughout the day and/or throughout the year, unlike say, the background music played in hotels, pubs, gyms etc. This implies a

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<sup>59</sup> See *supra* Part I.B.3.

<sup>60</sup> There may still be a question as to whether the charges are in relation to the food/beverage only. Whether or not this is accurate, *prima facie*, much like in the *SGAE* case, hotels/pubs/event managers would indirectly profit because the type/popularity of the music player would cater to repeat clientele and certain assist in hotels/pubs/event managers maintaining a certain reputation that benefits their business.

restriction, albeit an indeterminate one, in the number of persons in the audience. Patrons may be flowing in and out, but this is restricted to a few hours only. Further, though there may also be several new patrons at each year's events, it may be accurate to suggest that each hotel/venue/pub would have a set of 'repetitive clientele' as well. In other words, it is unclear whether the first threshold of "an indeterminate number of potential persons" / "fairly large number of people" could or would be fulfilled.

This, nevertheless, leaves the third factor, i.e. whether the audience at such events would be 'new public'. Presumably, the hotel/venue/pub/event manager has purchased and/or has access to a legitimate copy of the music/sound recordings in question and if that is so, it is not a case of the audience being given 'access' to illegal copies as was the situation in the *Ziggo* case noted above.

Going by logic, the right holder intends that the ability for each user to enjoy the work is restricted to only those who purchase a legitimate copy thereof (or gain access to such legitimate copy via subscription to an authorised music platform). Although some leeway can be made for friends and family, for the purchase of a single copy (or single subscription), the intended target of communication is the purchaser himself/herself and not other potential purchasers. From this limited perspective, by purchasing one copy (or single subscription) but making 100s (or more) enjoy the same, the hotel/pub is enabling others not intended by the copyright holder to enjoy the work from that one copy (or single subscription).

The factual situation also involves the hotel enabling access/availability using technical means different from those previously used. This is because, for individual users, typically, the copyright holders intend to make the work available through selling copies of the work and/or through subscription to streaming platforms. By airing the work through loudspeakers/music systems, this restriction of availability by the purchase of copies or by subscription to streaming services is being broken.

On the other hand, it is possible that each person or some persons or a substantial number of persons in the audience has/have already purchased a legitimate copy for his/her personal use and/or have subscribed to a legitimate music streaming platform. Thus, by airing the same sound recording through music systems, the hotel/pub is merely making available another mode to enjoy the work albeit in a group or social setting. However, it is impractical, if not impossible, to assess this factual point, both for the hotels/pubs as well as for the Court.

In sum, this third factor ('new public') is a highly vexed issue and in this author's opinion, there is no easy or right answer. This author believes that a Court could swing either way depending on the facts and contentions before it.

When these “interdependent” factors are now stitched together for a final analysis, the answer is not exactly clear. While two factors support the Plaintiffs’/Copyright holders’ case, the situation with the remaining two factors is not 100% clear. The line of jurisprudence in the ECJ is also ambivalent on the level of interdependency between these factors and in this author’s opinion, this is a subjective element in the analysis. In such a situation, this author would consider the question debatable and open to interpretation. Further, in this author’s view, though the ECJ jurisprudence does not indicate this to be the case, a Court in India applying such factors is also likely to consider the quantum (of audience) involved to also be relevant in determining ‘new public’. Given the restricted nature of the events, in this author’s opinion, it is feasible furthermore, to conclude that they are not ‘new public’. Ultimately, the point is that a Plaintiff in such cases cannot have a *prima facie* case on their mere say-so; it would probably require some convincing and most certainly, a clear elucidation by the Court. Unfortunately, this is lacking in the Madras High Court and Bombay High Court orders discussed above.

Although this author does not preclude the possibility of the plaintiff establishing a *prima facie* case, the point being made here is that one has to be made out (and cannot be presumed automatically), especially because the standards to be applied in India are unclear.

#### 1. *The legal standing to sue*

An important element of the *prima facie* analysis that every Court has to consider is whether the Plaintiff truly has the legal standing or the right to sue. By this, the author is not just referring to the issue of whether a collecting society, other than a registered one under the Copyright Act, can sue – an issue that was raised in the Bombay orders noted above. A discussion on that point is beyond the purview of this article and thus, the author does not wish to comment on the same. There is, however, another issue to be debated.

The other issue stems from Section 54 of the Copyright Act<sup>61</sup>, which only allows the owner or an exclusive licensee (ignoring the case of anonymous works for a moment) to seek civil remedies for copyright infringement. When a given music/sound recording is being utilised, one is potentially dealing with multiple rights *qua* different subject matters embedded within that same music/sound recording:

- a. The lyric, which amounts to literary work;
- b. The musical composition composed by the composer/music director, which amounts to musical work;
- c. The performance of the various musicians and singers who play the musical work

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<sup>61</sup> Copyright Act, *supra* note 17, § 54.

and/or sing the lyric; and

- d. The final song as recorded on a medium, which amounts to a sound recording;
- e. If applicable, the video/cinematographic film in which the aforesaid final song/sound recording gets utilised;

Technically, each of the above subject matters is different from another and enjoys separate sets of rights. If the song was created for a film, in practice, however, it is assumed under Section 17 of the Copyright Act that copyright over all the above works stands assigned to the film producer. The author uses the word ‘assumed’ because this author believes this legal understanding to be incorrect, though it is the prevailing view, as has been pointed out by this author elsewhere.<sup>62</sup> The film producer could further assign the right *qua* the sound recording to a music label. Even if the song was created for a standalone album, in practice, the authors/performers involved usually execute assignment agreements in favour of music labels.

Typically, therefore, even assuming there is an act of infringement, it is the film producer and/or music label as the case may be, who will have the right to sue for any infringement in any of the above works.

Granted, the amendment to the Copyright Act in 2012 added another layer of complexity. Among others, the Amendment stipulated through various changes to the Copyright Act that notwithstanding any assignment to a film producer and/or music label, the authors/performers retain a right to seek royalties for use of their work even after assignment. Section 18 of the Copyright Act was amended by this 2012 Amendment<sup>63</sup> to the effect that authors of literary (lyricists) and musical work (composers) shall have the right to receive royalties on an equal basis with the film producer/music label (as the case may be), for utilisation of their literary/musical work in any form other than communicating the same to the public in a cinema hall. Any agreement to the contrary is declared void.

It is obvious from the text of this amendment that the right of the author of the literary/musical work author is *qua* the film producers/music label. It is an *in personam* right against film producers/music labels who have obtained their copyright by assignment agreements; it is not an *in rem* right. Moreover, contrast is to be made with the language used in Section 14 of the

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<sup>62</sup> Adarsh Ramanujan, *Copyright of Music Composers, Lyricists and Performers: Another Missed Opportunity by Mad HC in the Illayaraja Cases – Part I*, SPICYIP <https://spicyip.com/2020/03/copyright-of-music-composers-lyricists-and-performers-another-missed-opportunity-by-mad-hc-in-the-illayaraja-cases.html> (last visited Apr. 09, 2020); Adarsh Ramanujan, *Copyright of Music Composers, Lyricists and Performers: Another Missed Opportunity by Mad HC in the Illayaraja, SPICYIP Cases – Part II*, <https://spicyip.com/2020/03/copyright-of-music-composers-lyricists-and-performers-another-missed-opportunity-by-mad-hc-in-the-illayaraja-cases-part-ii.html> (last visited Apr. 09, 2020).

<sup>63</sup> Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India).

Copyright Act<sup>64</sup>, which sets out the meaning of “copyright”. Section 14 deals with “exclusive” rights and infringement under Section 54<sup>65</sup> deals with the violation of such “exclusive” rights without the consent of the copyright holder. By the very nature of “exclusive” rights, it is a right granted against the entire world, *in rem*. The proviso to Section 18 added in 2012 does not deal with “exclusive” rights, but only a “right” to claim compensation from certain specified persons on a 50:50 basis. It is a right *simpliciter* (as opposed to an “exclusive” right) and this right has been contextually connected to be a claim against specified individuals, viz. assignees (as opposed to the whole world). A contextual interpretation, thus, suggests that the proviso to Section 18 does not confer an independent right to authors of literary and musical works to sue a third party for alleged utilisation of their works outside of a cinema hall.

This leads to the conclusion that (if and) once the copyright over the various works stand assigned to film producers and/or music labels, as the case may be, despite the 2012 amendment, the authors cannot sue a third party for playing the song/sound recording embodying their work before a huge crowd at a specific event. Even assuming such an act amounts to infringement, it is the film producers and/or music labels to which the right has been assigned, which will have the right to sue and in the event, any royalties are recovered from such alleged infringer such film producers or music labels would have a statutory obligation to share the same on an equal basis with the authors of the literary and musical works.

A similar conclusion would equally apply to the case of performers rights because Section 39A states that Section 18, *inter alia*, with necessary adaptations and modifications, will apply even to performers rights.

In other words, for lyricists, music composers and performers (and consequently, collecting societies/entities claiming to be administering their rights) to have the standing to sue, there must be an averment in the Pleint, substantiated with documents demonstrating that they retained the copyright in their works and that it is not assigned to film producers or music labels. Without such averment and/or substantiation, such lyricists, music composers and performers (and consequently, collecting societies/entities claiming to act in representative capacities) would lack the standing or the legal right to sue for the alleged infringement.

Accordingly, it is questionable for the Indian Performing Rights Society, for instance, to seek infringement against such acts unless they have pleaded and/or can substantiate that the authors/performers involved have ownership of the Copyright in their works. Given that this is

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<sup>64</sup> Copyright Act, *supra* note 17, § 14.

<sup>65</sup> *Id.* § 54.

likely to be a matter within the special knowledge of the authors/performers concerned and the collecting society in question, the burden would be on them to establish that no such assignment to the music label has taken place.<sup>66</sup>

Seen in this light, the suit initiated by the Indian performing rights Society before the Madras High Court appears unsustainable, since there is no recording of any such finding in the order of the Hon'ble Court.

As far as the suits initiated by *Phonographic Performance Ltd.* are concerned, the above analysis suggests that they would have standing to sue in such circumstances (ignoring for a moment the issue of whether only registered copyright societies can), but even there it would be incumbent on the Plaintiff to place on record appropriate assignment agreements *qua* each work for each sound recording and that too, with the proper scope.

To be fair, perhaps there was clear material to this effect in the pleadings/documents and/or perhaps this was not an issue contended by the defendants. Moreover, as noted earlier, this author believes the current interpretation practised in the industry on automatic assignment *qua* works involved in cinematograph films is incorrect<sup>67</sup> and if that is so, the conclusions on who has the standing to sue, and for what 'work', would be entirely different.

#### **B. Is the conclusion different in the case of live performances/live bands recreating the Copyrighted Works?**

The aforesaid conclusions are unlikely to change if, instead, the alleged infringer is using a live band/performer(s) to recreate the musical work in question. Under the Copyright Act, for literary work such as lyrics or musical works (composition),<sup>68</sup> the author has the exclusive right "perform the work in public". Therefore, if a live band recreates the musical work of the composer and/or uses the lyrics of the music in question, that will amount to "performing" the musical work and/or literary work. The remaining question is whether such performance is in "public". If the same standard of the term "public" as is used in "communicate to the public" is applied here, we once again face a difficult question for the same reasons enunciated earlier.

The above, however, was in the context of literary and musical works. About sound recordings, there is no separate exclusive right to "perform the work in public". Instead, the question will be whether such a live performance would amount to "communication to the public". The definition of this term is broad enough to include any mode, the key ingredient being the audience can "*see or hear or otherwise enjoy*" the work. Thus, performing the song could arguably be

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<sup>66</sup> The Indian Evidence Act, 1 of 1872, § 106.

<sup>67</sup> See *supra* note 63.

<sup>68</sup> Copyright Act, *supra* note 17, § 14.

considered as making ‘available the work’. Nevertheless, once again, it comes down to the difficult question of whether the audience fulfils the requirement of ‘public’.

### **C. Is the conclusion different in the case of Broadcasts?**

Under Section 37(1)(b) of the Copyright Act of India, one of the rights constituting "*broadcast reproduction right*" is the exclusive right to "*cause the broadcast to be heard or seen by the public on payment of any charges*". While the language is not identical to the phrase "*communication to the public*", it conveys the same meaning, albeit with the added condition that it must be on payment of charges. This added condition is missing in the definition of "*communication to the public*". This textual difference suggests that in the case of copyright-protected works and/or Performers' rights, the law focuses on exclusivity, i.e. preventing others, whereas, in the case of Broadcasts, the law focuses on revenue or compensation.

This distinction is also seen in the EU law and can be illustrated by reference to the judgement of the ECJ in the *SCF* case,<sup>69</sup> which arose under Article 8(2) of the Directive 92/100<sup>70</sup> (later replaced by Directive 2006/115<sup>71</sup>). The only reason for this case to be relevant in the present analysis<sup>72</sup> is the fact that the term ‘remuneration’ is mentioned in Article 8(2) of Directive 92/100, much like the term ‘compensation’ is mentioned in Indian law concerning ‘broadcasts’.

In the *SCF* case, the ECJ made special mention of the term ‘remuneration’ in this Article 8(2) of Directive 92/100 and contrasted this provision from Article 3 (1) of Infosoc Directive – the former was held to be a right that is compensatory in favour of performers and producers of phonograms, whereas the latter was held to be a right that is preventive in favour of authors.<sup>73</sup>

Although the reasoning and the judgment of the ECJ in said *SCF* case appears to involve a relatively more conservative analysis of the term “communication to the public” in Article 8(2) of Directive 92/100 given the above distinction, it seems that later cases have diluted the distinction. Reference in this respect may be had to the ECJ’s judgment in the *Reha Training*

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<sup>69</sup> Judgment of the European Court of Justice Case C-135/10, *Società Consortile Fonografici (SCF) v. Marco Del Corso*, decided on Mar. 15, 2012, ECLI:EU:C:2012:140.

<sup>70</sup> Council Directive 92/100/EEC of 19 November 1992 on Rental right and lending right and on certain rights related to copyright in the field of intellectual property, art. 8(2), 1992 O.J. SPEC. ED. (L 346) 61, 64.

<sup>71</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental right and lending right and on certain rights related to copyright in the field of intellectual property, 2006 O.J. (L 376) 8.

<sup>72</sup> EU Copyright law is split across multiple Directives. The purpose here is not to analyse the same for a consolidated understanding. The limited point of relevance here is that the Directive 92/100 primarily dealt with rental and lending rights of authors, performers, phonograms/sound recordings and cinematograph films. It also dealt, in a limited way with the broadcasting and communication to the public, of performances and phonograms/sound recordings (Article 8 thereof). The rights concerning communication to the public of works by authors gets covered in Article 3(1) of the Infosoc Directive and Article 3(2) of said Infosoc Directive also dealt with making available to the public, performances, phonograms/sound recordings and cinematograph films. This Infosoc Directive also provided an exhaustive list of exceptions and limitations to such rights.

<sup>73</sup> *SCF*, *supra* note 70, ¶ 75.

case<sup>74</sup>, where it was held that the same tests must apply in determining whether an act was “communication to the public”, whether under Article 3(1) of the Infosoc Directive or Article 8(2) of Directive 92/100 (or the corresponding provision in Directive 2006/115).<sup>75</sup>

Therefore, the conclusions in the previous section of this article for copyright-protected works as far as the concept of “communication to the public” is concerned, are unlikely to change even in the context of ‘broadcast reproduction right’.

### III. CONCLUSION

In conclusion, the Bombay and Madras High Court orders which formed the starting point of this article lack sufficient reasoning to justify the interim injunctions granted therein. On the larger issue of what is covered by the term “*communication to the public*”, there is ambiguity on what is meant by the term ‘public’ in the Copyright Act. Honestly, it would be an exercise to in vain to attempt defining the term ‘public’ through legislation. Instead, going by the jurisprudence/interpretation of the similar law in the EU, there are multiple factors for a Court to evaluate. The application of these factors to the facts involved in the Bombay and Madras High Court cases do not present an easy answer. While a Plaintiff is not necessarily precluded from making out a *prima facie* case of copyright infringement, the factual situation presents complexities that could stump anyone. Therefore, for the Court to have directed such injunctions without having analysed the law clearly may not be the correct approach.

There is also the question of legal standing to sue and for the Court to have directed such injunctions without having analysed the assignment related issues carefully in its orders may also not be the correct approach. Although this author has made reference to one’s doubts on the correctness of the prevailing view on copyright ownership in the context of films, Plaintiffs need to be careful in understanding their position as far as copyright law is concerned and a proper assessment of the agreements in place may need to be undertaken before any litigation is pursued. The additional right created in favour of authors under the 2012 amendment does not grant authors the right to sue third parties if their rights stand assigned to film producers and/or music labels.

To be fair, as stated in this article, perhaps the defendants did not raise such issues. Even in that event, it is to be recollected that such orders tend to be considered precedents for all practical purposes and more nuanced/reasoned approach from judicially trained minds is the need of the hour to evolve copyright jurisprudence in this country.

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<sup>74</sup> Reha Training, *supra* note 47, ¶ 34.

<sup>75</sup> *Id.* ¶¶ 29-34.