



Pervasive Effect of Competition Law on Copyright Societies in India

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Copyright societies play a vital role in the copyright system. They enable markets to function for the use of copyright works in situations where the copyright holder cannot contract directly with the user. This is done by way of simplifying the negotiation process in managing the rights of their members and acting as a single contact point for licensees. Generally, it is admitted that copyright societies act in the interest of both rights owners and end users. There is, in practice for operational reasons, a single society per sector in India. That means that both users and authors only have one partner with whom they must deal. They have no choice and the society occupies a *de facto* monopoly, and potential abuses may result from their double monopoly situation. It is therefore by no means surprising to see that collective management has attracted a lot of attention from the side of the competition authorities. It has also become increasingly clear that the inherent monopoly of copyright society raises serious concerns for the competition authorities.

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As far as authors, performers and producers of sound recordings are concerned, getting a budgetary reward for the utilization of their works, performances and sound recordings is presumably one of the most significant parts of copyright and related rights. The normal way of exploiting copyright or related rights involves the grant of a license for certain uses of such works, performances or sound recordings. However, it is probably not materially possible for the copyright owner to monitor the use of each of his works on every occasion in a given country, let alone in foreign territories. He or she would not be able, in practice, to license and collect from each user, bearing in mind the large number of potential uses that need to be licensed in a given country, if not all around the world.

The user of the songs is in a similar position. If a restaurant owner, for example, wants to play background music in the restaurant, or if a broadcast station wants to transmit music, in the absence of a collective management framework, a separate license would be required for each work played or transmitted. The establishment of copyright societies is the answer to address such issues. Copyright societies play a vital role in the copyright system. They enable markets to function for the use of copyright works in situations where the copyright

holder cannot contract directly with the user. This is done by way of simplifying the negotiation process in managing the rights of their members and acting as a single contact point for licensees.

In India, the business of issuing or granting of a license in respect of literary, dramatic, musical and artistic works incorporated in cinematograph films or sound recordings shall be carried out only through a copyright society duly registered under Section 33 of the Copyright Act, 1957. However, an owner of a copyright shall, in his capacity, continue to have the right to grant licenses in respect of his works consistent with his obligations as a member of the registered copyright society.¹ Act further mandates the Central Government that, they shall not ordinarily register more than one copyright society to do business in respect of the same class of works.²

Registration of one copyright society per class of work is indeed an advantage to rights owners, as well as to users. This will help the rights owners to devote their time to and focus on their creative activity, without having to be concerned about managing and administering their rights. Similarly, the end users of such works would engage with only one body instead of having to seek authorization from each rights owner, thereby saving time and resources. The mandate of the existence of only one copyright society per industry effectively grants a monopoly to the copyright society and the same ensure the

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concentration of bargaining power and equal terms of royalty in an industry.

Generally, it is admitted that copyright societies act in the interest of both rights owners and end users. There is, in practice for operational reasons, a single society per sector in India. That means that both users and authors only have one partner with whom they have to deal. They have no choice and the society occupies a *de facto* monopoly, and potential abuses may result from their double monopoly situation. It is therefore by no means surprising to see that collective management has attracted a lot of attention from the side of the competition authorities. It has also become increasingly clear that the inherent monopoly of copyright society raises serious concerns for the competition authorities.

With the advent of the latest technologies, the potential market of the music industry has expanded considerably in the last two to three decades. This made the life of the legal professionals who are practicing in the field of copyright more complicated. Now they must be increasingly cross-disciplinary in their approach to each case. In this part, the researcher attempted to examine the relevance of the Competition Act, 2002 to Copyright societies.

Applicability of Competition Law in Copyright Related Issues

At first glance, competition law might seem to have little, if any, role to play in the outcome of a copyright suit. In its various appearances, competition law seeks to ensure full and fair competition in the sale of goods and services.³ Copyright law does serve a pro-competitive role; not in the market for the particular book, painting, or film, but in the larger market for ideas. The Copyright law affords the author an exclusive right in his or her expression to provide a 'commodity' that can be sold in that larger market. It protects only the expressions and not the ideas.⁴The author's expression, together with the expressions created by others, will compete in this broader market for the underlying idea.

Once we recognize the importance of copyright for this larger market, it becomes clear that competition law can play a role in the outcome of a copyright suit. In some cases, it is possible that a copyright owner's dominant position, or acts taken by the owner to protect its rights, will restrict or destroy competition in other markets, possibly even the market for ideas. Under the right conditions, competition law may

intervene to preserve some degree of competition in these other markets. The immediate effect of the copyright law is to secure a fair return for an 'author's' creative labour. However, the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.⁵ The emergence of new communications technologies and the proliferation of new copyrightable subject matters have led to the gradual expansion of copyright protection.

Sub-Section (5) of Section 3 provides that Sub-Section (1) of Section 3 of the Competition Act, 2002 shall not take away or restrict the right of any person to restrain any infringement of copyright or the right of any person to impose reasonable conditions for protecting his rights under the Copyright Act. Hence, all the defences, which can be raised before the Copyright Board, can be also raised before the Competition Commission. Further, if we look at Section 62 of the Competition Act, 2002 it is clear that the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

Moreover, relying upon the preamble of the Competition Act that the legislation has been enacted to provide *for the establishment of a Commission to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto*, it is, submitted that the protection of interests of consumers is an important object for the enactment of the Competition Act, 2002 and, therefore, if the Competition Act has provided for an additional forum for protection of consumers' rights in addition to the forum of Copyright Board provided under the Copyright Act, 1957, it cannot be said that the Competition Commission is acting without jurisdiction.

Provisions of the Competition Act, 2002, particularly Sections 3 and 4 apply to the Copyright Societies as they do to most other business verticals. Section 3 prohibits agreements, which cause or are likely to cause an appreciable adverse effect on competition within India. The probability and not mere possibility of its consequence as appreciably affecting competition is the requirement. It is pertinent to note that, the agreement need not have taken effect or have been operationalised for the

provisions of Section 3 of the Act to apply.⁶ What is important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to the competition in the market.⁷ However, the application of this Section is subject to the possible exemption.⁸

Section 4 of the Act prohibits the abuse of a dominant position in the relevant market.⁹ The underlying principle in the definition of a dominant position is linked to the concept of market powers, which allows an enterprise to act independently of competitive constraints. Such independence enables an enterprise to manipulate the relevant market in its favour to the economic detriment of its competitors and consumers.¹⁰ Provisions of the Copyright Act, 1957 effectively create a monopoly and mandate that only one copyright society can exist in a particular industry. This ensures the concentration of bargaining power and equal terms of royalty in an industry. Hence, Section 4 of the Act shall apply to copyright societies as well. However, in contrast to Section 3(5), this Section does not provide any possible exemption from a finding of abuse.

Even a copyright society based outside the Indian Territory falls within the jurisdiction of the Competition Act, 2002. Competition Commission of India is competent to enquire into any agreement or abuse of dominant position or combination if the same has an appreciable adverse effect on competition in the relevant market in India and pass appropriate orders and it is immaterial, whether the agreement has been entered into outside India or any party to the agreement is outside India, or the enterprise is outside India, or combination has taken place outside India.¹¹ In other words, Commission has the power to enquire into any acts taking place outside India but having an effect on competition in India.¹² Thus, if any act in violation of the provisions of the Competition Act, 2002, even if committed outside India has an effect in India, Commission would have territorial jurisdiction.¹³

Copyright Societies and Application of Section 3

This Section *inter alia* provides for the prohibition of entering into anti-competitive agreements. It shall not be lawful for any enterprise or association of enterprises or person or association of persons to enter into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of service which causes or is likely to

cause an appreciable adverse impact on competition within India. It is pertinent to note that, copyright societies fall within the meaning of an *enterprise* under the Act.

A number of agreements are, however, by their very nature restrictive of competition, and in such cases, the Commission does not hesitate to find that infringements *per se* have been committed. For this Section, anti-competitive agreements could be classified into Horizontal and Vertical agreements. Horizontal agreements, which are subject to Section 3 and, which potentially affect the copyright societies include the following;

- (i) Agreements fixing purchase or selling prices;
- (ii) Agreements limiting or controlling supply;
- (iii) Agreements for sharing of market or source of production or services by way of allocation of geographical market or types of goods or services in the market;

The above-mentioned agreements are *per se* void. Since these agreements are presumed to be anti-competitive, the onus lies on the person or enterprise to establish that the agreement does not fall under the prohibited category and the enquiry before the Commission shall relate to only that aspect. Once, the agreement falls under sub-section (3) of Section 3, it is not necessary to prove that, the agreement has an appreciable adverse effect on the competition.

Vertical agreements, which are subject to Section 3 and, potentially affect the copyright societies include the following;

- (i) Tie-in agreement;
- (ii) Exclusive supply agreement;
- (iii) Exclusive distribution agreement;
- (iv) Refused to deal; and
- (v) Resale price maintenance

These vertical agreements are not *per se* void and are not to be presumed to be anti-competitive. Such agreements shall be treated as anti-competitive and in contravention of sub-section (1) of Section 3, only when it is established that the agreement falls within the meaning of sub-section (4) of Section 3, and its adverse effect on competition is appreciable. In such cases, the onus lies on the complainant to substantiate the claim. Hence, the enquiry before the Commission shall be concerning both aspects.

To be covered under Section 3 of the Act, the anti-competitive agreement should have an appreciable adverse effect on competition within India, irrespective of where the agreement or the

understanding has been arrived at. However, the Commission observed¹⁴ that, as regards the existence of appreciable adverse effects on competition, the scheme of the Act envisages two situations;

- (a) Where the agreement is of the most pernicious nature, including cartels, as mentioned under Section 3(3), appreciable adverse effect on competition is presumed; and
- (b) In less pernicious agreements, such as those mentioned under Section 3(4), an appreciable adverse effect on competition has to be seen regarding factors given under Section 19(3) of the Act.

It may be further noted that the formation of an association and approval of the by-laws by its members amounts to an agreement between the members *inter se* and if the by-laws contain such clauses, which are likely to cause an appreciable adverse effects on competition, such clauses shall be void in terms of Section 3(2) of the Competition Act, 2002 and shall not be binding upon the members.¹⁵ It is a notion that two or more legal entities may be considered as a *Single Economic Entity* for applying competition law.¹⁶ For instance, the competition law does not perceive a parent company and its subsidiary as competitors, even if they are active in the same market.

Hence, we can say that copyright societies and their members are to be treated as a single economic entity. Because the individual members of the copyright society continue to have the right to grant licenses in respect of their own works consistent with their obligations as a member of the registered copyright society. While addressing a dispute in this context Commission relied upon the internationally accepted doctrine of *Single Economic Entity* and observed that, for the application of Section 3, an agreement has to be proved between two or more enterprises.¹⁷ The Commission in *Shamsher Kataria* observed that, an internal agreement between an enterprise and its group/parent company is not within the purview of the mischief under Section 3(4) of the Act.

Under the Competition Act, 2002 once the essential elements of Section 3(3) are established, a presumption arises that, such conduct has an appreciable adverse effect on competition. Of course, this presumption can be rebutted, if the opposite parties are able to prove that, their conduct has a pro-competitive effect or that, there is no appreciable

adverse effect on competition as enumerated under Section 19(3) of the Act. The burden of proof shifts on the opposite parties to show that impugned conduct does not cause an appreciable adverse effect on competition.¹⁸ The Supreme Court interpreted “*shall be presumed*” as a presumption and not evidence itself, but merely indicative on whom the burden of proof lies.¹⁹

However, the provisions of Section 3 do not apply to exercise of intellectual property rights. All forms of intellectual property have the potential to raise competition law problems. IP provides exclusive rights to the holders to perform a productive commercial activity. However, the same does not include the right to exert restrictive or monopoly power in a market or society. To encourage investment in cultural production, an effective copyright regime is essential.²⁰ The right enables the creator to prevent others from using his creations. At the same time, there is a need to curb and prevent anti-competitive behaviour that may surface in the exercise of the intellectual property rights.

Each feature film is nothing but a bundle of copyrights.²¹ A cumulative reading of the provisions²² of the Copyright Act, 1957 makes it clear that a right granted under the provisions of the Act is not an absolute right. Protectable copyright comes to vest in cinematograph film on its completion, which is said to take place when the visual portion and audio portion are synchronised.¹⁴ However, the owner of a copyright has full freedom to enjoy the fruits of his works by earning an agreed royalty through the issue of licenses; this right to repeat is not absolute. It is subject to the right of others to obtain a compulsory license as also the terms on which such license can be granted.²³ However, copyright does not give its holder immunity from laws of general applicability, including the antitrust laws.²⁴

The legislative intent was to grant higher protection to pure original artistic works such as paintings, sculptures etc., and lesser protection to design activity, which is commercial. The legislative intent is therefore clear that the protection accorded to a work that is commercial is lesser than and not to be equated with the protection granted to a work of pure art.²⁵ In other words, the immediate effect of our copyright law is to secure a fair return for an author’s creative labour. However, the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.²⁶

As a copyright holder, a film producer can at his sole discretion, determine the manner of communicating his film to the public and this includes commercial terms on which film is permitted to be communicated to the public.²⁷ While determining whether an exemption under Section 3(5)(i) of the Act is available or not, it is necessary to consider *inter alia*, the following:¹⁰

- (a) Whether the right which is put forward is correctly characterised as protecting intellectual property; and
- (b) Whether the requirements of the law granting the IPRs are being satisfied.

Though, the registration of intellectual property rights is necessary, the same does not automatically entitle a company to seek exemption under Section 3(5)(i) of the Act. The important criteria for determining whether the exemption under Section 3(5)(i) is available or not is to assess whether the condition imposed by the IPR holder can be termed as “imposition of reasonable conditions, as may be necessary for the protection of any of his rights”.

The concept of protection of intellectual property rights is qualified by the word “necessary”. So, the relevant question is whether in the absence of the restrictive condition, would the intellectual property right holder would be able to protect his IPR.

Copyright Societies and Application of Section 4

The conduct of copyright societies’ may sometime infringe Section 4 of the Competition Act. The number of points, which recur in all the cases, can be dealt with at the outset. *First*, CCI considers, whether the copyright societies in question are in a *dominant position*. For this section, *dominant position* means the position of strength enjoyed by an enterprise, which enables it to operate independently of competitive pressure in the relevant market and to appreciably affect the relevant market, competitors and consumers by its action. A perusal of the definition would reveal that, for an entity to fall within the definition of enterprise, it must be engaged in any activity, which is relatable to the economic and commercial activities specified therein.¹⁴

Whether, an entity is an enterprise is the starting point for determining the application of the Competition Act, 2002. This determination is based on the functions carried out by the entity, irrespective of ownership or profit-making motive.²⁸ It is conceivable that the dominant position may be

acquired due to several factors even outside the *relevant market* but, for Section 4, this position of strength must give the enterprise the ability to operate independently of competitive forces in the relevant market or the ability to affect its competitors or consumers in the relevant market in its favour. Hence, strength derived from even other markets, if they give an enterprise such abilities as mentioned above, would render the enterprise as dominant in the relevant market.²⁹

Therefore, the position of strength is not some objective attribute that can be measured along a prescribed mathematical index or equation. Rather, it has to be a rational consideration of relevant facts, a holistic interpretation of seemingly unconnected statistics or information, and application of several aspects of the Indian economy.³⁰ It is very clear from the facts that, the copyright societies are enjoying a monopoly or dominant position as a result of specific statutory provision.³¹ Such monopolies are not only a reality but are regarded by many countries as inevitable instruments of public growth and public interest. While this ideology may have played some role in spurring the growth of copyright societies, much of this increase can be attributed to the pragmatic response to the prevailing milieu, which is frequently an outcome of the historical past in different countries.

Monopolies granted by the statutes may lead to certain harmful effects, antithetical to the scheme of a modern competition policy, such as:

- (a) The dominant power enjoyed by copyright societies may be abused because of statutory protection.
- (b) Because of such statutory protection, copyright societies may adopt policies or contractual terms which tantamount to restrictive trade practices.

In the interest of the end users, copyright societies need to be competitive in their dealing with their members as well as their service delivery. While government should reserve the right to grant statutory monopolies to copyright societies in the broad national interest, it is desirable that the government always keep in mind that the de-regularisation of statutory monopolies and compulsory licensing are likely to endanger competition that would be healthy for the market as well as the consumers. Inference in this regard could be seen in a number of cases dealt with by the Commission from time to time.

Observations of CCI in *Coal India case*,³² as well as *IRCTC case*³³ are equally applicable in the case of copyright societies, where copyright societies and their members could also be treated as a *group* for the purpose of the Act and could be considered as dominant in the relevant market. Further drawing attention to *Shivam Enterprise case*³⁴, it can be stated that, since government accepts only one copyright society per specified field, end users are dependent on the copyright societies for licensing the works of the members registered themselves with such copyright societies. In the absence of other competitors in the relevant market, copyright societies can act independently and affect the interests of the consumers. Therefore, in the absence of competition, copyright societies can be considered dominant in the relevant market, and therefore Section 4 should be applied against them.

Conduct of copyright societies may be abusive, when through the effects of conduct on the competitive process; it adversely affects consumers directly or indirectly. A finding that an undertaking has a dominant position is not by itself recrimination but simply means that irrespective of the reasons for which it has such a dominant position, the undertaking has a special responsibility not to allow its conduct to impair undistorted competition on the common market.³⁵ Under its statutory monopoly, copyright societies are in a position where they can exploit their trading partners, by way of increasing the price or reducing or limiting the supply. These practices are generally seen in markets with high entry barriers, which means that the competition entry is difficult, and the dominant undertaking can reap the benefits of exploitative pricing for a longer duration of time.³⁶

Under Section 4(2) of the Act, 2002, if a copyright society limits or restricts the provision of services or market thereof to the prejudice of the customers, shall be treated as an abuse of dominance.³⁷ However, mere ownership of an intellectual property right cannot confer a dominant position. The conduct of an undertaking in a dominant position consists of the exercise of a right classified by national law as “copyright”, such conduct can never be reviewed in relation to Article 86 of the treaty.³⁸ Refusal to grant a license, even if it is the act of an undertaking holding a dominant position, cannot itself constitute abuse of a dominant position. However, it was also made clear that the exercise of an exclusive right by the proprietor may in exceptional circumstances, involve abusive conduct.

Similarly, in the *BCCI case*,³⁹ Commission observed that, with the advent of the *private professional league*, BCCI extended its monopoly to the new genre of cricket in the establishment of the Indian Premier League (IPL). In addition, BCCI assumed the right to sanction/approve cricket events in India as per Section 32.4 of ICC Bye Laws making the approval of BCCI critical to the organisation and success of any competing league and is a very important source of dominance for BCCI. The Commission noted that, by explicitly agreeing not to sanction any competitive league during the currency of media rights agreement BCCI had used its regulatory powers in arriving at a commercial agreement, which is at the root of a violation of Section 4(2)(c).

Conclusion

Copyright-related activities have gained a significant role in determining the economy of a nation, especially after the execution of the TRIPS agreement, which has enlarged the scope of copyrights by including computer programs, broadcasting, performances and designs under its umbrella. This has brought in several new problems, along with the benefits promised. The protection available under copyright law has been greatly expanded to respond to the challenges posed by the latest technologies in the field of communications as well as other copyrightable subject matter. The emergence of new communications technologies and the proliferation of new copyrightable subject matters have led to the gradual expansion of copyright protection. As protection increased, the growing power of copyright owners also increased.⁴⁰ Copyright confers to its holder a legal monopoly. Such a legally granted monopoly is of no use if it cannot be enforced. The market of copyright, especially in the field of music works, is peculiar. The central issue in connection with the copyright of a musical work is the remuneration and establishment of an encouraging system to further develop the author's creativity and thereby creation of new protected works. The establishment of copyright societies is the answer to address such issues. Copyright societies play a vital role in the copyright system. They enable markets to function for the use of copyright works in situations where the copyright holder cannot contract directly with the user. This is done by way of simplifying the negotiation process in managing the rights of their members and acting as a single contact point for licensees. Copyright societies,

though on one side offer ample rewards, the same can also be a cradle of abuse of dominant position. Thus, competition authorities have a vital role to play in ensuring free and fair competition as there is a potential threat that copyright societies may exploit their dominance in the relevant market.

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