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INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 2

2021

Recognition of Online Streaming Platforms as 'Broadcasting Organisation' under Section 31d of The Copyright Act, 1957: An Analytical Study

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ABSTRACT

In March 2019, the Bombay High Court in the case of Tips Industries Ltd. v. Wynk Music Ltd. and Anr, ruled that online streaming platforms like Spotify, Saavn, Gaana etc, do not fall within the ambit of 'broadcasting organisations' under Section 31 D of the Copyright (Amendment)Act,2012 and therefore, will not be entitled to receive statutory licenses . This decision raised split opinion as to the status of online streaming sites with respect to statutory licensing, since the term 'broadcasting organization' does not find a definition under the Act. The Judicial interpretation of the term and the Legislative Amendment to the Act proposed in 2019, contradict each other. The latter clarifies that it was the legislature's intent to include online streaming platforms within the ambit of 'broadcasting organizations', yet leaving the qualifications of a 'broadcasting organization' under the Act, unspecified. The lack of legislative clarity warrants excessive judicial interpretation by different courts each overruling previous judgments based on the Court's interpretation of the law, which is equally inefficient as it is unnecessary. This paper intends to criticize and counter the decision of the Bombay High Court, and make a case for the inclusion of internet streaming services into the statutory licensing scheme providing both economic and experiential justifications. It will also analyze the insufficiencies of the existing statutory licensing framework, suggest reforms and propose standards and guidelines for the setting of fair and reasonable royalty rates by the Copyright Board.

Keywords: Broadcasting organizations, Copyright Board, online streaming platforms, Royalties, Statutory licensing

I. INTRODUCTION

S.31D of the Copyright (Amendment) Act, 2012, which permits broadcasting organizations desirous of communicating to the public by means of a broadcast or performance, previously published literary or musical work and sound recordings, to seek statutory licenses in exchange for the payment of royalties, has been under the scrutiny and criticism of the Indian Music

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Industry (IMI) since its introduction in 2012.[2] The basis for the opposition raised against the implementation of the statutory licensing scheme is three pronged. Firstly, the statutory licensing scheme contemplated under S.31D results in the systematic dilution of the exclusive right of the copyright holder to sell, reproduce, to communicate to the public and to give on commercial rent or lease music or a sound recording, by making consent of the copyright holder non-mandatory for the grant of statutory licenses for the use their work.[3] Secondly, the pre-determined, Copyright Board mandated royalty rates fetters the copyright holder's right to contract and their agency in negotiating a fair licensing fees in correspondence with the value they assign to their work, often earning them a pittance for their creation.[4] Thirdly, there is a lack of incentive for creators to create new work under the statutory licensing scheme, as they are neither able to monetize from or even recover the costs of production of new artistic works thereby decreasing public utility.[5] The most recent subject matter of debate in relation to S.31D, has been whether digital streaming platforms can be considered as 'broadcasting organizations' entitled to seek statutory licenses under the Copyright Act.

The Chairman of the Indian Music Industry, Vikram Mehra in his key note address at Dialogue: The Indian Music Convention 2019, cited the provision of statutory licenses to television and radio broadcasters at inadequately low rates of royalties to be one of the major blockages in the prosperity of the Indian Music Industry. He opined that the decision of the Bombay High Court in Tips Industries Ltd. v. Wynk Music Ltd., denying online streaming platforms the right to seek statutory licenses, '*came as a welcome relief*'.[6] The central claim of the paper is thus - at the cusp of the digital revolution of music industries globally [7], the exclusion of one of the major avenues of music consumption from the statutory licensing scheme, which aims at democratizing the market for music by making music more accessible to the public and reducing transaction costs involved in entering into individual licensing agreements,[8] is

[2] Simrat Jaur, *Why Such a Small Pittance for Music?: The Music Industry Raises its Voice Against Statutory Licensing*, SPICYIP, (Mar. 17, 2021, 8:05PM) https://spicyip.com/2019/12/why-such-small-pittance-for-our-music-music-industry-lifts-up-its-voice-against-statutory-licensing.html.

[3] Shweta Venkateshan, *Why OTT and Cloud services in India should not be subject to Statutory Licensing*, THE PRINT, Oct. 13, 2020.

[4] INDIAN MUSIC INDUSTRY ('IMI'), *Dialogue: The Indian Music Convention 2019 Report*,7(Nov. 27, 2019) https://indianmi.org/wp-content/uploads/2020/10/Vision-2022_2019_Final_webversion.pdf.

[5] WILLIAM A. LANDES, RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 73 (Harvard University Press 2003).

[6] INDIAN MUSIC INDUSTRY ('IMI'), *Dialogue: The Indian Music Convention 2019 Report*, 10 (Nov. 27, 2019) https://indianmi.org/wp-content/uploads/2020/10/Vision-2022_2019_Final_webversion.pdf.

[7] Abhijeet Sen, *Music in the Digital Age: Musicians and Fans 'Come Together' on the Net*, 12 J. DEV. COMM. 8 (2009), https://www.globalmediajournal.com/open-access/music-in-the-digital-age-musicians-and-fans-around-the-world-come-together-on-the-net.pdf.

[8] Dr.Kalyan C. Kankanala, *A Case for Statutory Licensing of Music for Broadcasting*, BANANAIP COUNSELS (Mar.18,2021, 1:05PM) https://www.globalmediajournal.com/open-access/music-in-the-digital-age-musicians-and-fans-around-the-world-come-together-on-the-net.pdf.

irrational. The primary apprehension of the Indian Music Industry seems to be centered on the fact that the royalty rates set by the IPAB maybe inadequate to incentivize creation and investment.[9] The solution therefore, is not to exclude digital streaming platforms from the ambit of the statutory licensing scheme, rather it is to create a royalty structure under the statutory licensing scheme which enable creators to extract fair value from their creation in terms of monetary compensation.

However, in order to ensure the efficient functioning of the statutory licensing scheme for digital streaming platforms, and the satisfaction of all interested parties, the current legislative framework is in need of reform and clarification. Even though the Draft Copyright (Amendment) Rules, 2019 implies that online streaming platforms fall within the ambit of the statutory licensing scheme, there exists little legislative clarity about whether both interactive and non-interactive online streaming/radio services could subject to the statutory license scheme. While the Copyright Act states, that the royalty rates are to be set by the IPAB, which is to be paid in advance to the copyright owner; neither the Act, nor the Copyright Rules enumerate the guidelines or the standards for setting royalties resulting in arbitrary setting of unfair, insufficient or exorbitant royalty rates.

This paper is divided into four sections. In the first section the author offers a detailed jurisprudential analysis of the statutory licensing scheme using the writings and theories of John Locke, Jeremy Bentham, Friedrich Hegel, Emmanuel Kant, Margaret Radin and Justin Hughes. The second section traces the legislative and judicial history and developments with respect to the statutory licensing scheme enshrined under S.31D. The third and fourth sections of the paper are interconnected- the former offers counterarguments to the conclusions of the Bombay High Court in the case of Tips Industries Limited v. Wynk Music Limited and analyzes whether the existing statutory licensing framework can support its proposed expansion into the realm of digital music streaming platforms and, through the latter, the author makes a case for the inclusion of digital streaming platforms within the statutory licensing scheme. The paper also contains suggestions for a possible model of royalty setting and administration for digital platforms.

II. UTILITY, PERSONHOOD AND PROPERTY

The utilitarian theory prioritizes collective happiness and therefore collective rights over the rights of individuals. John Stuart Mill argues that individual rights maybe justified only as long

[9] INDIAN MUSIC INDUSTRY ('IMI'*), Dialogue: The Indian Music Convention 2019 Report*, 11 (Nov. 27, 2019) https://indianmi.org/wp-content/uploads/2020/10/Vision-2022_2019_Final_webversion.pdf.

as they promote social good which serves as the yardstick to judge utility[10]. Intellectual Property rights by protecting the proprietary interests of creators, incentivizes creation and invention and promotes research and development. The creation of more artistic works, i.e, literary, musical, dramatic or visual, for the pleasure and appreciation of the public, generates the greatest happiness of the greatest number and it promotes overall social welfare thereby justifying, through the principle of utility, the existence of intellectual property rights.[11]

John Locke in his Second Treatise of the Government propounded the labor based justification of property rights. According to Locke, '*God has given the earth to the children of man, and this earth had been given to them in common*' but whenever one intermingles his efforts with the divine endowment, any resulting product ought to be his, that is , man is entitled to the fruits of his labor. The natural right theory extends to intangible property[12]. A man's right to the produce of his brain or intellect is equally valid with his right to the produce of his hands. A man's labor, physical or intellectual, and the product are inseparable and so to have exclusive rights over one would mean having exclusivity over the other and vice versa. Blackstone extended the Lockean theory into the realm of control and asserted that man should have exclusive control over all that which is his property that is, over everything which has come to be his property as a result of the mixing of his labor either physical or intellectual. According to Blackstone, when a man by the exertion of his rational powers has produced original work, he seems to clearly have a right to dispose of that work as he pleases, and any attempt to vary the disposition made by him, is an invasion of that right of property[13].

Locke recognizes the existence and importance of individual proprietary rights over the fruits of one's labor, but also argues that man is entitled to private property only as long as there is '*enough and as good left to others*'.[14] He argued that if the appropriation of objects stands prejudicial to the interests of commoners then such ownership should be prohibited. The intersection between the utilitarian and the natural right theory lies in the exception to the latter. Both Mill-ian and Lockean theories of property tries to strike a balance between private and public rights. While the utilitarian theory focuses on collective rights and extends individual rights only to the extent that it creates social good, the theory of natural right despite

[10] *John Stuart Mill: Ethics*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (Nov.17,2020, 1.15PM) https://iep.utm.edu/milleth/

[11] Peter S. Menell, *Intellectual Property: General Theories*, 67 BERKELEY TECHNOL. LAW J., 1600, 1602 (2012).

[12] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, 11, 12 (C.B McPherson,1980).

[13] *Blackstone on Property*, ONLINE LIBRARY OF LIBERTY (Nov.17,2020, 3PM) https://oll.libertyfund.org/pages/blackstone-on-property-1753.

[14] LOCKE, *Supra* note.14.

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emphasizing on individual rights, asserts that it extends only to the extent that the recognition of the individual right is not prejudicial to the common interest. In effect, both theories argue that the recognition of individual proprietary rights must benefit or must not be at the cost of the rights and interests of the public. Therefore both, Locke's and Mills theory, justifies the existence of the statutory licensing scheme, since its intent is to make artistic works more accessible to the public.

The Personhood perspective of property however, does not support the existence of the statutory licensing scheme. The Personhood justification of property rights, theorizes that property provides a mechanism for self-actualisation, for personal expression, for dignity and recognition as an individual person. Immanuel Kant in his *Philosophy of Law*, considers property of an individual as an extension of his/her person to such a degree that depriving a person of his property or interfering with his property is equivalent to an aggression on his personality[15]. Hegel in his *Elements of the Philosophy of Rights* asserts that, a person must translate his freedom into an external sphere in order to exist as Idea. The personality of a person is the determination of his will, and is distinct from his person. While man has possession over his person, property is essential for the external actualization of human will. A man's property, is thus, an embodiment of his personality. Hegel's personhood justification of property extends to intellectual property since he classifies attainments, eruditions, talents, mental aptitudes, artistic skill and inventions as 'things' and therefore capable of being held by persons as property.[16] While they maybe internal, owned by the free mind, its expression leads to its embodiment in something external. It then follows that, an idea belongs to its creator because the idea is a manifestation of the creator's personality or self and therefore, intellectual property cannot be alienated just as a personality cannot be alienated[17].

Under Article 300A[18], the Government may deprive a person of his personal property by acquiring it for a public purpose, in exchange for compensation for such acquisition. Therefore, if Hegel's and Kant's personhood perspective of property were practically applied, even such acquisition would not be justified. However, theoretical abrasion, has not, in the case of property acquisition, hindered policy making. If the law permits the Government to acquire property in exchange for compensation, despite it being a 'aggression on the owner's personality', there is no reason why such acquisition should not extend to intellectual property, where the State, under the statutory licensing scheme, provide licenses to broadcasting

[15] James .W. Child, *The Moral foundations of Intangible property*,73 THE MONIST, 25, 29 (1990).
[16] FREDREICH HEGEL, PHILOSOPHY OF RIGHT (TM Knox, Oxford University Press,1952)
[17] DB Resnick, *A Pluralistic Account of Intellectual Property*, 46 J. BUS. ETHICS 319, 326 (2003).
[18] INDIA CONST. art.300A.

organization to communicate to the public copyrighted work, in exchange for royalties provided to the creator. Professor Margaret Jane Radin's '*Personhood Perspective of Property'* and her classification of property, however, can be applied to offer a counter.

Radin, in her *Personhood and Property*[19], theorizes that people possess 'certain objects they feel are part of themselves', these objects are so closely bound to a person's self perception and expression, that their deprivation of these objects affects their sense of personhood. She argues that the level of importance that a piece of property has in establishing sense of personhood depends upon who owns the property that is, the degree to which the person and the 'thing' is bound, which is further determined by the kind of pain occasioned by its loss. On this basis, she categorizes property into personal and fungible property. An object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement with a substitute, that is such objects are so closely bound to the person that it is indispensible to one's personality, the second category of objects are those which are perfectly replaceable with other goods of the same market value, and are held purely for instrumental reasons. The former is personal property and the latter, fungible property and these are theoretical opposites. She proposes that it should then logically follow that the more a piece of property creates a sense of personal existence, i.e., the more personal a piece of property, the wider must be the degree of control an individual is granted with respect to that piece of property. Thus, the personhood perspective generates a *hierarchy of entitlements*: the more closely connected with personhood, the stronger must be the entitlement to control that property thereby maximizing liberty.

Professor Justin Hughes, applied Radin's classification of property and hierarchy of entitlements to intellectual property. According to him, the difference between tangible and intangible property, specifically copyrighted works are the role the owner has in the creation of each and the excludability of tangible property as compared to intellectual property. With respect to intangible property the copyright owner often has a direct hand in the creation of the intellectual property while the owner of tangible property is rarely involved in the design and the creation of the object he holds. Hughes asserts that from painters to writer, to singers to artists, '*they have no choice but to describe where they live'*[20] which implies that in developing copyrightable material, creators cannot help but draw from personal experiences and even without their knowledge cause the intermingling of their biases, beliefs, personal information,

[19] Margaret Jane Radin, *Property and Personhood,* 34 STAN. L. REV. 957, 982(1982).
[20] Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOSO ARTS & ENT. L. J. 81, 84 (1998).

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feelings into that which they create. Therefore, Hughes argues that '*when a res of intellectual property is first encountered, it is noted that instead of an individual's personality moving into an existing object, it is the individual's personality which causes the object to come into existence'*[21]. Applying property as personhood to copyrighted material leads to its classification as personal property, bound to persons to a greater degree than tangible external objects and inseparable from the creator and therefore, entitling the creator to have exclusive control over such material.

However, Radin's and Hugh's Personhood perspective of property, provides arguments against the statutory licensing scheme as a whole. Therefore, to use, these theoretical arguments to exclude online streaming platforms from the statutory licensing scheme, which already provides statutory licenses to television and radio broadcasters, is hypocritical as it is discriminatory.

A purely utilitarian argument may be made for the inclusion of online streaming platforms within the ambit of 'broadcasting organizations' under Section 31 D. Section 31D seeks to mitigate the impact of the unequal bargaining power that exists between copyright owners and broadcasters, by enabling the latter to broadcast already published copyrighted work on the rate of royalty and other licensing terms determined by the IPAB. This will also lead to the dissemination of more content on cyber space as the copyright holders will no longer be able to refuse to share their content with internet broadcasters which are willing to comply with the statutorily prescribed preconditions. This creates easier access to larger volumes of content to subscribers of streaming platform services at lower costs due to decreased cost of obtaining licenses, which in turn generates greater content consumer satisfaction. Inclusion of online streaming platforms is therefore justified according to the principle of utility, since it promotes the greatest happiness of the greatest number and creates social utility.

III. EXISTING STATUTORY AND JUDICIAL FRAMEWORK

Under Section 31 D of the Copyright (Amendment) Act, any broadcasting organization, desirous of communicating by way of broadcast or by way of performance of a literary or musical work and sound recording which has already been published may do so, by obtaining a statutory license from the IPAB at rates of royalties payable to the copyright owner fixed by the IPAB and paid to the owner in advance.[22] The broadcasting organization is required to give prior notice of its intention to broadcast the work stating the duration and the territorial

[21] *Id.* at 87

[22] The Copyright Act, 1957, δ31D Cl.1,No.14, Act of Parliament 1957 (India).

coverage of the broadcast[23] and the rates of royalties payable for Radio and Television Broadcast are to be different and are to be differently fixed by the Board[24]. Rule 29 to 31 of the Copyright Rules 2013 mandate the maintenance of book of records by the broadcasting organization[25], establishes the procedure for issuance of notice to the copyright owner which must include information about the duration and territorial coverage of the broadcast and establishes the determination of royalty rates to be a pre-condition to obtaining a Statutory license under Section 31 D[26]. While the provisions mandate the issuance of a notice to the copyright owner declaring the broadcasting organizations' intention to broadcast the owner's work, the notice performs the function of informing and not seeking permission, the copyright owner, therefore, does not have the agency to deny the right to broadcast when the organization has already obtained a statutory license. Consent of the copyright owner is required only in order to make technical alterations to the content during the broadcast. Section 31 D was introduced with an intent to facilitate greater access to copyrighted material at reasonable rates by withdrawing from copyright owners their option of making 'unreasonable' terms in voluntary licensing agreements.

According to 227th Rajya Sabha Parliamentary Standing Committee Report, the objective of the Copyright (Amendment) Act, 2012 was '*to remove operational difficulties, to address newer issues that have emerged in the context of digital technologies and the Internet'*[27] and to bring the provisions of Copyright Act 1957, in conformity with two World Intellectual Property Organisation (WIPO) Internet Treaties, namely, WIPO Copyright Treaty (WCT), 1996 and the WIPO Performances and Phonograms Treaty (WPPT),1996, '*to the extent considered necessary and desirable'*[28]. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty were negotiated in 1996 to address the challenges posed to the protection of copyrights and related rights by digital technology, specifically with regard to protecting material disseminated over digital platforms through the Internet.[29] The Committee on analyzing the intent behind S.31 D , found that the provision was proposed with an intention to, on the one hand support the failing Radio FM industry and on the other hand

[23] The Copyright Act, 1957, δ31D Cl.2, No.14, Act of Parliament, 1957 (India).
[24] The Copyright Act, 1957, δ31D Cl.3, No.14 , Act of Parliament, 1957 (India).
[25] The Copyright Rules, 2013, Rule 30.
[26] The Copyright Rules,2013, Rule 31.
[27] PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, Two Hundred and Twenty Seven Rajya Sabha, *Report on the Copyright (Amendment) Bill, 2010*,¶1.2 (Nov.2010), http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf.
[28] Id.
[29] Dr.Mohan Dewan, A Step Towards a Protected India, MONDAQ (Mar.27, 2021, 12:51PM) https://www.mondaq.com/india/copyright/735452/a-step-towards-protected-india#

to make music more accessible to the public by making the process of licensing less costly by eliminating the lengthy monopolistic negotiations entered into by owners of copyright with broadcasting agencies for the grant of licenses.[30] According to the Madras High Court, S.31D provides a mechanism to strike a balance between private interest and public interest.[31] It protects private interest of the copyright holder by providing royalties in recognition of labour and protects private interests by making works more accessible to the public by eliminating the deterrents faced by broadcasting organizations, in obtaining licenses and making work publicly accessible.[32]

After the introduction of the Copyright (Amendment)Act, the Department of Industrial Policy and Promotion (DIPP) issued an Office Memorandum in September 2016 in response to representations made by industry stakeholders, as to whether internet broadcasting companies are entitled to obtain statutory licensing under S.31 D of the Copyright (Amendment) Act. According to the Office Memorandum, 'any broadcasting organization desirous of communicating to the public…' was to be interpreted liberally and was not intended to be confined to Television and Radio Broadcasting companies, but extended to internet broadcasting agencies.[33] S.2(ff) of the Copyright Act defines *'communication to the public'* as *'making work or performance available for being seen or heard or enjoyed by the public directly or by means of diffusion other than the issuance of public copies, whether simultaneous or at places and time chosen individually, regardless of whether any member of the public actually hears or sees or enjoys the work or performance made available'*,[34] additionally, the explanation to S.2(ff) contemplates the mode of communication be include cable, satellite or *'any other means of simultaneous communication'.* Therefore, S.31D read with S.2(ff) of the Act, implies that any broadcasting organization ie, any organization involved in the business of 'communicating to the public' works or performances, not only through satellite and cable but 'any other means of simultaneous communication' would be entitled to obtain statutory licenses. Internet Broadcasting Organizations like televisions and radio broadcasters are involved in the business of communicating to the public and the fact that the definition contains the phrase 'any other means of simultaneous communication' implies that the definition contemplates other modes of communication other than cable and satellite and therefore, there

[30] PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, Two Hundred and Twenty Seven Rajya Sabha, *Report on the Copyright (Amendment) Bill, 2010*,¶15.2 (Nov.2010), http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf.
[31] South Indian Music Companies Association v. Union of India, (2016) 3 MLJ. 647.
[32] *Entertainment Network (India) Limited v. Super Cassette Industries Limited*,(2008) 13 SCC 30.
[33] DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, *Office Memorandum*, Sep. 5, 2016, https://dipp.gov.in/sites/default/files/OM_CopyrightAct_05September2016.pdf.
[34] The Copyright Act, 1957, δ2(ff), No.14, Act of Parliament 1957 (India).

arises no reason to exclude internet streaming services from the ambit of S.31D.

The start of the legal debate regarding whether the statutory licensing scheme covers online streaming platforms has its roots in the events that transpired between Spotify, a Swedish internet music streaming company and Warmer Chappel Music Ltd, who hold the copyright of the works of several Anglo-American artists[35]. Spotify invoked the statutory licensing scheme under Section 31 D[36] of the Copyright Act, 1957 in order to be authorized to communicate to the Indian public through its platform, Warner/Chappel's repertoire, for which Spotify had failed to negotiate licensing terms and obtain a license from the copyright holder. Under the statutory licensing scheme however, Spotify launched its service in India, making available to the Indian audience Warner/Chappel's repertoire. Warner/Chappel Music Ltd, moved to the Bombay High Court claiming copyright infringement by Spotify and sought a permanent injunction against the streaming service from continuing to use the Plaintiff's repertoire.

Spotify contended that under Section 31 D, it qualified as a broadcasting organization and had secured streaming and broadcasting rights over the Plaintiff's repertoire under the statutory license scheme, in accordance with which the defendant had deposited 5.28 thousand Euros to the Copyright Office as an advance payment of royalties to the copyright owner and creators. On these grounds Spotify claimed, that Warner Chappel could not restrain the use of their repertoire since, under Section 31 D of the Act, consent of the copyright owners is not required for broadcast under a statutory licensing scheme. The Court would during the course of the case determine whether statutory licensing under Section 31 D extends to on-demand streaming and whether the IPAB could provide a statutory license for the repertoire of a non-Indian Company without their consent or authorization. Spotify launched its application in India on February 26, 2019, prior to obtaining the statutory license.[37] As such, this is a deviation from the Copyright Act and the Rules which state that prior to obtaining a statutory license, the royalty rates have to be fixed by the IPAB. However, the legal squabble came to an end when the plaintiff and the defendant came to a settlement among themselves, beneficial to both parties.[38] The legal questions raised in this case remained unanswered until it was subsequently raised in the case of Tips Industry Ltd. v. Wynk Music[39] which will be discussed in detail in the following section.

The Draft Copyright (Amendment) Rules of 2019, in consonance with the Office Memorandum

[35] Warner Chappelle v. Spotify AB, Intellectual Property Rights Suit No. 547 of 2019.
[36] Copyright (Amendment)Act, 2012, δ.31D, No.27 , Act of Parliament ,2012(India).
[37] Gaurav Lagate, *Spotify and Warner Chappel sign a global deal*, THE ECONOMIC TIMES, January 14, 2020.
[38] Harry King, *Spotify Battle Ends in India*, THE FIRST POST, January 20, 2020 at pg.6.
[39] Tips Industries Ltd. v. Wynk Music Ltd, COMMERCIAL SUIT IP (L) No. 198 of 2018.

issued by the DIPP intends to extend the statutory licensing to internet broadcasting organisations

IV. CRITIQUING 'TIPS INDUSTRIES LIMITED V. WYNK MUSIC LIMITED'

The ambiguity in the law, arises from the fact that 'broadcasting organizations' has not been defined under the Copyright (Amendment) Act, 2012 and therefore, whether online streaming platforms can also be considered as broadcasting organization has been extensively debated. A single judge bench of the Bombay High Court in May 2019 issued a permanent injunction against the respondent, Wynk Music Ltd from making available Tip's Industries', i.e, the plaintiff's repertoire through their internet streaming service ruling that internet streaming platforms do not fall within the ambit of 'broadcasting organizations' under Section 31 D of the Act and therefore cannot obtain a license under the statutory licensing scheme.[40] The High Court arrived at this conclusion based on three grounds.

The first assertion of the Court was that, the language of the section and related rules reveals that the intention of the legislature was to allow statutory licensing specifically for Radio and Television Broadcasting organizations, as these modes find specific mention within the provision and the section also implies that it is only of these specific modes of broadcast that the Intellectual Property Appellate Board may determine royalty rates. Additionally, under rule 29 of the Copyright Rules, 2013, the broadcasting organization is to notify the copyright owner of the territorial coverage and duration of the broadcast which is not possible to be defined when work is made available on the Internet, thereby fortifying the claim that broadcasting organizations is confined to Radio and Television Broadcasters.

The Court in this case seems to have applied the rule of '*expressio unius est exclsuio alterius'* in interpreting the provision, which states that the express mention of one or more things of a particular class may be regarded as excluding others[41]. Applying this rule of construction, since the provision includes both a general term, 'any broadcasting organisation' and a specific term, 'radio and television broadcasters, internet broadcasters will not be included within the ambit of 'broadcasting organizations by virtue of existence of specific terms. *However, it may be argued that, by the rule of* **'***noscitur a sociis', which states that the meaning of an unclear word or phrase, in this case*[42]*, 'any' broadcasting organization must be determined by the words*

[40] Karan Dhalla, *Tips Industries Ltd v. Wynk Music Ltd and Anr: A case for statutory misinterpretation?*, SPICYIP (Mar.19, 2021, 3:23PM) https://spicyip.com/2019/09/tips-industries-v-wynk-music-a-case-of-statutory-mis-interpretation.html.
[41] Daniel Greenberg, '*The Nature of Legislative Intention and its Implications for Legislative Drafting'*, 27 STAT.L.R 15, 22 (2006).
[42] Id.

that surround it, internet streaming platforms may also be included within the ambit of 'any broadcasting organisation' since internet broadcasters, like Television and Radio broadcasters are engaged in the business of 'broadcasting'. While 'broadcasting organization' has not been defined, under Section 2(dd)[43] broadcast has been defined to mean communication to the public by any means of wireless or wire diffusion in any one or more of the forms of signs, sounds or visual images and includes re-broadcast. Section 2(ff)[44] of the Copyright (Amendment) Act 2012, defines 'communication to the public' as making any work or performance available for being seen or heard or for the enjoyment by the public directly or by any means of display or diffusion, other than the issuance of their physical copies either simultaneously or at times and places chosen individually, regardless of whether any member of the public actually sees or hears the work or performance. Communication through satellite or cable or any other means of simultaneous communication to more than one household or rooms of hotels or hostels are also deemed to be communication to the public. Therefore, any organization involved in the business of broadcast and communication of work to the public is logically a broadcasting organization and hence, there seems to be no reason to specifically exclude online streaming sites from the ambit of 'broadcasting organizations' as they are also engaged in the business of simultaneous broadcast. While streaming and broadcasting are technologically dissimilar, the Act intends for broadcast to mean communication to the public and streaming is a means of communication to the public.

The second ground that the Court cited was that, it was the intent of the legislature to confine the meaning of 'broadcasting organization' to television and radio broadcasters. The Court relied on the 227th Rajya Sabha Standing Committee Report[45], which stated the legislature introduced the statutory licensing scheme in order to support the radio and television broadcasters who could not afford the royalty rates set by individual licensing contracts, to conclude that the legislative intent was to exclude internet broadcasting organizations from the meaning of 'broadcasting organizations'. The report further went on to justify non-subjection of the internet streaming platforms to Section 31 D on the basis that the nature of internet services is different from that of other conventional broadcasting services since it allows for download, sharing, storing of content, which is not covered by the scope of 'communication to the public'. Therefore, only those online music and literary work streaming platforms which

[43] The Copyright Act, 1957, δ 2(dd),No.14, Act of Parliament 1957 (India).
[44] The Copyright Act, 1957, δ 2(ff) , No.14, Act of Parliament 1957 (India).
[45] PARLIAMENTARY STANDING COMMITTEE ON HUMAN RESOURCE DEVELOPMENT, Two Hundred and Twenty Seven Rajya Sabha, *Report on the Copyright (Amendment) Bill, 2010*,¶15.2 (Nov.2010), http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf.

do not provide services such as on-demand purchase, download or sharing options would be considered as broadcasting organization if, streaming platforms were to be included within the ambit of broadcasting organizations under Section 31 D. But the question then may arise as to whether 'or for the enjoyment of any performance' under Section 31 D can be construed to include sharing and download service.

This argument made by the High Court that, the language of the provision and the reason for which it was introduced indicates the legislative intent to have been against the inclusion of online streaming sites, is inherently flawed. *On 5th September 2016, the Department of Industrial Policy and Promotion(DIPP) of the Ministry of Commerce and Industry, Government of India, issued an office memorandum clarifying that the words 'any broadcasting organization desirous of communicating work to the public through broadcast' may not be restrictively interpreted to be covering only radio and television broadcasters as the definition of ' broadcast' is read with 'communication to the public', appears to be inclusive of internet broadcasting as well*[46]*. Thus, online streaming platforms fall within the ambit of 'broadcasting organisations' of Section 31 D of the Act. On May 30th, 2019 the DIPP notified the introduction of the Copyright (Amendment) Rules Draft, 2019 to amend the Copyright Rules of 2012. The amendment sought to bring internet broadcasters within the ambit of 'broadcasting organizations' in Section 31 D by replacing 'by way of radio and television broadcast' with the phrase 'for each mode of broadcast'. Regardless of the fact, that the proposed amendment remains a draft and is yet to be enforced, the Office Memorandum and the proposed amendment indicate the legislative intent is very clearly, to include online streaming platforms within the ambit of 'broadcasting organizations' under Section 31 D of the Act.*

The third ground the Court offered was that the services made available to the public, through online streaming platforms, like downloading, sharing, storage and offline streaming of music was beyond the scope of 'communicating to the public' and therefore, online streaming platforms cannot be 'broadcasting organizations' since the business they were engaged in was beyond the definition of 'broadcast' under the Act. The Court held that, the download feature of the online platforms exceeds the scope of 'communication to the public', but rather falls within the purview of 'commercial rental' and therefore violates the exclusive rights of the plaintiff under Section 14(1)(e)[47] and therefore the activities and services of the Defendant have

[46]DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, *Office Memorandum*, Sep. 5, 2016, https://dipp.gov.in/sites/default/files/OM_CopyrightAct_05September2016.pdf.
[47] The Copyright Act, 1957, δ 14(e), No.14, Act of Parliament 1957 (India).

the effect of infringing the copyright. The court re-iterated the rights of a copyright holder with regard to sound recordings under Section 14(1)(e) and stated that the right to sell, give on commercial rent or lease a sound recording, to reproduce a sound recording or to communicate music/ sound recording to the public is an exclusive right of the copyright owner. Stored copies of the sound recording on subscriber's devices can be shared and transferred to a third party or to other devices which the court opined amounts to the sale of works, which the defendant is not authorized to carry out. Non-payment of this subscription fee prompts a withdrawal of such access to the same, until the subscription is restored. The Court asserted that the sale or commercial rental of sound recording through digital means is no different from sale or commercial rental carried out through physical modes.

This argument made by the High Court is based on the false assumption that all online streaming platforms are interactive. There exists, both interactive and non-interactive online streaming sites, the former allowing the consumer to download, share, store and stream offline and the latter, the model followed by most streaming sites, simply allowing the consumer, to listen to music online on the application. Statutory licensing is made available only those broadcasting organizations which engage in the business of 'communicating to the public' literary, musical works and sound recording which have already been published. Since the features of downloading, storage, sharing and offline streaming provided by most music streaming platforms are according to the opinion of this court excessive of 'communication to the public' and constitutes 'commercial sale or rental', this then consequently implies that internet streaming platforms, even if they are to be entitled to statutory licenses, such licenses do not authorize them to provide the above mentioned services amounting to 'commercial sale or rental', unless the copyright holder, whose exclusive right it is under Section 14(1)(e), authorizes the streaming platforms to do so. It may be argued that broadcasting through internet does not mean communication to public where there is user discretion. [48]A statutory license could thus entitle the streaming platform to only perform the activity of communicating to the public that is making work available for hearing and enjoyment and for no other purpose. Thus, the Court in excluding all online streaming platforms from the statutory licensing scheme, on the ground that some of them provide interactive services has made a gross generalization.

V. A CASE FOR STATUTORY LICENSING OF DIGITAL STREAMING PLATFORMS

The Indian Music Industry, like its global contemporaries, is in the midst of a digital revolution.

[48] Tips Music Ltd v. Wynk Music, Notice of Motion (L) No. 197 of 2018 IN Commercial Suit IP (L) No. 114 of 2018.

Digital Technology has transformed the way music is bought, sold and consumed.[49] There has been a shift in the way people listen to music, from using terrestrial radio, records to listen to music to digital means of listening to music. The past decade has witnessed the '*creative destruction*'[50] of cassettes, CDs and record stores by MP3 players and iPods, which, post 2015 has been phased out and almost completely been replaced by digital intangible modes of music consumption in the form of Internet Radio Broadcasters or streaming services such as iTunes, iHeart Radio, Youtube Music and Spotify function on subscription based, ad-based or purchase- based models.[51] The Digital Revolution of the music industry has made music more accessible, convenient to consume and less costly to produce and disseminate.[52] The digitization of music, however, brought with it, its own host of problems.

The Digital Revolution in the music industry began in the early 1999, sparked by the launch of Napster Inc., a Peer to Peer music service which allowed its users to consume music for free by illegally downloading MP3 files from other users' computers.[53] Before Napster, consumers, in order to access music would have to purchase the album as a whole in the form of a cassette or a CD from record stores. Physical sales of albums, was the major source of revenue for artists and record labels. Music was localized and expensive, with only a hand full of people willing to pay for music.[54] Napster perpetuated the narrative and expectation that 'music should be a free commodity'.[55] In order to access music, a user no longer needed to own the record for life, but rather, with a dial-up modem and a computer, they could download music for free and store it in their systems to listen to at their convenience. Napster had about 80 million users illegally downloading 14,000 MP3 files a minute.[56] Listenership boomed. The flux in the consumption of music under normal circumstances would be advantageous for artists and record labels, however, as a greater number of consumers began using Napster for music consumption, album sales and revenue of accrued by the music industry in physical sales dropped and artists remained uncompensated by consumers and Napster which was illegally

[49] Chacko Jose P, *The Age of Digital Technology in Music Industry*, 8 INTL.J. OF SCI. & TECH. R., 2695, 2698(2015).
[50] In reference to Joseph Schumpeter's 'gale of creative destruction'.
[51] Dillon Wallace, *When CDs took a Front Seat to Cassette Tapes*, KODAK:APERTURE (Mar.19,2021, 8:37PM) https://kodakdigitizing.com/blogs/news/when-did-cds-take-a-front-seat-to-the-cassette-tape.
[52] Catherine Jewell, *Creating Value from Music and The Rights that Make it Possible*, WIPO (Jan.29,2015) https://www.wipo.int/ip-outreach/en/ipday/2015/creating_value_from_music.html.
[53] Lauren Dali, *Napster ignites the Music Revolution*, TUNED GLOBAL (Mar.20, 2021, 10:53AM) https://blog.tunedglobal.com/napster-digital-revolution.
[54] Stephen Dowling, *Napster and How it Transformed the Music Industry*, BBC (May 31, 2019). https://www.bbc.com/culture/article/20190531-napster-turns-20-how-it-changed-the-music-industry.
[55] Tom Lamont, *The Day Music was Set-Free*, THE GUARDIAN (Feb.24,2013) https://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing.
[56] Eamonn Forde, *Oversharing: How Napster almost killed the Music Industry*, THE GUARDIAN (May 31,2019) https://www.theguardian.com/music/2019/may/31/napster-twenty-years-music-revolution.

providing access to their intellectual property.[57] Streaming services, such as Spotify have drawn inspiration from the Napster model and can be considered 'legal Napster' of sorts.[58] The rationale behind streaming services is similar to that of Napster- make music available and accessible free of cost or at affordable rates. However, unlike Napster, streaming services compensate artists and record labels in the form of royalties and credits in exchange for licenses. However, the process of obtaining these licenses have proven to be cumbersome for radio broadcasters, due to the disproportionate bargaining power between parties, monopolistic licensing terms and the abuse of the dominant position by record labels in licensing negotiations.

In India, the shift to digital though significant has been more recent. About 95% of Indian consumers today, consume music either through streaming or through other digital platforms.[59] In 2019, 70% of the total revenue accrued by the Indian Music Industry, was generated through digital sales and streaming; physical album sales contributed a measly 7% of the total generated revenue[60], projecting no growth since 2018.[61] Digital will soon become the conventional. However, the Indian Music Industry is afflicted by the problem of piracy. Piracy rates in India in 2018, was up to 76%, remaining the highest in the world.[62] The Industry loses INR 1500 Crore annually to piracy related revenue leakages.[63] Statutory Licensing of Streaming Services may prove to be beneficial in curbing piracy related revenue leakages in the Indian Music Industry.

While the question of *whether*, online streaming platform fall within the ambit of Section 31 D of the Act, has encountered split opinion from the legislature and judiciary, the question rather must be '*should*' online streaming platforms, in keeping with the transforming digital music landscape, be brought under the statutory licensing scheme, either through Section 31 D of the Copyright (Amendment) Act, 2012 or through any other piece of legislation.

Internet radio broadcasters enable the public to try out and discover new music at a lower cost,

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[57] Id.

[58] Dan Kopf, *Napster Paved the way for Our Streaming Reliant Music Industry,* QUARTZ (Oct.22, 2019) https://qz.com/1683609/how-the-music-industry-shifted-from-napster-to-spotify/

[59] INTERNATIONAL FEDERATION OF PHONOGRAPHIC INDUSTRY ('IFPI'), *Music Consumer Insight Report, 2018,* 7 (Oct.7, 2018).

[60] INDIAN MUSIC INDUSTRY ('IMI'), *Digital Music Study ,2019,* 6 (Sep.22, 2019) https://indianmi.org/imi-research/reports-and-papers/.

[61] INDIAN MUSIC INDUSTRY ('IMI'), *Digital Music Study,2018,* 4 (Oct.23, 2018) https://indianmi.org/wp-content/uploads/2018/10/Digital-Music-Study-2018.pdf.

[62] INTERNATIONAL FEDERATION OF PHONOGRAPHIC INDUSTRY ('IFPI'), *Music Consumer Insight Report, 2018,* 12 (Oct.7, 2018).

[63] INDIAN MUSIC INDUSTRY ('IMI'), *Dialogue: The Indian Music Convention 2019 Report*, 11 (Nov. 27, 2019) https://indianmi.org/wp-content/uploads/2020/10/Vision-2022_2019_Final_webversion.pdf.

and in the long run, this is likely to increase not only the amount of music listened to, but also the social benefit gained from doing so.[64] While it is necessary and desirable to incentivize the creation of new music by ensuring that creator's right over their work is protected and creators obtain monetary benefit for the use of their work, it is equally important to incentivize progress by encouraging more efficient ways of obtaining social benefit by developing more advanced methods of delivering recorded music.[65]

In India, the copyright law has not adapted to changes in the way the public access music, it still remains hostile online radio services all of which are to negotiate individual licenses from record labels leaving them little space for growth or to obtain financial profit. The statutory licensing scheme in the United States was introduced in order to curb music piracy, in the form of Napster Inc and to encourage more legitimate means of digitally providing music through internet radio services like Pandora[66]. It is often asserted that statutory or compulsory licensing of internet streaming platforms could save the music industry.[67] They claim that it would benefit not only the streaming platforms itself and the consumers, but with the effective means of setting royalty rates, statutory licensing could even benefit Record Labels and artists. Statutory licensing schemes for online non-interactive radio or streaming services have increased the public's access to music thereby removing incentive of the consumer to engage in illegal digital transmission of copyrighted work or the creation and distribution of illegal copies of copyrighted music through services like Napster.[68]

Artists and record labels must shift from expending funds on creation of physical albums but rather must shift to the use of online streaming and broadcasting platforms for the sale of their music, since the cost of operation, production shipping is much are almost absent and since more consumers are shifting to the less costly, more convenient alternative of listening to music online. This reduces costs for the record labels, the webcasters and the consumers.[69] This shift to the exclusive use of online streaming platforms, could also dis-incentivise pirates from illegally downloading and distributing music since the cost associated with pirating music are

[64] Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313 (2002).
[65] James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. LAW REV.46,57 (2014).
[66] Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 317 (2002).
[67] H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. LAW REV.46,52 (2014).
[68] Dan Garon, Poison ivi: *Compulsory Licensing and the Future of Internet Television*, 39 J. CORP. L. 173,176 (2013).
[69] Jasmine A. Braxton, *Lost in Translation: The Obstacles of Streaming Digital Media*, 36 HASTINGS COMM. ENT. L. J., 57, 63 (2014).

 [ISSN 2581-5369]

increased in comparison to a record, CD or cassette, because in order to pirate music files, consumers must invest in high quality sound recording software, programs, or systems, stream the entire song to copy it fully, and then divide up the streaming music copies into individual files for dispersal to the public. Pirating becomes difficult since unlike traditional means, the pirate does not own a physical copy and the digital copies are available only through the streaming sites and are not available on the user's device and is therefore difficult to replicate high quality copies.[70]

The statutory licensing scheme in the long-run would makes agencies, recording labels and any other intermediaries redundant, no longer critical in ensuring a successful music career and would eliminate them from the distribution loop.[71] The artist and the broadcasting organization would directly be able to enter into licensing contracts the terms of which are pre-determined through statute. This would be advantageous to artists because they would obtain the complete monetary value of their work through royalties, without having to be satisfied by the share of the royalties allowed to them by the agency representatives. This would afford artists with greater artistic and creative liberty and create greater transparency in the royalty administration systems. Additionally such a statutory license model with pre-determined licensing terms would also permit freer entry into the market for music production, support independent artists unrepresented by agencies and protect independent inexperienced artists from unfair licensing terms imposed by broadcasting organizations. The free entry and easier dissemination of artistic work would create a diverse and democratized market for music which is equally beneficial to the consumers as it is to the artists.

While it is true that the statutory licensing scheme operates without the consent of the copyright holder, this loss of control of the copyright holder over his works is justified on economic grounds. These licenses benefit owners and users by reducing the high transaction costs associated with private license bargaining. In fact, transaction costs can reach a level so high that beneficial and utility-increasing negotiations will not take place at all; this can result in market failures that have the potential to impoverish copyright owners, desired users, and consumers at the same time[72]. An argument that may be offered against the encouragement of online streaming platforms through the use of statutory licensing, is that internet streaming platforms instead of driving album sales, for which it was intended, has consistently diminished

[70] Neil S. Tyler, *Music Piracy and Diminishing Revenues: How compulsory licensing for interactive broadcasters can lead the recording industry back to prominence*,161 PENN.LAW REV. 2101, 2108 (2013)
[71] Patrik Wikstrom, *The Music Industry in the Age of Digital Distribution*, BBC (April 23, 2018) https://www.bbvaopenmind.com/en/articles/the-music-industry-in-an-age-of-digital-distribution/.
[72] Neil S. Tyler, *Music Piracy and Diminishing Revenues: How compulsory licensing for interactive broadcasters can lead the recording industry back to prominence*,161 PENN.LAW REV. 2101, 2108 (2013).

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album sales which is the main source of revenue for record labels[73]. To this it can be argued that in the absence of streaming platforms making music more easily accessible to the public at reasonable costs, there is a greater possibility of music piracy. The emergence of streaming platforms and the piracy, both reduce album sales, but piracy, unlike access over streaming platforms through the statutory licensing, does not fetch copyright owners any royalties or monetary benefit. For consumers of music, the choice is rarely between affordable streaming services and purchasing physical albums rather it is between affordable services and piracy[74]. In the long-run, while the use of interactive services may largely displace traditional record sales, the savings associated with significantly reducing the illegal downloading, copying, and distribution of sound recordings can more than offset these loss.[75] Statutory licensing of internet streaming platforms is an effective tool against music piracy, as music piracy decreases, annual revenues for record labels will inevitably increase. As a result, the recording industry may very well be able to exceed existing plateau revenues by embracing a novel solution that harnesses innovative and promising technologies and capitalizes on consumer preferences.[76]

VI. CONCLUSION

In India there seems to be no legal framework to allow statutory licensing of online radio services since due to the lack of legislative clarity, judicial interpretation has excluded from the ambit of Section 31 D online streaming service and erroneously so, in the opinion of the researcher. Section 31 D as it exists, is not comprehensive enough for statutory licensing of streaming services, the draft rules of 2019 also suffers from ambiguity. While it states that 'any broadcasting organisation' includes online streaming services, it does not clarify whether this includes both interactive and non-interactive services. It is not possible for both kinds of services to have similar licensing requirements since different rights of the copyright holder are involved. It also does not establish the basis or the standards for setting royalties leading to arbitrary royalty rates set by the IPAB and unnecessary costly adjudication. The most effective model of royalty setting could be a hybrid model which includes both a fixed and a variable royalty figure. Every artist whose repertoire has been displayed on the streaming platform will

[73] Jasmine A. Braxton, *Lost in Translation: The Obstacles of Streaming Digital Media*, 36 HASTINGS COMM. & TECH.L.J, 57, 66 (2014).
[74] Ronda Brin, *The Copyright Royalty Board: An Explainer*, RE:CREATE (Mar.15, 2021, 10:50PM), https://www.recreatecoalition.org/copyright-royalty-board
[75] Dan Garon, Poison ivi: *Compulsory Licensing and the Future of Internet Television*, 39 J. CORP. L. 173,176 (2013).
[76] James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. LAW REV.46,57 (2014).

be provided a fixed rate of royalties in addition to a variable figure which will be determined by the extent of user interaction, popularity and number of streams annually. The fixed rate as one-time payment would be guaranteed to the artist even if the song does not perform on the charts. Licenses could be renewed annually, and at every renewal, the broadcasting organization would be liable to pay the fixed rate of the royalties and the variable rate at the end of the licensing year. At the end of the licensing term the broadcasting organization would have the discretion to decide which artists licenses would be renewed and which ones they would remove from their streaming service.

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 [ISSN 2581-5369]