

Royalties in Private Radio Industry of India

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1. Introduction

Ever since its inception in India as a private establishment in the 1920s, radio had largely been a government owned and run entity until the late 1990s when private enterprises were allowed to foray back into broadcasting, initially on a trial basis and eventually as full-fledged operators. The era with government- control over radio witnessed a myriad platter of content offerings via the radio stations, which were driven by the intention of providing the listeners with a wide array of experiences and included playing popular music, rendition of dramas and classical music concerts – live or otherwise, educative programs, news, sports commentaries, social messaging amongst others.

When the radio space was eventually opened up to the private sector, the government, as part of the licensing agreements, limited the options of content that these broadcasters could relay, for instance, the broadcasters were refrained from broadcasting news or sports commentaries (Bhagia, 2018). Owing to the same, music became the prime facilitator of the private radio industry with broadcasters relying heavily on sound recordings licensed to them by music labels to fill airtime and to attract audiences. This is evident with the heavy reliance on music by private radio stations during their airtime - in one operational hour of radio stations, 50 minutes consists of music and talk (Ahluwalia, 2017). Additionally, the private radio industry in India, riding at the back of the recorded music industry, grew from an INR 74 Cr industry, in 2001, to INR 3100 Cr industry in 2019 (Sharma, 2001; FICCI-EY, 2019).

Though music is a critical component for the radio industry in India and has played a primary role in its speedy growth over the years (as discussed later in this paper), the relationship between private FM radio industry and record labels has been uneasy from the very beginning as the radio industry in India has failed to pay a ‘fair value’ for its wide exploitation of music licensed to it by music rights holders.

The first section of this paper delves into the pivotal role played by the music industry in the growth and expansion of the private radio industry in India. The following section highlights how music remains an integral input for the private radio industry in India and delineates how price controls (in India) have acted as an impediment to the growth of the recorded music industry vis-a-vis the growth of the private FM sector which has benefitted as a result - so much so, it is a growing and not a stagnant medium and has in fact been expanding, in terms of reach as well as diversified offerings. The paper then discusses a timeline of the *M/s Music*

Broadcast Pvt. Ltd. &Ors. v. PPL (2010), which fixed royalties to be paid by radio stations party to the case at 2% of Net Advertising Earnings of each such station for usage of repertoire of certain players of the recorded music industry. The next section analyzes how music markets across global territories have their unique market dynamics and in turn, mechanism of payment of royalties, therefore, Indian Radio Industry, was on the contrary observed to be advocating international practices without taking into account the Indian market conditions. The “international scan” is followed by an examination of the present situation of radio royalties in India. Finally, it is observed that determination of such radio royalties through free market practices is crucial to music rights holders given the vital role these stakeholders play in keeping the private radio industry afloat and the risk of investments undertaken by them. The denial of such a right to music rights holders has the effect of subsidizing the private FM radio industry at the cost of the music industry in India.

Background to the radio industry in India.

Radio broadcasting has had a captivating journey since its onset in India. It initially started as a private venture in the British Era as the Radio Club of Bombay made the first ever broadcast in June, 1923. The Indian Broadcasting Company Ltd. was set up in 1927 as a private company, which ended up being liquidated in 1930, thereby paving way for the then government to take control of the industry (Prasarbharati, 2020). Radio had been (and continues to be) under the protective wing of the government of the day since the birth of Indian State Broadcasting Service under the Department of Industries and Labour (and now the Ministry of Information and Broadcasting) in 1930 until the year 2000 where private FM broadcasters began operating independently in India.

The entry of private players into radio began as an experimental arrangement with All India Radio (AIR) providing them with hourly slots in respective cities. The first slots were allotted in Delhi and Mumbai (1993) and gradually expanded to Kolkata (1994) and Panaji (1994). During this phase, the two private players who were involved in programming content to air on AIR were Times of India’s Times FM and Mid-Day Group’s Radio Mid-Day, which generated a revenue of INR 93 Cr within a span of four years of commencement of operations(Kohli-Khandekar, 2019). Eventually, the sale of these slots by the Indian government stopped in 1998 and the government started developing a policy for a full-fledged entry of private broadcasters. Amidst these developments, AIR also dabbled with the idea of Sky Radio, a multi-channel satellite-based radio service.

The year 1995 proved to be crucial for broadcasting in India as the Supreme Court, in *The Secretary, Ministry of Information & Broadcasting Vs Cricket Association of Bengal & Anr.*¹, decided that air waves are public property, hence their usage has to be regulated in the interest of citizens to protect their rights. Broadcasting media is influenced by the free speech right of the citizens guaranteed by Article 19 (1) (a) of the Indian Constitution and therefore, monopoly of this medium (broadcasting media), whether by Government or by an individual, body or organization is unacceptable. Freedom of speech and expression empowers people of India to access information, education and entertainment across diverse socio cultural regions to be able to make informed decisions. Such media platforms cannot be monopolized by the government or the citizens of India. The broadcast media should be governed by the public, it should not be under the government control. It should be autonomous and independent of government on social, economic and political matters. Until this point, the broadcasting environment was largely controlled by State-owned broadcaster, Prasar Bharti, on account of historical and other factors and the judgment by the Hon'ble Court paved the way for prospective privatization of the radio industry in India.

The first private radio station to operate was Radio City in Bangalore in 2001. Currently, private radio in India has expanded to 113 cities with over 400 stations (Motilal Oswal, 2017).

2. The expansion of the radio industry in India

All India Radio was the sole radio broadcaster in India until 2000 where FM radio broadcasting was opened to private agencies via auctioning of licenses. The government auctioned licenses in the FM spectrum gradually through three Phases. Phase 1 and 2 of the FM license auctions resulted in the coverage of cities with a population of 3 lakh and above while Phase 3 considered cities populated by 1 lakh people and above.

Phase 1, 2000:

In May 2000, the Ministry for Information and Broadcasting (MIB) opened for auction 108 frequencies across 40 cities (TRAI, 2008). Overall, the result of Phase 1 was a mixed one as initially there was mass withdrawal from bidders primarily because of high amounts of

¹ The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr., 1995 SCC (2) 161

licensing fees. The government expected to collect INR 80 Cr. from 108 licenses but the over- optimistic demand of the remaining serious bidders led to overbidding. The government at the end of the bidding collected around INR 386 Cr. (Kohli-Khandekar, 2013). Essentially, it turned out that those with the means stayed as they saw immense potential in the radio business which was evident by the overbidding.

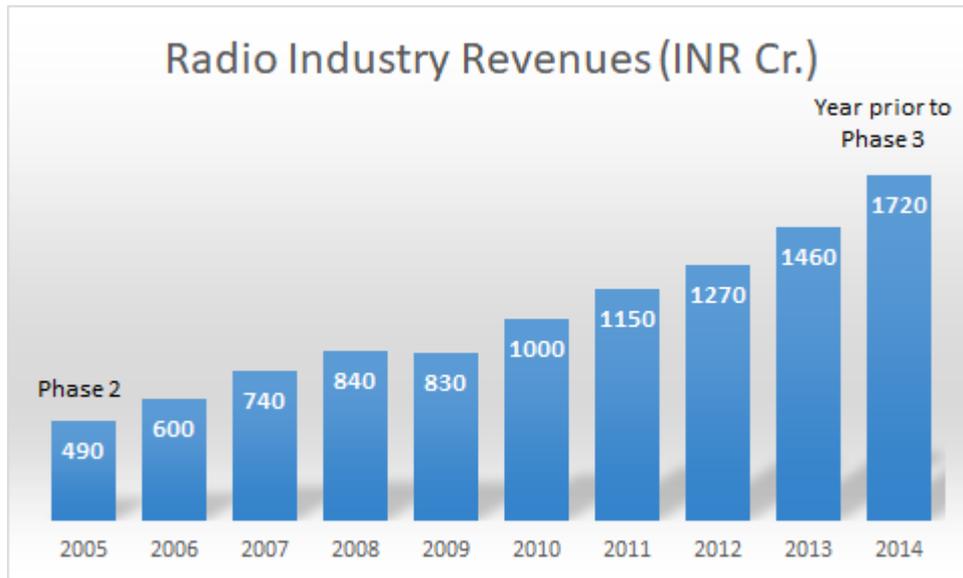
For instance, the highest price for a license in Mumbai was INR 9.75 Cr. (the reserve price, which is set by the government and is the lowest stipulated fixed price in the auction for a license, was set at INR 1.25 Cr.). The radio advertisement revenue in Mumbai during the period of Phase 1 auctions was less than INR 20 Cr. whereas ten radio licenses were auctioned in the city at INR 9.75 Cr. each (Kohli-Khandekar, 2013). A similar trend was iterated nationwide.

The abovementioned business model turned unviable with high annual licensing fees (license fee with a 10 year-period validity increased annually at 15%) plus operating expenses for the then nascent radio industry suffered losses (TRAI, 2004). Even in this phase, the private FM radio industry witnessed modest growth despite a high amount of license fees. In 2001, the private FM radio industry reported ad revenues of INR 74 Cr., which increased more than three-fold to INR 240 Cr. in 2004 (Sharma, 2001; O'Brien, 2010).

Phase 2, 2005:

The turning point for the radio industry was the roll out of Phase 2 auctions of FM spectrum licensing in 2005 which introduced a number of reforms to the policy guidelines, especially the modification of the prevailing exorbitant spectrum licensing system to a rational license fee structure. As per policy guidelines of FM licensing Phase 1, annual licenses were to be renewed at an increment of 15% on the existing license fee. For Phase 2, renewal of annual licenses moved from a fixed license regime to a revenue-based model of 10% of One Time Entry Fees or 4% of Gross Revenue, whichever is higher (TRAI, 2008). This shift in policy was a result of deliberations held by the government with different stakeholders of the private FM radio industry in India.

Figure 1: Radio Industry Revenues 2005-2014



(Source: FICCI Frames M&E Report, 2009-15)

Thus, the new business model became viable for broadcasters as only a percentage of their revenues were to be paid as annual spectrum fees. This encouraged many corporate players to venture into the FM business even as the existing ones were expanding. This is evidenced by a rise in the number of radio stations from 21 stations in Phase 1 to 245 stations in Phase 2 (TRAI, 2008; MIB, 2020). During this phase, the radio industry was a rapidly growing sector indicated by positive trends. For instance, in 2008, there was a shift of ad shares in major sectors such as TV and Print towards radio and the internet (FICCI-FRAMES, 2009).

According to the FICCI Frames M&E Report 2015, the radio industry outperformed all other traditional media segments by a growth of 18% and 15% for two consecutive years in 2014 and 2013 respectively. Between Phase 1 & Phase 2 (2005-14), the radio industry grew at a CAGR of 13.38%.

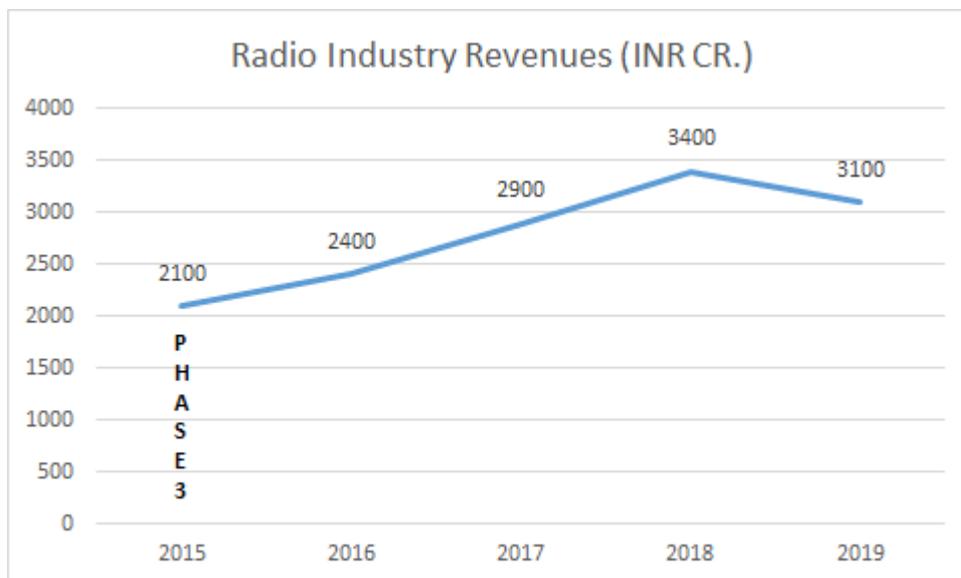
Phase 3, 2015:

The introduction of Phase 3 was held online and in two batches, with regulations that further expanded growth opportunities to the benefit of the radio industry in India. The license fee was further lowered to 2.5% of NOTEF (Non-Refundable One-Time Entry Fees) or 4% of Gross Revenue (whichever is higher), the license period was extended from 10 to 15 years, permitted FDI in the private FM radio sector was increased from 20% in Phase 2 to 26% in

Phase 3, which was ultimately raised to 49% under the government route in 2015 (MIB, 2011; PTI, 2015). These significant changes were coupled with flexibility displayed by the government.

Such measures brought profitability to the radio industry by considerably reducing their capital and operating costs. FM companies that held multiple frequencies in the same city encouraged shared infrastructure and services/programmes. Networking of channels across India, which was not permitted in previous Phases, now allowed a radio broadcaster to broadcast the same content within a radio broadcasting company's own network across the country. This helps in cutting costs for radio broadcasters as they are no longer required to create new and distinct content for each city. Further, the radio industry led by Phase 3 auctions saw a monumental surge of 66% in the number of stations to 407, as compared to 243 stations in Phase 2 and the total FM coverage expanded from 85 to 113 cities in India (Motilal Oswal, 2017). This spurt in growth of FM channels and coverage has been accompanied by a steady growth in radio ad inventory.

Figure 2: Radio Industry Revenues 2015-2019



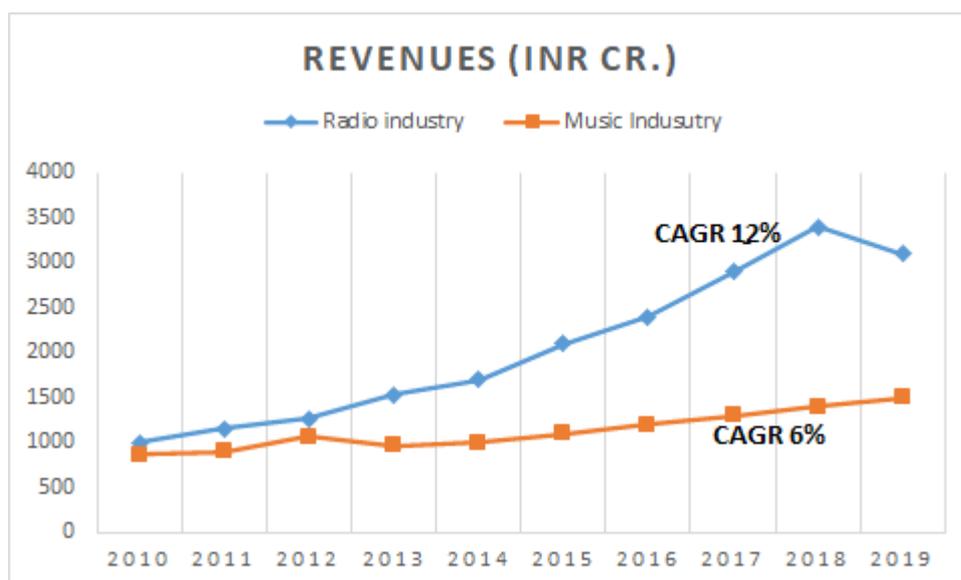
(Source: FICCI Frames M&E Report, 2020)

An important fact that deserves to be highlighted here is that music has majorly fueled the private FM radio industry since its dawn in India and has driven the industry forward, serving as its backbone over the years. Almost 50 Minutes of an operational hour in radio stations consists of music and talk time (Ahluwalia, 2017).

At this stage, it also becomes relevant to discuss that in addition to advertising revenue from inventory or Free Commercial Time (FCT), broadcasting organizations have now begun to earn revenues from non-FCT avenues (non-radio operations) such as content production and syndication, events such as concerts and award shows, etc. It is pertinent to note that be it jock talk, concerts like Radio City’s Gig City LIVE, dance festivals like ENIL’s Mirchi Rock & Dhol, music related shows like Mirchi Cover Star, benchmarks like time check, sparklers like *Bauaa* on Red FM; majority of content created by radio stations are largely music related or consistently has music as a key input, enabling Private radio industry to increase its revenues steadily, in addition to FCT revenues. The non-FCT initiatives and favorable policy guidelines in Phase 3 e-auctions of FM licenses have infused fuel to the growth of FM Radio Industry in the recent years. The graph above depicts an approximate 50% of growth witnessed in the overall radio sector in 2019 over the year 2015.

Emphatically, in light of the facts presented above, the radio industry no longer is in a germinal state, instead, it has shown consistent growth over the past two decades. It grew from an INR 74 Cr. industry in 2001 to an INR 3100 Cr. industry in 2019 (Sharma, 2001; FICCI-EY, 2019). The radio industry has been growing at a CAGR of 23% (approximately). Prior to the Covid-19 pandemic, the radio industry was estimated to grow to INR 3610 Cr. by 2022 (FICCI-EY, 2020).

Figure 3: Comparative Growth of Radio Industry and Music Industry between 2011-2019.



(Source: FICCI Frames M&E Report, 2011-20)

Ideally, considering the private FM radio industry's vital dependence on the recorded music industry for sound recordings, one would expect the level of growth of the two sectors to show some sort of semblance. However, it is rather appalling to note that in the past decade, the staggering growth of the private FM radio sector in India at a CAGR of 12% is in stark contrast to the lower growth rate of the recorded music industry in India at a CAGR of 6%, as depicted in the graph below.

The systemic devaluation of music, which serves as a key input to the private radio industry, has widened the revenue gap between both the industries over the years for reasons such as the compulsory license order.

Introduced in 2010 vide an order passed by the erstwhile Copyright Board and applicable to parties to the royalty dispute (discussed in detail under Section 4), the rate of 2% Net advertisement earnings² of radio stations to be paid by radio stations as compulsory license fee towards usage of sound recordings owned by certain record labels, has greatly undermined the value of music for which is an essential raw material for the radio industry.

Given that the private radio industry has witnessed augmented growth since its genesis in India in 2000 as highlighted above, the said rate significantly altered the terrain in which both the markets operate and has had the effect of subsidizing the private radio industry at the cost of the recorded music industry in India. At this point, it becomes relevant to discuss the radio industry's diversified growth over the years and how music has played an indispensable role in its journey.

3. Music as a propellant to the flourishing radio industry in India

Globally, music contributes immensely to the commercial radio. It takes care of about 75% of the airtime, appeals to radio consumers and attracts broadcasters' advertising revenues. However, license fees for the use of sound recordings amount to only 1.65% of global commercial radio industry revenues (Schultz M. , 2016).

²Net Advertisement earnings of each FM radio stations is arrived at after taking into consideration the earnings of that particular station after all government and municipal taxes paid, if any, and commission paid towards the procurement of such advertisements to the extent of 15% of such advertisement earnings shall be excluded. (Ref. The Copyright Board Order Dt. 25-Aug-2010)

The radio industry in India is heavily dependent on the recorded music industry as a major portion of the radio industry's business is tied to music. This flow of music into its "formal" partner industry of radio is estimated to contribute revenues of INR 2170 crore (almost twice the size of the recorded music industry) and full-time-equivalent (FTE) employment of 4230 (around 4 times the employment generated) by the recorded music industry in India (Deloitte-IMI, 2019). Such an amplified effect shows the value extracted by radio from recorded music, and from the significant investments made by record companies in artists and in the production of that music.

The recorded music industry in India like any other music industries in the world would spend money on various aspects like music production, music distribution, brand building, marketing, talent tapping and acquisitions. The music company constantly needs to invest in order to create more music. In the scenario where the physical record sales revenue is decreasing, the companies depend more on the revenue earned from licensing music. The royalty earned from licensing music plays a crucial role in maintaining the expenditure and quality of music production.

The compulsory licensing arrangement forces certain music rights holders to accept below-market prices determined by rate-setting bodies. For instance in 2018-19, BIG FM paid 2.02%, Radio City paid 2.59%, Radio Mirchi paid 3.5%, Red FM paid 6.96%, Kal Radio paid 7.11 % and HT Media paid 6.99% of its overall radio revenues as royalty (Exhibit 1). It is also observed that southern music stations and stations that predominantly play English music have been paying higher rates of royalty compared to others. The above figures suggest that though few players pay the 2% compulsory license to music labels, the current rate of royalty that is operational in India for majority of players is much higher than the 2% suggested by Copyright Board Order (Exhibit 4).

One of the contentions behind approving a lower rate of royalty was the expenditure involved in establishing and running radio stations at the time of reviewing such rate. As mentioned in Section 2, the Radio industry has grown at an average growth rate of 23% in the last ten years. In a scenario where the royalty rates are lower due to compulsory licensing, the record labels would have no option but to reduce investments into Artists and Repertoire (A&R), thus reducing impetus to sign and develop new talent and thereby, fresh music content reducing employment potential from allied services like studio production labs, sound engineers, etc. This ultimately harms the consumers of music, who would otherwise be able

to benefit from more innovative and diversified song offerings in India. This clearly explains why a lower rate of royalty is not desirable in India. Looking at the global numbers, in 2019 itself, the recorded industry invested USD 4.1 billion in A&R, whereas USD 1.7 billion in marketing. This was equivalent to 33.8% of total revenue collected which was invested back into music (IFPI, 2020). This suggests the importance of investment into the music for the growth of music industry.

While record labels not party to the order passed by the Copyright Board continue to have a voluntary licensing arrangement with radio stations, the compulsory licensing regime applicable to certain players has been relied upon by the private FM radio sector as a leverage to put pressure during royalty negotiations on these labels not party to the order - often being needlessly dragged to court.

For instance, in the case of *Zee Entertainment Enterprises Limited v. Entertainment Network (India) Limited (2019)*, Zee Music had an existing licensing arrangement with ENIL which expired. Negotiations were ongoing between the two parties; however, they did not materialize and before the term could expire, ENIL sent a notice of statutory licensing under Section 31D applying the 2% compulsory licensing rate decided in *M/s Music Broadcast Pvt. Ltd. & Ors. v. PPL (2010)* to which Zee was not a party and paid Zee an ad-hoc sum of money. Zee sued ENIL for infringement in Bombay High Court and post filing of consent terms, Justice Sriram directed ENIL to file an application before Intellectual Property Appellate Board (IPAB) as IPAB was the appropriate authority for setting rates under Section 31D, which was later extended to 6 weeks and to pay Zee the due amount for usage of its repertoire. This case has now been amicably settled between both the parties.

According to industry surveys conducted to understand the consumption patterns of music, it was found that radio remains the primary source of music consumption amongst surveyed respondents, despite the influx of many alternate emerging platforms of music consumption (IMI-IFPI, 2019). In this modern digital landscape Radio is still a prevalent choice of media. The average Indian radio listener spends 2.4 hours per week listening to music. The radio, is an important part of the media mix today, as radio saw 53% increase in engagement year on year from 2018 (IMI-IFPI, 2019).

The period of lockdown due to the COVID-19 crisis has further shown that engagement with radio is only increasing. As per a study, in India, private radio industry has managed to

increase its listenership base by 23% to 51 million, which is next to only television at 56 million and social media at 57 million. (PTI, 2020). This is a green light that engagement is and will remain strong and should remain relevant to advertisers, government, and definitely consumers.

According to the Digital Music Survey of 2019, In India, audio streaming comprised 39.4% of time spent listening to music across three methods (video streaming, audio streaming, and radio) and they returned 71.8% of the revenues generated by them, Meanwhile, radio was responsible for 21.7% of listening time but its payout was just at 2.9% of their total revenues. In a country like India with a high level of radio engagement as noted above and wide music fandom (who recognize themselves as music lovers or fanatics) of 80% of surveyed respondents compared to the global average of 54%, copyright owners of sound recordings are merely entitled to receive equitable and fair remuneration for the use of their sound recordings in radio broadcasting (IMI-IFPI, 2019).

Radio industry in India is largely dependent on music industry for its content, a preferential status to radio industry for the compulsory fixation of lower royalty rate, could potentially harm the growth of music industry in the long run.

4. The multiple revenue channels of the Radio industry in India

The private FM radio industry is continuously expanding and diversifying, indicating the overall strengthening of the radio industry in India. Myriad channels of revenues have opened up for the radio industry over the years while the recorded music industry, which remains a critical propellant of the radio story, remains a neglected partner. In the year 2018-19, the radio industry booked revenues of INR 3100 crores riding on the back of the recorded music industry by paying subsidized royalties for music (FICCI-EY, 2019).

As per the 227th Parliamentary Standing Committee Report on the Copyright (Amendment) Bill, 2010, the need of broadcasters was justified, at that time, as “hassle free access to (musical) works”. The voluntary licensing and free market pricing were criticized as that could bring in “unreasonable terms and conditions” by the copyright societies. The offenders or automatic license holders were justified in the name of “adequate return” by the users to the owners. The report mentions about litigation driven licensing and royalty fixing, which many scholars have advised against (Rajya Sabha, 2010). Radio industry is more organized and structured, compared to the music industry that comprises of many individual entities

creating content that is eventually being used for creating value of a radio network. Compulsory licensing is not desirable for a healthy growth of music industry.

The current avenues indicating profitability of the radio industry have been elucidated below.

a. Omnichannel avenue model of the radio industry

The transformed omnichannel model of radio from traditional medium has opened up new avenues for brands from an advertising point of view for better reach to target audiences, in more relevant ways. Beyond advertisements, radio's growth has been enabled through brand-sponsored programmes, programmatic content, concerts, events and activation, and podcasts.

b. Content Diversification

As pointed out by broadcasting industry leader Abraham Thomas, CEO, of Reliance Broadcast Network Ltd., radio is a hyper-local platform with growth opportunities based on catering to demands of local audiences in the newer territories of tier 2 and tier 3 cities (Dsouza, 2019).

Fever FM has introduced content in both music and non-music categories across genres such as crime, horror, sitcom etc. (Adgully , 2019). They are also into sports-related endorsements through partnerships with franchises, leagues across a range of sports such as hockey, football, kabaddi, and badminton (HT Media, 2020).

Content diversification is a prime factor which has already started inducing further growth of the radio industry. However, this growth is largely dependent on the music industry. Indian radio industry has diversified in content, however the radio promise of India is primarily music radio. The Indian radio content creators have learnt the skills of positioning new diversified content from music point of view. Be it sports like cricket updates, thrillers like Mafia Stories of MY FM, crime stories like *Kissa Crime Ka* on Radio City, radio narratives like *Yaadon Ka Idiot Box* on BIG FM etc. packaged between songs; all such content is presented and/or packaged around music.

c. Consolidation

Alongside innovations, the radio industry has simultaneously been consolidating in the background.

Profitability achieved by radio stations through consolidation is evident upon consideration of a case study of the merger between HT Media and Next Mediaworks Ltd.

HT Media operates radio channels across key metros under the brands of Fever 104 FM and Radio Nasha, while Next Mediaworks used to operate the Radio One brand. This merger saw the integration of Fever 104 FM and Radio Nasha – 7 stations and Radio One 6 stations (Delhi, Mumbai, Kolkata, Chennai, Bengaluru, and Pune) into a total 13 stations. Interestingly, HT Media proposed to own 74% in the merged entity, while Next Radio and Next Mediaworks' shareholders would hold the rest.

Speaking in the context of this merger, Shobhana Bhartia, Chairperson, and group editorial director of HT Media had laid out a vision for the changing landscape of the radio industry in India (Jha, 2018).

“Radio is a fast-growing segment and research has shown that it has significant urban listenership. Radio One’s merger with our metro operations gives us both a complete bouquet across English and Hindi in all of the country’s biggest radio markets and will help us serve listeners and advertisers better. Such consolidation is another sign of the growing maturity of the radio market. We are convinced that the merger will add value to all stakeholders. We look forward to working with Radio One to realize our common vision”

Around the same time, a leading torchbearer of the radio industry- Nisha Naryanan, COO, Red FM-predicted that ‘the industry may see a lot of mergers and acquisitions’ (Bhagia, 2018).

The radio industry was consolidating as well as expanding into new territories at the same time after the Phase 3 auctions. As a result, the present landscape of radio broadcasters is a complex mesh of giant media holding entities interspersed with aspiring new entrants.

Even in the past, in 2015, Entertainment Network (India) Ltd. (ENIL) which owns Radio Mirchi had acquired seven radio stations from TV Today Network's Oye 104.8 FM in Tier-II cities (BestMediaInfo, 2015). It was also eyeing stations of Oye FM in the major cities of Mumbai, Delhi and Kolkata the acquisition of which was refused due to regulatory issues (Verma, 2015). However, in 2018, ENIL entered into a non-binding Memorandum of Understanding (MoU) with the TV Today Network limited to acquire those three stations. The approval of the sale is pending at the end of the Ministry of Information and Broadcasting (ENIL, 2019).

As of 2019, Radio Mirchi has international presence through brand licensing agreements with local media partners. It currently operates in UAE – where it is in a top position in listenership across the Emirates – in Bahrain and most recently in the United States where it is beamed across cities like New York, Philadelphia, Atlanta, amongst many others (ENIL, 2019).

Radio Mirchi has active plans to expand further in the US and Canada in the coming years. They are also aspiring to enter another country in the Gulf region. These existing and emerging international radio stations are targeted at the South Asian Diasporas. The radio broadcaster is able to enter and thrive in newer territories in foreign locales riding on the back of primary content revolving around popular Bollywood music ranging from contemporary to retro and hits from the recent decades (ENIL, 2020).

d. Revenue Leakages through creative accounting methods

Barter and Cross-Media deals

Radio networks have also been partaking in constructing their online portals. Utilizing 70-80 percent of broadcast time for music, a radio station makes a radio jockey (talent) popular therefore using a layered approach in fashioning and endorsing their radio jockeys as celebrities (Schultz M. , 2016). This talent consequently is used across other media platforms such as television, social media, digital broadcasts, local events, concerts, newspapers, magazines, cinema etc. to encash on the bankability of these local stars / national stars.

According to industry sources, the overall size of barter deals amounts to about 30-40% of the overall deals done with brands. Barter deals are concluded in multiple ways; these deals can constitute a set off against vendor's expenditure, free gifts for contests, and can also release expenditure on other platforms in cases of cross media ownership, depending upon terms of the barter deals.

The major radio players in India are owned by conglomerates with interests in media & entertainment business apart from others. Radio Mirchi is operated by Entertainment Network (India) Ltd, a subsidiary of Bennett, Coleman & Company Ltd of the Times Group (ENIL, 2020). Radio City is run by Music Broadcast Limited (MBL), a subsidiary of Jagran Prakashan Ltd – a major publishing house (Radio City, 2020).

Red FM and Kal Radio is owned by the Sun Group, a media giant with a TV broadcasting network focused on South Indian languages, Direct-to-home (DTH) services, publications and OTT services, amongst others (Sun, 2020). HT Media owns and operates Radio Fever 104 (HT Media, 2020). My FM is owned by DB Corp Ltd which has interests in publishing and digital space. Big FM is owned by Reliance Broadcast Network Ltd. of the Reliance Anil Dhirubhai Ambani Group.

In many of these cases, the impact of such barter deals has a bearing on the radio network's profit and loss account. If royalties payable to music copyright holders are based on ad-revenues only from radio broadcast, the money that broadcasters earn from advertisers as a result of these barter and cross media deals does not get accounted for in the broadcast ad-revenue. This impacts royalties payable towards use of music and thereby, undermines the value of music.

Creative accounting

Apart from the direct usage of music there are various indirect usages of music which should also be accounted for. These usages comprise music- based contests, using parodies, using *stationalities* (popular RJs) around popular music, music artistes singing adlib songs in interviews, using benchmark identities (every show would have specific elements that listeners come back to every day like traffic beat, time check etc.) with popular music etc. This value building through music is never formally

acknowledged and taken into consideration when in fact; music is being used as an instrument in popularizing the platform or its talent.

At its infancy stage, the private FM radio sector argued and presented itself as a fledgling medium, requiring royalty rates for music content to be substantially reduced for the sector to grow. Given that a media platform is set up within a gestation period of three to five years, the initial capital investment and one-time license fees is something that is amortized over a period of time. As a result of this, the copyright board issued an order in 2010 that mandated few music companies in dispute to issue compulsory license of their music to radio stations at flat 2% royalty (Exhibit 4). Looking at the growth of radio industry and increasing investment that the music industry incurs, this royalty rate is low. Fast forward to the present scenario, the radio industry that uses 70-80% of recorded music for its air time has grown to record revenues of INR 3100 crores riding on the back of the recorded music industry by paying subsidized royalties for music (FICCI-EY, 2019).

A perusal of the financial reports of ENIL (Exhibit 2), a market giant in the private FM sector, for the past half-a-decade lays out a clear trend as to the share of its key expenses. Operating expenses as a percentage of revenue were reported to be between 45%-55% over the years, while the employee costs hovered in the range of 16% to 22%. However, the proportion of royalties as a payout had remained flat at 3%-4% of the total revenues (Exhibit 2).

A similar trend is observed from the annual reports of MBL; whose financial performance for the past five years indicates that the operating expenses are in the range of 72%-77% of the revenues and the employee costs are between 20%-24%. Surprisingly, the royalty payouts have remained stagnant between 2%-4% (Exhibit 3).

This is a clear indicator of the low value attributed to music as an input (relative to the high dependency on it) into the private radio broadcasting industry. The growth and expansion of the industry is evidently attributed to music due to the popularity of music and the structural constraints on content for radio broadcasting.

Despite the aforementioned dependence on music as a key input for the radio industry's offerings – it is evident that its value is undervalued monetarily – as music rights holders' payouts are relatively miniscule to the radio industry's expenditure on operating expenses and employee costs. While it can be argued that the expansion in the number of radio stations

could have contributed to rising employee and operating expenses, it does not justify the low payouts for licensing music – as the dependence on music remains high if not more as radio broadcasters acquire new circles. This discrepancy is well emphasized by the 2 percent compulsory licensing order (discussed in the next section) for those who are party to the order and serves to highlight the systemic devaluation of music.

The following section discusses in detail the long-standing and much debated issue of radio royalties in India.

5. The Case of the Copyright Royalties

The Income Tax Act, 1961³ defines “royalty” as the consideration (including lump sum payment) for the transfer of all or any rights (including the granting of a license) in respect of a patent, invention, model, design, secret formula, process, trademark, copyright, literary, artistic or scientific work. In common terms, a royalty can be understood to be the fair value arising out of licensing a copyrighted material. A copyright is the intellectual property of the copyright owner and the intellectual property is usually dealt with per the norms of property transactions referred to in a utilitarian manner. This system of dealing with intellectual property is more of a system of administering intangible assets (Merges, 2011).

In exchange for permission to exploit certain rights associated with the copyright owned by music rights holders, a user of the works pays royalty to the owner by making a recurring or a one-off payment. Such permission can also be referred to as a “license” and therefore, royalties are also known as license fees. Copyright royalty is often a case of negotiation between the rights holder and the rights user. Thus, royalty is nothing but a price point that acts as permission for the material to be used.

In the context of music, royalties usually relate to getting permission to use music, from respective music rights holders. For the purposes of this paper, our discussions would be limited to record labels, which typically own copyright-protected sound recordings and thereby, are entitled to receive royalties as consideration in return for granting permission to use their sound recordings.

The determination of copyright royalties is executed in a structured manner. Let us unravel that from the broadcast industry’s case. When the private FM broadcaster use music as its

³Explanation 2 to Section 9(1)(vi) of the Income Tax Act, 1961.

main content, the discussion of royalty cannot turn a blind eye to the complex layers associated to the value chain of creating, producing, marketing and distributing that piece of music.

The fair allocation of revenue is a concept first Lloyd Shapely gave in his paper. This method is very relevant for the music industry with reference to radio as it has more than one stakeholder namely, music composer, singer, songwriter, right holder, representative of the right holder and broadcasting stations (Watt, 2010). It was observed in a research about royalty negotiation between the patent holder and the licensee that whenever there were infringement cases, “reasonable royalties” were calculated. Royalties are always negotiated in extreme situations, usually in the shadow of litigations. It is thus advisable to have royalty negotiation as an exercise to match fulfilled-expectation equilibrium (Shapiro, 2006).

When in the free market the music producers and users fail to arrive at an agreement, the user postpones the payment. Under the compulsory licensing granted by majority of international convention signatory countries’ copyright laws the user continues to use the music. In case of disagreement in an ideal situation this would be pushed to a scenario where the matter is escalated to the copyright boards or litigations as consequences. The rates would be renegotiated and usually they would end up being in favour of the user i.e. broadcasters in the context of this paper. This is the case with the Indian copyright board order and royalty being fixed at 2%. This kind of negotiation is highly undesirable for the growth of the music industry.

While reviewing the copyright system in the US the Federal Government suggested, expansion of compulsory licensing schemes, implementation of taxes and broadening the fair use doctrine would help reduce the gaps in royalty in USA (Boyajian, 2010). Further, as per Boyajian the monopoly of royalty will get diluted with digital platforms and free availability of music content of advertisement supported platforms. Ideally, both parties, the right holder and the licensee should have equal power to exercise their bargaining, under a free market situation without the statutory intervention. Following the international conventions, the global copyright scenario has been emerging in a way that it practically discourages a free bargain and a market place between the stakeholders. The rates and terms of such copyright royalty must be “Fair Reasonable and Non-Discriminatory (FRND) (Schultz M. F., 2018).

The US copyright policy has led to reviews and discussions in hindsight, leading to an argument about the free market negotiations and the right of music companies to the royalty. Mitch Glazier, Chairman and CEO of Recording Industry Association of America (RIAA) applauded the introduction of Ask Musicians for Music Act of 2019 (The AM/FM Act), which would ensure fair market value for music across platforms (RIAA, 2019). It has been realized over the years that compulsory licensing has not been fair for the music companies. The new Act has challenged the revenue practices of the largest entertainment industry in the world. The new Act deals with the fair market practices.

A compulsory licensing regime gives the reign of bargaining power to the licensee and they push the regulator to have these decisions in their favor.

The case of copyright royalties paid as remuneration to certain record labels in India on account of the Second Order of the Copyright Board is elaborately discussed below. The validity of the compulsory license granted to radio stations by this order (as explained below) shall expire on September 30, 2020. An analysis of the order is followed by an objective assessment of the present ability of IPAB to hear such a matter.

Build up to M/s Music Broadcast Pvt. Ltd. &Ors. v. PPL (“Order of August 25, 2010”)

In 1999, FM Radio was opened up to the private sector, which marked the commencement of Phase I of FM Radio in India. In 2000, Phonographic Performance Limited (“PPL”) fixed a tariff scheme of INR 1500 per needle hour or 20% of net advertising revenue, which is higher. This scheme was not agreeable to radio stations, which approached the Copyright Board relying upon Section 31 of the Copyright Act, 1957 for grant of a compulsory license. Simultaneously, an additional issue arose when Entertainment Network Industry Limited (ENIL) started commercially exploiting songs owned by T-Series under the apparent belief that T-Series was a PPL member. T-Series filed a suit before the Delhi High Court in order to stop radio stations belonging to ENIL from playing and broadcasting songs owned by T-Series.

Consequently, several broadcasters, including ENIL, approached the Copyright Board relying upon Section 31 (1)(b) of the Indian Copyright Act for grant of compulsory license, which was permitted by the Copyright Board. On November 19, 2002, the Copyright Board fixed an interim rate of INR 1200 per needle hour for prime time broadcast for two hours in the morning (8 am-10 am) and two hours in the evening (6 pm – 8 pm). The rate for 8 lean hours

(night time) i.e. 10 pm – 6 am was at 25 of the standard rate. The rates applicable to 12 normal hours which did not fall within the prime time or the night hours were at 60% of the standard rate. Pursuant to this formula, royalty was fixed at an average rate of INR 660 per needle hour. This order is hereinafter referred to as the First Order of the Copyright Board. Music Broadcast Private Limited (MBPL) and other FM Stations filed appeals in the Bombay High Court against the First Order of the Copyright Board. Thereafter, a Civil Appeal was filed against the order of the Bombay High Court order dated 13th April 2004 before the Supreme Court of India. The Hon'ble Supreme Court vide its order dated 16th May 2008 upheld the decision of the Bombay High Court and while remitting the matters back to Copyright Board for fresh consideration on the principles of evaluation. The compulsory license applications filed by Music Broadcast Pvt. Ltd., Entertainment Network India Limited and Radio Mid-Day were listed before the Copyright Board as a result of the 2008 order of the Hon'ble Supreme Court. For the sake of clarity, it is relevant to note here that T-Series was not a party to the First Order of the Copyright Board.

ENIL preferred an application at Delhi before the Copyright Board on or about January 28, 2003 for grant of compulsory license in terms of Section 31(1)(b) of the Act against T-Series. On being notified, T-Series filed an objection contending that as the suit for infringement was pending before the Delhi High Court (as mentioned above), no application for compulsory license could be entertained. The Delhi High Court, on an application filed by ENIL, clarified that T-Series was free to canvas its submissions before the Copyright Board that the person infringing its copyright (ENIL) in this case, should not be granted compulsory license. The Copyright Board directed the parties to come with their respective witnesses. However, when T-Series intended to present oral evidence, its request to do so was declined and ENIL's application for grant of a compulsory license against T-Series was allowed. ENIL filed an appeal against this order before the Bombay High Court questioning the rates of compensation only. The said appeal was tagged with various other appeals which had been filed before the Bombay High Court against the First Order of the Copyright Board.

T-Series filed an appeal before the Delhi High Court on whether the license ought to have been granted in the first place. The Delhi High Court remitted the matter back to the Copyright Board to reconsider the application of ENIL for grant of compulsory license under Section 31 of the Act in reference to T-Series. The Hon'ble Delhi High Court directed the Copyright Board to give adequate opportunity to the parties in the case and consider the

matter afresh. ENIL was also directed by the Delhi High Court to file an undertaking that it would not broadcast the sound recordings of T-Series. ENIL filed a Special Leave petition against this order of the Delhi High Court before the Supreme Court.

On April 13, 2004, Bombay High Court allowed the appeals filed by FM stations and directed the Copyright Board to determine afresh the license fee under Section 31 in light of materials such as audited accounts of the FM Stations. The Bombay High Court pronounced an order stating that grant of a compulsory license under Section 31 of the Indian Copyright Act is permissible, whereas the Delhi High Court opined differently on the matter. The Delhi High Court ruled that a compulsory license could not be granted under Section 31 because under Section 31(2), compulsory licenses could only be granted in situations where licenses had not been granted to even one FM radio broadcaster. If there is more than one applicant, the license must be granted to the one that will best serve the public interest. The view taken by the Delhi High Court therefore was that the “mass grant” of compulsory licenses could not be done, and that All India Radio had been given the license to broadcast these songs already.

An appeal in the Supreme Court was preferred against the decision of the Delhi High Court, which upheld the view taken by the Bombay High Court and rejected the view taken by the Delhi High Court. Thereby, the Supreme Court in *Entertainment Network (India) Ltd. Vs Super Cassette Industries Ltd and Ors.*⁴ held that it was not satisfied with the manner in which the Copyright Board had dealt with the matter and refused to examine the witnesses. Thereafter, the Supreme Court redirected the PPL matters back to the Copyright Board for a fresh determination on rates. The T-Series matter was remanded for a determination on whether a license ought to be granted and if so, then at what rate.

In the meantime, while the Government of India introduced the FM Phase II scheme ("Phase II Policy") with certain modifications on 13th July 2005. Phonographic Performance Limited ("PPL") in the year 2005 further, revised and fixed a new tariff scheme of INR 2400 per needle hour or 20% of net advertising revenue , whichever is higher. In this Phase, 337 channels were put on bid encompassing 91 cities comprising of B, C and D Class cities. Radio broadcasting companies such as Puran Multimedia Pvt. Ltd; Synergy Media Entertainment Limited; Entertainment Network India Limited and Rajasthan Patrika Pvt. Ltd were successful bidders for the B, C, and D class cities. This revised tariff was not agreeable

⁴ Entertainment Network (India) Ltd. vs Super Cassette Industries Ltd and Ors, (2008)13SCC30

to the Radio Broadcasters, and hence they filed fresh compulsory licensing applications against PPL herein in the year 2008, which eventually led to the very well known Order by the Copyright Board in 2010.

Order of August 25, 2010 (“the Second Order”)

Nine applications for granting a compulsory license for broadcast of sound recordings were filed under S. 31 (1) (b) of the Copyright Act, 1957. Cases by Music Broadcast Private Limited, Entertainment Network India Limited and Midday were earlier decided by the Copyright Board on November 19, 2002⁵ and after appeal to the Hon’ble Bombay High Court⁶ and ultimately to the Hon’ble Supreme Court, were remitted back to the Copyright Board for consideration afresh vide judgment dated May 16, 2008.⁷ Rest of the six cases, were fresh filings made in 2008. Since all the cases related to common issues and in all nine cases, the respondent was the same, they were heard collectively. The six parties to the proceedings in the nine applications before the Copyright Board were PPL v. Music Broadcast Private Limited, Entertainment Network (India) Limited, Radio Mid-Day West India Limited (Now Next Radio Limited), Puran Multimedia Pvt. Ltd., Synergy Music Entertainment Ltd. and Rajasthan Patrika Pvt. Ltd.

The Copyright Board passed the Second Order-

- a. Fixing the royalty at 2% of net advertisement earnings or Net Advertising Revenues (“NAR”) of each FM radio station to be paid to all music providers.
- b. The validity of such a license granted shall expire on 30th September, 2020.

Litigation arising on account of the Second Order of the Copyright Board

Super Cassettes Industries Limited (T-Series) filed a Writ Petition No. 6255 of 2010 questioning the Second Order. On September 15, 2010, the Delhi High Court pronounced an interim order that the Second Order would not be relied upon by any of the radio stations for a compulsory license against T- Series since T-Series was not a party to the proceedings in which the impugned Second Order of the Copyright Board came to be passed.

⁵ Music Broadcast Pvt Ltd. vs Phonographic Performance Limited 2003(26)PTC70(CB)

⁶ Phonographic Performance Limited vs Music Broadcast Pvt Ltd.2004(29)PTC282(Bom)

⁷ Entertainment Network (India) Ltd. vs Super Cassette Industries Ltd and Ors, (2008)13SCC30

MBPL, despite the above order passed by the Delhi High Court, filed an application for compulsory license under Section 31 (1) (b) of the Copyright Act, 1957, solely placing reliance on the rates fixed by the Second Order. Other eight broadcasters party to the Second Order also filed applications for compulsory license against T-Series on the basis of the Second Order. T-Series replied to MBPL according to the terms and conditions prevalent under the expired voluntary licensing arrangement between T-Series and MBPL. This offer was not accepted by MBPL; meanwhile, other broadcasters continued broadcasting the songs owned by T-Series on the basis of existing voluntary licensing terms and not on the basis of rates set out by the Second Order.

By its order dated September 1, 2011, the Delhi High Court held that even while the grant of compulsory license under Section 31 of the Copyright Act, 1957 was under consideration, an interim compulsory license could be granted. The Hon'ble court also stated in its order that an interim protection should be granted when the matter concerns the amount of license fee to be paid and despite T-Series not being a party to the Second Order, it is similarly placed as PPL, which was bound by the Second Order. Accordingly, it was appropriate that T-Series should also receive 2% of the NAR as license fee in the interim period for broadcasting of its sound recordings.

T-Series filed an appeal against the abovementioned order before the Supreme Court wherein the only question for consideration of the court was whether on a complaint made to the Copyright Board under Section 31 of the Copyright Act, 1957, the Copyright Board under Section 31(1) (b) can pass an interim order in the pending complaint.

The Supreme Court allowed the appeal of T-Series, noting that a Tribunal is a creature of Statute and can exercise only such powers as are vested in it by the Statute. Such incidental powers could at best be said to exist in order to preserve the status-quo, but not to alter the same, as would have no doubt happened if an interim compulsory license was granted in the matter. If the legislature had intended that the Copyright Board should have powers to grant mandatory injunction at the interim stage, it should have vested the Board with such authority; the presence of a power cannot be inferred from the absence thereof in the Statute itself.

Two appeals against the Second Order were also filed before the Madras High Court, one by PPL and the other by the South Indian Music Companies Association (SIMCA). SIMCA

challenged the Second Order on the grounds that since they were not made party by the radio stations in the compulsory licensing applications filed before the Copyright Board, the Second Order should not be enforced against them. Stay order passed in these appeals was ultimately not granted by Madras High Court, in contrast to the outcome of the Delhi High Court order for the similar issue involving T-series. This matter is currently sub-judice in the Madras High Court.

Amongst other considerations, the Second Order of the Copyright Board considers radio royalties paid internationally to benchmark and arrive upon the rate of 2% NAR of radio stations. The following section discusses how foreign markets and thereby, radio royalty rates are peculiar to their market conditions, thereby, the radio royalty rate as decided by the Second Order of the Copyright Board in India upon comparison with internationally prevalent rates is unjustified.

6. International scan

Internationally, the radio broadcasting for civilian purposes had commenced and progressed almost along similar timelines as in India. Prior to the emergence of radio as a means of broadcasting for civilian purposes in 1922, radio was used for military purposes in popular radio markets such as the US and UK. In the initial days of radio broadcasting, financing the broadcasts posed a significant challenge. In the US, the radio sector was largely financed by advertising while in Europe, including the UK, the government had financed the radio industry (Scott, 2020). Popularly, the model of selling advertising airtime was known as ‘American Plan’, while the reliance on license fee was labeled as ‘British Plan’ (Dunlap, Jr. , 1927).

Radio royalties’ payout systems across territories are very intricate and market-specific. Determination of such royalties depends on a multitude of factors such as market size, radio listenership, local legislation determining who gets paid what, etc. The entanglements created by these multiple factors makes the radio industry of each country unique and thereby, impossible to justify a generic straitjacket formula or system. The extent of this complexity can be captured in the differing practices followed by countries to determine radio royalties to be paid by radio broadcasters to their respective music rights holders from whom they secure the music; for the purposes of this paper, we will scan the international horizon limiting to a handful of countries only.

Globally, the radio industry is about the size of USD 40 Bn out of which the United States is the largest at USD 21.81 Bn (2017). The second largest market is Germany at USD 3.88 Bn, followed by China at USD 2.27 Bn, Canada at USD 1.74 Bn and the United Kingdom at USD 1.61 (Deloitte, 2019). The Deloitte Insights report, 2019 had stated that radio has proven to be a resilient platform and it can only be further improved.

Royalties in the United States, the largest radio industry in the world, is on one extreme and despite making a huge amount of revenue (for instance, in 2019, USA made close to USD 20.5 billion from 15,451 radio stations across the country), radio stations of USA do not share royalty with the copyright owners. In recent years, this has been criticized by the entire entertainment industry, and as a result of it, attempts are being made to modernize the existing copyright laws. By way of an example, the Ask Musicians for Music (AM-FM) Act⁸, introduced by Senator Marsha Blackburn in 2019, has been introduced with a view to recognizing the hard work put in by the music creators, to correct longstanding inequity in US Copyright law. The abovementioned bill would give the music owners the right to grant permission to use music as well as get royalty for the same. The bill would also allow them to negotiate rates with radio stations in exchange for use of sound recordings, thereby providing a window for meaningful marketplace negotiations.

On the other hand, royalty calculations in Germany are done in a rather comprehensive manner. The standard royalty payout is calculated as a percentage of a maximum rate i.e. 7.5% for music content multiplied by the actual music content of the programme. GEMA, the German collecting society for music authors and music publishers, made a distinction in respect of the radio broadcasting platforms such as pay radio, satellite radio and has its licensing rules accordingly (GEMA, 2020a). The broadcast revenues for consideration of base calculation is broad and comprises Radio subscription revenue; advertising revenue; revenue for Media for Equity, proceeds from product placement/product marketing; revenue from pay radio; revenue from chargeable telecommunication process; radio shopping; and donations to radio. It has even listed out the considerations and exemptions for revenue emerging from barter deals (GEMA, 2020b). In Germany the maximum royalty is fixed, however there are multiple parameters to arrive at a particular royalty, for a particular platform with a particular type of distribution pattern.

⁸ S.2932 – 116th Congress (2019-2020)

PPL UK on the other hand, looks after the royalties for the recorded music industry on behalf of record labels and performers. PPL UK charges the greater of a minimum fee and a percentage share of net broadcasting revenue (NBR is 85% of Gross Broadcasting Revenue) (PPL UK, 2020). It is also a particular system where the royalty rates are determined based on the nature of operations/type of radio station and its revenue size. PPL UK has defined six categories of radio stations – Commercial, community, hospital, prison, short-term restricted license, and student radio. The rates and terms and conditions for each of these categories are unique to their operations and purpose of existence. The royalty is usually negotiated between the collecting societies and broadcasters from time to time.

The radio industry in Nordic countries such as Denmark, Finland, and Norway is fairly small in comparison to large global markets. For instance in 2017, Denmark was a DKK 318Mn(USD 48Mn) market, Finland was at USD 79 Mn, Norway was at USD 97.24 Mn, and they too have a thriving presence of rather recently established private FM stations. These countries however have a higher royalty rates in comparison with the rest of the world and India. For, instance, against a global average of 1.65% royalty rate, Denmark pays 8.48% (Stroll, 2019; Statista, 2020; Huhn, 2019; Schultz M. F., The Market for Performance Rights in Sound Recordings: Bargaining in the Shadow of Compulsory Licensing, 2018). Conversely, Indian copyright board order suggests 2% royalty, whereas the market practice for the year 2018-19 is 3-4%.

According to an official of KODA (the copyright society for songwriters, composers, and music publishers of Denmark), the copyright societies of Nordic nations have a monopoly to deal with broadcasters as well as copyright owners. Typically, the agreements containing the negotiated rates would be revised after two years, however for broadcasters this can be with longer intervals. KODA aims to apply the same royalty rate for public and private broadcasters. The copyright societies proactively get involved in rate negotiation and litigations would be the last resort, since they have a monopoly and overall prefer agreed solutions rather than litigated.

It is evident that the radio industry, globally, operates in a complex environment. On the one hand, the largest radio market i.e. US barely pays any royalties, which is being challenged, whereas a small sized market such as Denmark pays a notably high rate of 8.48%. Added to these considerations, the regulatory and rights environment under which the private radio industry operates is drastically different across the markets (Schultz M. F., The Market for

Performance Rights in Sound Recordings: Bargaining in the Shadow of Compulsory Licensing, 2018). Therefore, the means and methods of determining radio royalties are specific to the complexities and needs of stakeholder environments of the music industry in these respective countries.

7. Indian situation on royalties from Radio industry

The fixing of royalty at the rate of 2% of NAR of radio stations to certain players of the recorded music industry in the matter before the erstwhile CRB was a culmination of a long drawn legal and commercial battle played out over a decade. The private radio broadcasters had successfully argued that the radio industry in India was a nascent one which was reeling with teething troubles even after more than a decade of its existence.

Meanwhile, the record labels involved in this matter and represented by PPL had argued for the recognition of a fair value of its respective repertoire. The appeals of the respondents in the matter i.e. PPL are still pending for close to a decade, thereby bringing in a new regime of royalty for the concerned parties under the auspices of existing compulsory licensing provisions in Section 31 of the Copyright Act, 1957.

As has been illustrated earlier in this paper, in 2010, the radio industry and recorded music industry were at a similar size, however, within a decade, the radio industry's CAGR (12%) was double the CAGR of the music industry (6%). The radio industry was approximately three times the size of the recorded music industry in 2019 (FICCI-EY, 2020).

Circa 2010, the recorded music industry was undergoing serious transformations in the way music was being consumed. Traditionally, the most significant portions of recorded music industry's revenues used to accrue from the sale of physical units of music recordings such as records, cassettes, and eventually CDs; however, there was a significant decline in the sales of such physical units for record labels. This decline can be primarily attributed to piracy as well as a growing plethora of alternate and emerging platforms of music consumption including the influx of internet-based platforms.

Moreover, the increasing cost of film music acquisition, creation & production of music and costs of marketing and promotion of sound recording content added to the woes of the record labels. As evidenced in the proceedings of the Copyright Board, the cost of acquiring the music rights of a few popular films was abnormally high; the rights for 'Singh is King'

(2008) were acquired for INR 13.50 Cr, rights for Ghajini (2008) were acquired for INR 8.5 Cr., Further, as per industry experts rights of PK (2014) were acquired for INR 15 Cr., rights of Zindagi Na Milegi Dobara (2011) were acquired for INR 12 Cr. and rights of Ra One (2011) were acquired for INR 15 Cr. The investment in the music acquisitions continues to grow along with the growth of film industry.

Radio industry has been growing consistently in terms of revenue, however in the absence of fair value negotiation with the music companies /Sound Recording Collection organisations, the music industry suffers. With the changing times in order to keep up with the market trends the investments of music industry have increased.

In the cases of many big banner Bollywood productions, these huge costs of acquisition paid by record labels provide the seed fund even, before the film hits the floor, for making. In light of such arrangements, the cost of acquisition of sound recordings for record labels effectively increased without a proportionate rise in the recorded music industry revenues. The radio royalty system determined by the erstwhile Copyright Board exacerbated the financial burden of PPL members to whom the order was and remains applicable till September 30, 2020.

Today, based on industry figures, the percentage share of music as content in radio broadcasting remains as high as 70-80% of the total broadcast in India. Additionally, major radio broadcasters in India owned by media conglomerates have interests in other media businesses as well. This leads to a series of barter deals within the group companies and with external holding companies which has an overall implication on the revenue reporting of radio broadcasters.

Owing to the nature of these deals, there are inherent challenges in identifying and quantifying such deals. However, the existence of these deals is undeniable and their impact on the payouts to the recorded music industry from the radio broadcasters is a dark cloud. The royalty calculation should be based on an elaborate system like that in Germany, to include all revenue generating through the usage of Music. These calculations should also include barter deals and other value additions. In the US as per the new revenue standard ASC 606 and IFRS 15 guidelines for entertainment and media industry, the fair value for barter deals in case of licensing, is usually decided at the time of entering into a contract (PwC, 2017).

The private radio industry has expanded and consolidated over time, as indicated by the financial reports of the radio giants. The operating and employee expenses were reported to be in the ranges of 45%-77% and 16-24%, respectively, of the revenues of the companies analyzed (Exhibit 2). The royalty payouts have remained at a measly 2%-5% (Exhibit 2). The argument that was considered while issuing the copyright board order of 2% royalty to specific broadcasters and music companies was about higher expenditure that radio industry was incurring. The radio industry was fledgling and its revenue potential was not explored too well. Over a period of time, the industry has started booking strong revenue. Looking at this scenario, such royalty rate needs to be relooked at.

Throughout this phase and even now, music continues to be a key input into the private radio industry and its growth story. Despite music's contribution, it remains undervalued due to the structural constraints imposed by the legal intervention sought by the radio industry in contrast to letting the market forces determine a fair value to music.

One of the challenges that the recorded music industry faces is also in determining the accuracy of royalty payments made by such radio stations even with the existing compulsory licensing arrangement between parties to the Copyright Board order as well as the extent of repertoire being used. As discussed in the section 5 of this paper, the compulsory licensing, that too negotiated in the shadow of litigations will not be in favor of the music industry. The fair value should be negotiated in the free market, between the music owner and / or its representatives (copyright societies) and the broadcasters. This will benefit not only the music companies but also the music creators and industry at large.

Under the existing practice, radio broadcasters are required to provide the logs of music tracks being played on the radio station, on the basis of which the royalty payments are verified by the collective management organizations or record labels. However, this system is besieged by fundamental problems to start with. In the Hari Bhakti⁹ Report, it was clearly set out by MBL that log files are time-limited, i.e. they are overwritten by the system after a month and "naturally the log of previous months will be difficult to obtain". This has a bearing on reconciling the logs from time to time. Based on the reports submitted by MBL in this context, data was unverifiable with respect to payments between MBL and PPL owing to

⁹ Hari Bhakti & Co, LLP is a CA firm which was directed by the Hon'ble High Court of Delhi in the matter of Music Broadcast Pvt. Ltd (MBPL) v/s Axis Bank and Ors (2018) to examine the records of MBPL to determine the payments of the broadcaster to PPL.

insufficiency in data reporting. As against this PPL in UK for example, gets transparent data about music air play from radio stations. PPL also invests in technology to further enhance accuracy of such data. They also develop their own system to do so (PPL UK, 2020).

The issues mentioned above lay out the general challenges faced by the recorded music industry and record labels party to the Order in particular.

8. Conclusion and Recommendations

Music industry contributes to revenue generation, employment and GDP of the nation. Record labels are accredited with bringing diverse and engaging music to consumers over the years. Music labels in India also incur A&R expenses in the current music landscape. The recorded music industry has come to assume a multi-dimensional role as investors, partners and collaborators with artists, as well as providers of support to other members of the media and creative industries. The recorded music companies are investor-partners to the film industry in India; the music companies invest considerable resources in acquiring the rights, distributing and promoting the sound recordings created for films by the film producers.

For non-film music, the record labels support artists in many unique ways such as – providing adequate resources, investment and establishing connections with people from the entertainment industry, facilitating global coordination, industry relationships, and general support. The music industry adds value to the private radio industry in India. The private radio industry attracts listeners and advertisers by using sizable chunk of its airtime as music content, made available by music labels.

It is observed that Music Industry has been enabling the Radio industry's growth in India. Looking at the comparative growth of both the industries, it is evident that though Music industry has been the content feeder for majority of radio industry, the value that it gets in form of royalty is low in India, a heavy radio consumption market. Following are the recommendations for royalty in India.

- The royalty negotiations should take place between radio broadcasters and music companies to decide fair value of royalty under free market practices.
- The 2% royalty fixed by the copyright board under the compulsory licensing, is way too low compared to current market practices. Royalty rate should consider the potential of a radio network to earn revenue, the investments made by music

companies and current market practices. A blanket rate for the radio industry's usage of repertoire owned by the record labels according to statutory, regulatory or judicial pronouncements has the effect of subsidizing the radio industry at the cost of the music industry thereby leading to the undue growth of radio industry, at the cost of music industry, considering the average growth rate of radio industry over past eighteen years.

- Considering the past experiences and looking at the trend of royalty rate, the suggested maximum rate of royalty should be 8% of the net revenue of the broadcaster. Such rate should be reviewed every two years for the betterment of the industry. The broadcasters and music companies should be allowed to enter into rate negotiation for healthy growth of the industry.
- Compulsory licensing is not an advisable practice.
- While considering the revenues of a radio station, the value of barter deals and other revenues generating from music must be considered. The music labels need to have the freedom to negotiate and arrive at an appropriate value from the radio industry, for their licensed music.
- The radio stations should be transparent about sharing their airplay logs for better calculation of royalties.
- Royalty rates should not be completely fixed based on international practices; they need to be re-interpreted from Indian market conditions perspective.
- Royalty negotiation should never happen in shadow of litigations, as it has a potential of doing injustice to music labels.

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ANNEXURES

Exhibit 1

Snapshot of Royalties paid by Major Radio Networks in India

Networks	Revenue (in Cr.)	License Fees (in Cr.)	%	Royalty (After deducting 4% License Fees)
Red FM	161.8	17.73	10.96	6.96*
Kal Radio	121.19	13.47	11.11	7.11*
Radio Mirchi	635.41	22.21	3.50	3.50
Radio City	324.7	21.4	6.59	2.59*
HT	194.04	21.32	10.99	6.99*
My FM	154.57	7.64	4.94	4.94
BIG FM	314.56	6.35	2.02	2.02

(Source: Annual Reports 2018-19)

* There was no mention of music royalty, thus the license fees is assumed to be music royalty + government license fees of 4% of gross revenue. The % shown above is after the deducted 4% from the license fees received.

Exhibit 2

An analysis of ENIL's operating expenses, employee expenses and royalty.

Entertainment Network (India) Limited	2019	2018	2017	2016	2015	2014
Revenue	6,35,41,40,000	5,45,90,52,000	5,76,11,13,000	5,33,71,76,003	4,70,65,48,014	4,07,16,57,231
Royalty	22,21,20,000	19,43,32,000	19,49,67,000	14,00,45,000	12,36,39,003	11,50,17,155
Operating Expenses	3,54,49,06,000	3,01,93,92,000	3,25,24,95,000	2,56,29,88,000	2,10,38,25,800	1,84,60,10,996
Employee Costs	1,26,18,04,000	1,18,53,98,000	1,05,37,52,000	93,83,80,000	82,75,56,920	75,22,45,195
Employee Costs / Rev	20%	22%	18%	18%	18%	18%
Operating Expenses / Rev	56%	55%	56%	48%	45%	45%
Royalty / Rev	3%	3%	3%	3%	3%	3%

(Source: Annual Reports of ENIL)

Exhibit 3

An analysis of MBL's operating expenses, employee expenses and royalty.

Music Broadcast Limited	2019	2018	2017	2016	2015
Revenue	3,39,80,42,000	3,17,63,12,000	2,75,85,26,000	2,40,04,53,000	2,07,50,40,000
Royalty	14,09,88,000	13,95,72,000	11,76,98,000	5,84,45,000	5,01,40,000
Operating Expenses	2,44,27,76,000	2,42,40,67,000	2,18,85,42,000	1,84,10,35,000	1,60,58,09,000
Employee Costs	68,94,63,000	68,89,26,000	65,07,14,000	51,12,34,000	43,15,29,000
Employee Costs / Rev	20%	22%	24%	21%	21%
Operating Expenses / Rev	72%	76%	79%	77%	77%
Royalty / Rev	4%	4%	4%	2%	2%

(Source: Annual Reports of Music Broadcast Limited)

Exhibit 4: Operative Part of the Second Order of the Copyright Board

In exercise of powers conferred under section 31(1)(b) of the Copyright Act, 1957, the Copyright Board directed¹⁰ the Registrar of Copyrights to grant to the *complainants* separate licenses for communicating the work recorded in sound recordings in the repertoire, present and future, of the *respondent* to the public by broadcast on revenue sharing basis subject to the following terms and conditions:-

- a. *2% of net advertisement earnings of each FM radio station accruing from the radio business only for that radio station shall be set apart by each complainant for pro rata distribution of compensation to all music providers including the respondent herein in proportion to the music provided by the respective music providers and broadcast by the complainant. Complainant shall be deemed to be a music provider for the music provided by it or received by it free of cost and broadcast. For arriving at "net advertisement earnings", all Government and municipal taxes paid, if any, and commission paid towards the procurement of such advertisements to the extent of 15% of such advertisement earnings shall be excluded;*
- b. *Complainants shall furnish within a week of grant of license by the Registrar of Copyrights a bank guarantee for Rs. 10,000 in favour of the respondent for each radio station. However, the sum of such bank guarantee shall be revised within two weeks after the close of every quarter of the year to such sum for which the complainant was liable for payment of compensation for that quarter. Quarter of a year means a period of three months ending on the last day of March, June, September and December of the relevant year;*
- c. *If the complainant fails to revise the bank guarantee in terms of clause (b), respondent shall be at liberty to cancel the license without giving any notice and recover the remaining dues from the available bank guarantee;*
- d. *Payment of compensation by the complainant to the respondent for a month shall be made by 7th day of the month following the month to which payment relates. Complainant shall also furnish alongwith the payment the date wise details of the periods for which the music relating to the respondent and all other music providers*

¹⁰<http://iprmentlaw.com/wp-content/uploads/2018/02/Copyrightboardorder.pdf>

has been used for the month. However, payment for the period beginning with the grant of license and ending on 30th September, 2010 shall be made in lump sum by 7th October, 2010;

- e. For any delayed payment for a month beyond 7th of the following month, interest at the rate of 1% per month or a part of month shall be payable;*
- f. In case payment is not made by the complainant for a radio station for consecutive two months, respondent herein shall be entitled to cancel the license by giving notice of one month and recover the remaining dues from the bank guarantee;*
- g. A complainant may for one or more radio stations, by giving notice of one month and after making payment of all sums due, cancel the license;*
- h. The validity of the license granted by the Registrar of Copyright shall come to end on 30th September, 2020.*