BEFORE COPYRIGHT BOARD

Bench : **Dr. Raghbir Singh – Chairman**
Sh. Satish Chandra - Member
Sh. Rajendra Kumar Mishra – Member

Case No. 1 of 2002

M/s Music Broadcast Pvt. Ltd.
Park Plaza, 6th Floor, 71,
Park Street, Calcutta-700 016.
V/s

….. Applicant

M/s Phonographic Performance Ltd.,
1/3 Bangur Avenue, Block D, 3rd Floor,
Kolkata – 700 055 (WB).

… Respondent

Case No. 2 of 2002

M/s Entertainment Network (India) Ltd.,
Registered office at
4th Floor,A-Wing,Matulya Centre,
Senapati Bapat Marg,
Lowerparel(W),Mumbai-400013.

…..Applicant

V/s

M/s Phonographic Performance Ltd.
Registered Office at.
Crecent Towers,
New Link Road,Andheri(W),
Mumbai-400053

….. Respondent

Case No. 6 of 2002

M/s Radio Mid Day West (India) Ltd.,
156-D, J Dadajee Road, Tardeo,
Mumbai – 400 034.

….. Applicant

Vs

M/s Phonographic Performance Ltd.
Flameproof Equipment Building,
2nd Floor, B-39, Opp. New Link Road,
Andheri (West) Mumbai – 400 053.

… Respondent

Cases Nos. 3-1/2008-CRB(NZ), 3-2/2008-CRB(NZ) & 3-3-/2008-CRB(NZ)

Puran Multimedia Pvt.Ltd.Regd.Office at
2,Sarvodaya Nagar,Kanpur-208005 and
corporate Office at 3rd floor,
8,Balaji Estate,Guru Ravidas Marg,
Kalkaji,New Delhi-1110019.

…Applicant.

V/s

Phonographic Performance Limited,
Crescent Towers,New Link Road,
Andheri)West),Mumbai-400053.
And also at Branch Office:-
G-11,Ground floor.Nizamuddin West,
New Delhi-110013..

… Respondent

Case No. 3-5/2008-CRB(WZ)

Synergy Music Entertainment Ltd.,
D-143,Sector-63,
NOIDA(UP-201301) .

..Applicant.

V/s

M/s Phonographic Performance Ltd.
Registered Office at.
Crecent Towers,
New Link Road,Andheri(W), Mumbai-400053.

…. Respondent

Case No. 3-4/2008-CRB(NZ)

M/s Entertainment Network (India) Ltd.,
Registered office at
4th Floor,A-Wing,Matulya Centre,
Senapati Bapat Marg,
Lowerparel(W),Mumbai-400013.

…… Applicant

Vs

M/s Phonographic Performance Ltd.
Registered Office at.
Crecent Towers,
New Link Road,Andheri(W),
Mumbai-400053

……. Respondent

Case No. 3-6/2008-CRB(NZ)

Rajasthan Patrika Pvt. Ltd.,
Kesargaarh,J.L.N. Marg,
Jaipur(Rajasthan)

…….Applicant

V/s

M/s Phonographic Performance Ltd.
Registered Office at.
Crecent Towers,
New Link Road,Andheri(W),
Mumbai-400053

……. Respondent

<u>Present:</u>

Shri Pravin Anand, Rajiv Nayyar, Krishnendu Dutta, Smt. Pratibha M. Singh, Neil Hildreth & Shri Abhishek Malhotra Counsel for the Applicants.
Shri Ashwini Mata, Sr. Advocate, Shri Himanshu Bagai & Shri Thomas George, Counsel for the Respondent

ORDER

These are nine applications under section 31(1)(b) of the Copyright Act, 1957 for grant of licence for broadcast of sound recordings. Matters at serial numbers 1 to 3 were remitted back to the Copyright Board by the Hon'ble Supreme Court vide its decision dated 16th May, 2008 in Entertainment Network (India) Ltd. vs Super Cassette Industries Ltd and others (2008)13SCC30. These cases were earlier decided by the Board on 19.11.2002 consequent upon applications of the petitioners herein in cases numbered as 1 of 2002, 2 of 2002 and 6 of 2002 and have been reported as Music Broadcast Pvt Ltd. vs Phonographic Performance Limited 2003(26)PTC70(CB). Decision of the Copyright Board was challenged in the Bombay High Court [Phonographic Performance Limited vs Music Broadcast Pvt Ltd.2004(29)PTC282(Bom)]and ultimately in the Supreme Court. Hon'ble Supreme Court in its judgment dated 16th May, 2008 did not approve the manner in which the Board had dealt with the matter. It observed that the Board refused to examine the witnesses and took up the matter on a day for hearing which was fixed for production of witnesses. Supreme Court set aside the order of the Board and remitted matter to the Board for consideration afresh. Rest six cases bearing numbers 3-1/2008, 3-2/2008, 3-3/2008, 3-4/2008, 3-5/2008 and 3-6/2008 are fresh filings during 2008.

2. Copyright Board in its sitting held on 29th July, 2008 directed the parties on both sides to file the paper books alongwith the list of the witnesses of the respective parties. It was followed up with follow up action for updation in this regard during the various sittings of the Board. In its sitting held on 26th May, 2009, the Board set a deadline upto 30th June, 2009 for filing of further documents and furnishing list of witnesses to be examined. Hon'ble Delhi High Court in its order dated 4th August, 2009 directed that the evidence-affidavits of parties which have already been filed or served upon opposing counsel by 28.7.2009 shall be taken on record. Accordingly, examination of witnesses began with its sitting on 28th July, 2009 and was followed up through subsequent sittings ending up on 12th July, 2010.

3. In all thirteen witnesses of the applicants were examined. In 1 of 2002, four witnesses including one expert witness, Shri Bibek Debroy, were examined. In 2 of 2002, two witnesses were examined. In 6 of 2002, two witnesses were examined. In 3-1,

3-2 and 3-3 of 2008, four witnesses were examined. In 3-4 of 2008, one witness was examined.

4. In all five witnesses of the common respondent in all cases which included one expert witness were examined.

5. Shri Ashish Shah, PW1, testifying in 1 of 2002 submitted that till 31st March, 2005 operating expenses which include programming cost, royalty cost and licence fee paid to Government of India were higher than staff cost. However, subsequent to 31st March, 2005, since the licence fee was to be paid on revenue sharing basis, the operating cost has come down as compared to staff cost. He acknowledged the declining trend of physical format of music sales and did not offer any reason therefor.

6. Shri Ayan Chakrborty, PW2, testifying in 1 of 2002 submitted that the expenses towards employees, administration, selling, distribution are on higher side because of ever increasing number of stations since 2006. But as a percentage of net revenue, they fall substantially lower than expenses incurred by the company towards music royalty payable to the respondent and other copyright owners.

7. Ms Apurva Purhoit, PW3, testifying in 1 of 2002 explained as to the term 'closure of the allocated frequencies' to mean as to the prospective individual players who took frequencies by paying to the Government One Time Entry Fee (OTEF) and having set up the studio facilities, looking at the operating costs of running the stations, did not put stations on air. Witness stated that due to the expansion of radio stations under Phase II from approximately 20 to 300 stations the coverage expanded and revenue grew by an average of 20% till the beginning of 2008. However, in the second half of 2008 the revenue growth has gone down to approximately 5% and is expected to be negative this year.

8. Prof Bibek Debroy, PW4, testifying in 1 of 2002 as expert witness, submitted that in determining royalty rates one can either have an absolute figure or a percentage of revenue figure. He submitted that he would recommend revenue sharing method over the absolute figure method for the following reasons:-

(a) absolute figure method is completely arbitrary;
(b) absolute figure method is fixed for the duration of the contract and does not have the flexibility to adjust during economic periods of either upturn or downturn;

(c) absolute figure method does not adjust for inflation;
(d) absolute figure method cannot handle possibilities of substitution of music from other channels to FM;
(e) absolute figure method is normally not used globally;
(f) revenue sharing method does take into of complainant's problems of being an infant industry;
(g) revenue sharing method takes care of the problems mentioned by both the sides.

He submitted that the global range of revenue sharing is 0.4. to 5% with the upper end of the range for developed markets. Infant industry argument could be addressed with a rate that is towards the lower end of the range. FM advertising rates have been declining and that preceded the present economic downturn. This decline is primarily because of competition. Complainant has proposed a rate of 0.25%. In the range of 0.4% to 5%, 0.4% figure was for Australia. So given the differences in level of development, 0.25% is reasonable for India. Each and every copyright owner who has granted a licence to the complainant would demand a percentage share of advertising revenue from the complainant.

9. Shri Prashant Panday, PW5, testifying in 2 of 2002, submitted that the profits registered since 2005-06 by complainant, ENIL, are to a large degree because of the change in Government licensing policy. To a suggestion as to whether the FM radio industry is still in the infancy stage, witness replying in yes said that the listenership and advertising revenue are too small. When songs start to be played on radio, they are not hit and they become hits when radio exposes them to the different audiences. In matter of average time spent listening to radio in the US as compared to India, the witness submitted that penetration of radio as mentioned in Prof James Dertouzos report is about 82% in US of all people 12 years and older. In comparison, in India the penetration of radio is barely 10 to 15% across the country. There is lot of circumstantial evidence which indicates that radio promotes music. Telecom companies are ever eager to sponsor what is known in the radio industry as "song tags" because the promotion of the music on radio increases the downloads of the song by the mobile subscribers.

10. Shri Dalpat Raj Jain, PW6, testifying in 2 of 2002 submitted that he was not deposing in favour of a music royalty based on advertising revenue share.

11. Ms Aarti Kathariya, PW7, testifying in 6 of 2002, submitted that, as per the terms of the licence granted by Ministry of Information and Broadcasting, the complainant is allowed to broadcast only music programmes on its radio stations and there is a significant bollywood content in the radio broadcast time of the complainant. Complainant does broadcast non-bollywood content on its radio station. There are other content providers, besides PPL, to the complainant, namely, T-Series and Yashraj. Complainant has formal agreements with the content providers and it pays royalty to them in accordance with the Copyright Board order of 2002. Instant complaint is in continuation of complaint filed in 2002 and no complaints have been filed against the other music providers. In answer to the question as to the reason for complainant bidding under Phase II FM policy inspite of it suffering losses till the financial year ending on 31.3.2005, witness answered that the shift in payment of licence fee from lump sum to revenue share mode prompted the complainant to participate in the bid under Phase II. Latter is in the interest of the radio operators and is better in contrast to the lump sum fee payment method under Phase I. Radio advertisements happen to be major component of the revenue earnings of the complainant. Penetration of radio players has been post 2006 after the Government announced Phase II policy. All new radio stations playing music owned by copyright owners are bound under law to pay the necessary royalties to the eligible copyright owners. With more number of radio broadcasters, the individual share in the limited advertising revenue per location is bound to decrease, notwithstanding the fact that they all have to still pay the same amount of royalties to the respondent. Increase in royalties with the decreasing revenues is affecting the complainant and is hence not conductive to the growth of new entrants. As per the terms of the licence, the radio operators can broadcast very limited sponsorship programmes. To the suggestion that if payment of royalty was pegged at 2.5% of net revenues would, according to her, the complainant would no longer incur losses, witness answered that the royalty paid by complainant has huge financial implications and felt that it should be in the range 1 to 2.5% of the net revenues. Licence granted by the Government of India specifically lays down strict rules on the kind of programming to be undertaken restricting the complainant from exploring other revenue streams for supplementing income. Complaint filed is not only because the complainant is suffering huge losses

because of exorbitant royalty rates but also because it is arbitrary and also not in line with the internationally accepted standards.

12. Shri Naresh Malaviya, PW8, testifying in 6 of 2002, submitted that the operating losses are total of many components of which royalty is a major part. The royalty payments are made to copyright owners as per order of the Copyright Board. Reduction of royalty rates will help in reducing losses. All the cost components which are controllable can be reduced from the end of FM radio operator. Royalty which is a fixed cannot be controlled by it. Considering the losses of radio company, the percentage rates of royalty are too high which is also beyond the control of the complainant. Music layout is essential of complainant's business and important part of cost element and hence the requisition for 1 to 2.5 percent has been made. Considering the radio industry, Government has moved licence fee from fixed to sharing basis in Second phase. FM industry players are also in discussion with the Ministry to reduce the same. Witness submitted that he does not accept that the claim for compulsory licencing is mere a device to cover up for their operational inefficiency and to subsidize expenditure on other heads that they claim to have spent. Reduction of loss is a continuous exercise. Witness that were taking care of for the other costs. Royalty is something beyond their control which is the next thing to be considered. This will help make the radio business profitable and benefit to both the parties.

13. Shri Rajinder Batra, PW9, testifying in 3-1, 3-2 and 3-3 of 2008, submitted that it was correct that the brand value of the company had increased in the last one or two years. But that was still not in profits. There was no provision for payment of royalty to IPRS in the balance sheet. Similarly, there was no provision for payment of royalty to PPL. Company had already reduced running costs of diesel, petrol, electricity, travel, telephone expenses etc. But that had not improved the profitability. Royalty rates are very high compared to the size of stations. Source of advertisement revenue is limited.

14. Shri Poovanalingam, PW10, testifying in 3-1, 3-2 and 3-3 of 2008, submitted that he was aware of the time slot voluntary licensing entered into by AIR which preceded the FM Phase I regime. He submitted that AM penetration in India is about 90% and FM penetration is about 30%.

15. Shri Kanwar Sameer, PW11, testifying in 3-1, 3-2 and 3-3 of 2008, submitted that it is true that the complainant herein has not filed any compulsory licencing case against any other content provider other than PPL. Percentage content of PPL music in relation to the average daily broadcast for the period ending 31st March of 2008, 2009 and the current year had been approximately 25 to 30%. Royalties being paid by the complainant herein to T-Series, Yash Raj and Nupur are excessive. Two voluntary licence agreements had to be signed under severe business compulsions. However, the said agreements never came into force. He submitted that he was aware of the royalties prevalent in the radio for B, C and D categories of cities and submitted that those are subject to change as per the decision of the Copyright Board. He submitted that the complainant was making payment to T-Series in accordance with the order dated 19th November, 2002 of the Copyright Board. But the voluntary agreement so made has a clause that the rates would be revised according to the decision of the Copyright Board. It is fair and reasonable to pay uniformly to all content providers in relation to a particular station. Music is the backbone for any radio station but that is not the only factor.

16. Shri Rahul Gupta, PW12, testifying in 3-1, 3-2 and 3-3 of 2008, submitted that they are in operating losses for the years ending 31.3.2007, 31.3.2008 and 31.3.2009 and the biggest contributor thereof was incorrect assessment of music royalty. Percentage of royalty paid to T-series would be about 70%. All agreements have a clause of revision of rates dependent upon the outcome of the decision of the Copyright Board. Payment of royalty forms approximately 25 to 30% of operational expenditure. The same needle hour rate should be applicable to all companies or percentage of revenue be divided upon usage. Puran has deposited bank guarantee with PPL and has even submitted cheques to PPL which PPL has not encashed. Puran pays T-series and Yashraj at the rate of Rs 440 and Rs 661 respectively which is subject to revision retrospectively in terms of the forthcoming decision of the Copyright Board. These agreements are without any bank guarantee.

17. Shri Sudeep Jain, PW13, testifying in 3-4 of 2008, submitted that they had not paid any amount towards the advertisement expenses to their holding companies because they were not in a position to pay the same. They had been taking loan from their

holding company to meet their regular expenses as well as to re-pay their secured loan amount. They were paying to Yashraj and T-series at different slabs for different cities.

18. Shri S. Suresh, RW1, testifying in 1 of 2002, 2 of 2002, 3-5 of 2008, 6 of 2002, 3-1 of 2008, 3-2 of 2008 and 3-3 of 2008 submitted that because of its limited budget, Indian Music Industry (IMI) restricts its raids to 6 to 8 cities. Piracy has been detected in many other towns beyond these 6 to 8 cities. Till recently most of these raids related to physical media like CDs, cassettes and MP3 CDs. There are many on going civil actions. In India physical anti-piracy has been estimated at fifty per cent till 2005 and after it has marginally increased to fifty five per cent. During raids IMI/police seize, CD burner equipment, computers, laptops, etc. also have been seized. Piracy levels in developed countries like Canada and Birmingham part of UK as per information got by the witness from a newspaper is higher than India. Physical sales of members of PPL is year by year declining. PPL's royalty income for 2008-09 is 16 crores from broadcasting, 22 crores from public performance and 99 crores from mobile and digital. In broadcasting, the income from radio is more than from television. In the new agreement with AIR effective from 15th September, 2008, rates are Rs. 525 per needle hour for FM non-metro and Rs. 600 for FM metro. PPL has hardly received the usage reports after 15.9.2008 from AIR and accordingly he submitted that he could not say at that point of time how much of the revenue pertaining after 15.9.2008 was due from AIR. According to newspapers reports, AIR advertising revenue is approximately 40% of the total radio advertising revenue which includes revenue from FM, Vividh Bharti and primary channels. There is nothing unusual in the industry about what they call as "paid promo" or "paid advertisement" where copyright holder, instead of charging, pays for broadcasting of music. There had been fall of radio advertising in 2008 to the extent of 14% as compared to previous year. Radio advertisement spent in India is less than half as compared to 8-10 globally. There are 11400 FM stations in USA as compared to approximately 270 in India. It is correct that television garners more advertisement than radio. It is partially correct that most TV entertainment channels are subscription based as opposed to radio FM which is free to air. TV entertainment channels have income from advertisement and subscriptions both. It is correct that TRAI has recommended for a revenue sharing mode instead of a lump sum basis as fee charged by the Government

from radio FM stations. It is correct that in Australia with an industry of 30 years old the royalty charged for music utilization from FM radio stations is to the tune of 0.4%. Rates in Australia have been provided statutorily with an upper limit of 0.9%. Adoption of foreign models in the Indian conditions is meaningless and baseless. Witness agreed that there is loss of revenue due to piracy. He did not agree that radio is the most important medium for promoting and popularizing music. He disagreed that the revenue sharing model is the most fair and equitable and reasonable mode. Gross royalty earnings of PPL are 137 crores for 2008-09, 114 crores for 2007-08 and 61 crores for 2006-07 out of which Rs. 120 crores, Rs 100 crores and Rs. 56 crores for the respective years have been dispersed to the music companies. PPL, when it fixes tariff, consults content seekers like radio industry, television, restaurant, hotels, mobile phone companies except for amusement parks. The current published tariff for private FM radio is Rs. 2400 per needle hour or 20% of net advertisement revenue related to music, whichever is higher. Witness, when called to recall as to which radio channel was consulted before publishing this tariff, could not provide any name. Music is released on radio before the film is released. Thus it increases the popularity of the singers and other artists. Witness agreed that the present cost of music royalty paid by ENIL is higher than the royalty payable in Australia. Witness agreed in principle that the royalty rates for non-metro cities have to be different from metro cities. Single largest royalty income of PPL is from caller ring back tones (CRBT). In recent times the revenues from digital including mobile sales have increased considerably. With the growth of technology, music companies have many more sources of income than merely physical sales like CDs or cassettes. Alternative sources of music alongwith piracy have led to decrease in physical sales. 50% upto 2005 and 55% thereafter of music sale is pirated. Witness considered the present published tariff of PPL as reasonable for private FM radio broadcasting and said that none of the companies is paying as per that tariff. Revenue earnings from mobile and internet for 2005-06 was Rs. 14 crores, for 2006-07 was 34 crores, for 2007-08 was 69 crores and for 2008-09 was 99 crores. There are about 40-44 categories of public performances from which PPL earns revenues. Witness did not agree to the suggestion that the reason for loss of the complainants is because of exorbitant licence fee charged by PPL. PPL is non-profit organization. Revenue earnings of the private FM

broadcasters vary despite having access to the same content of PPL music. Witness partly agreed with the suggestion that the revenue earning capacity of the private FM broadcaster depends on various factors such as the city in which it is located and the advertising revenue generating capacity of such city. Having agreed to the suggestion that the USA and Canada represent examples of evolved private FM industry, the witness mentioned that he was not aware that in Canada the royalty collecting society NRCC charges a royalty rate of 1.44% of the first 1.25 million Canadian dollars earned by a private FM broadcaster and 2.5% of any further revenue earned by a private FM broadcaster. He agreed that in Russia the royalty charged by the collecting society from private FM broadcaster is roughly 1% of the revenue earned by such broadcaster. Witness submitted that Puran suffered losses in 2007-08 and 2008-09 which were not nominal and further submitted that if Puran was asked to pay royalty at PPL's published tariff rates they would suffer more losses. However, he submitted that he was not aware that if Puran was asked to pay royalty at rates under First Licencing Case it would still suffer loss. He submitted that FICCI has suggested to the Ministry of Information and Broadcasting that royalty should be in line with international norms which is in the range 3-5 per cent of the annual revenue of a station. He agreed that FICCI has suggested a single collection agency for music rights fee or development of a mechanism where one rate is applicable to all agencies of royalty collection bodies. He submitted that he is aware that in the FICCI report it has been mentioned that though private FM has impacted physical sales of music cassettes and CDs, on an overall basis, the number of units sold has not changed and that number of units sold increased marginally in 2007 from 175 million in 2006 to estimated 176 million. About 25-35 private FM radio broadcasters in India have collectively 230-240 radio stations. Only ENIL has made profits in the last two financial years. It is correct that advertising revenue is currently the only source of revenue of a private FM broadcaster. There may be other sources such as award ceremonies, move promotions etc. These may collectively constitute 5-10% of the revenues. Royalty tariff determined as a percentage of the net advertising revenue of private FM broadcaster will be predominantly correct subject to a minimum or a floor level tariff based on needle hours.

19. Shri Sanujeet Bhujabal, RW2, testifying in 1 of 2002, 2 of 2002, 3-5 of 2008, 6 of 2002, 3-1 of 2008, 3-2 of 2008 and 3-3 of 2008 submitted that the cost of music rights of Dostana was between 15-20% of the total cost of production which is Rs. 50 crores. It indicates the kind of money that has to be paid for the music rights. Music companies do send letters to radio FM and other media platforms to promote the films. Piracy is a relevant factor in reducing potential revenues of the music companies. But that is not the only factor. Internet does not affect music revenues in a big way because internet connectivity in our country is still very low. Witness submitted that the sale figures of Vande Mataram album are confidential. Different modes of exploitation of music album Vande Mataram are physical format, publishing, licensing, public performance, digital, etc. Witness submitted that he had shared revenue figures of physical format and he submitted that the figures in relation to other format were not known to him. He submitted that he has some knowledge of exploitation. He submitted that the figures for Dostana and Kidnap exploitation in some are known to him and submitted that those are confidential in nature and thus could not be shared in the open court. He submitted that all figures relating to exploitation of Soni Music were confidential in nature. He agreed to the suggestion that the deposition in his affidavit could not be understood until the revenue figures for exploitation of the music was not revealed. Suggestion that radio contributes to an extent in popularizing and creating awareness for a film is partly correct. Radio is the cheapest form of entertainment in India. Internet piracy in India is predominantly very low. There could be some proportion of Ipod owners who could do illegally downloading the songs from the internet. With a view to evaluate a song before purchasing its audio rights, purchaser evaluates the strength of star cast, the director, the scale of the project, music, the picturisation of the songs in the film etc. Commercial viability of the song is dependent upon these factors and upon the box office success of the film. He did not agree to the suggestion that the FM radio has promoted music across the country. It promotes a movie and only plays a few new film hit songs and hardly any other repertoire like Ghazal, classical and devotional music. Witness stated that he could not disclose the information relating to the price of acquisition of the sound track rights of the movie Ravanan in Tamil and Telugu. He agreed that in an interview to Economic Times in early months of 2010, he had stated that the sale of music in physical

format is being rapidly replaced by sale through digital formats. It does not mean that loss on physical sales has been completely compensated by revenue gains through digital formats. Mobile related sales predominate amongst the digital sales.

20. Shri Ramesh Arora, RW3, testifying in 1 of 2002, 2 of 2002, 3-5 of 2008, 6 of 2002, 3-1 of 2008, 3-2 of 2008, 3-3 of 2008, 3-4 of 2008 and 3-6 of 2008 submitted that he carries on whole sale and retail business of CDs and DVDs but not of cassettes. He mentioned about certain music dealers of New Delhi who have shut their business. He stated that he was unable to say whether one can download thousands of songs from the internet in a few minutes. He said that he knew that Palika Bazar was known for pirated music. He said that he knew in MP3 CDs there were very few genuine CDs than pirated. He said that in his opinion 80% reduction in sale was due to FM radios and whereas there was 20% reduction attributable to other factors – other factors being counterfeit and piracy. He stated that he meant reduction in sale as reduction in sale in physical format. He knew that music companies had different streams of revenue apart from physical format – ring tone being one. He stated that they in the music sale receive the music CDs etc. 2-5 weeks in advance of the film release. He stated that his knowledge is limited to North India. Similarly he does not have knowledge about other regional language FM radio channels. He agreed that there are other factors like internet, mobile phone, piracy, gadgets like Ipod etc. which have affected music sales. But it is more because of introduction of radio FM. Usually there is one raid in a year in Palika Bazar to detect piracy of VCDs and DVDs. By the year 2002, there were about 25 to 30 shops doing retail business in genuine music CDs in Palika Bazar. As of today this figure of shops selling genuine merchandise has reduced to 4 to 6 shops. In the year 2002, the shops which were selling pirated CDs etc. were about 10. As of today, only pirated DVDs and VCDs are being sold due to major MRP. Witness mentioned he could not venture a guess of the number of shops selling pirated DVDs and VCDs because they are underground but put a guess of between 4 to 6. It is correct that after launch of the music and songs the same is first played on the private FM radios. Witness submitted that they receive the music within a few hours of the launch of it.

21. Shri Girish Jain, RW4, testifying for 1 of 2002, 2 of 2002, 3-5 of 2008, 6 of 2002, 3-1 of 2008, 3-2 of 2008, 3-3 of 2008, 3-4 of 2008 and 3-6 of 2008 submitted that he is

aware that a person can down load hundreds of songs from the internet free of cost illegally and in a short time and sell the same. Music or Ipods held by overseas is mostly legal but while in India it is mostly illegal. Witness was not aware about FICCI KPMG reports regarding music. PPL has paid his company a royalty of about Rs. 16 crores plus. Witness stated that his company earned Rs. 16 crores from PPL in 2009-10. Physical format sales are in the range of Rs. 7.50 to 10 crores. It is correct that a person buying a CD would do so only after listening to the songs from radio and TV. A person who does not see a video of a song does not buy its CD or cassettes. He submitted that his company is also involved in the sale of music through digital forms like mobile downloads, internet streaming etc. Sales through digital form have increased from Rs. 60-65 lakhs in 2005-06 to 10 crores in 2008-09.

22. Prof S.K. Laroiya, RW5, testifying for 1 of 2002, 2 of 2002, submitted that his final conclusion based upon his study conducted over a period of eight days immediately before making submissions before the Board are (1) FM has significant negative impact on the music sales in rupees crores; (ii) FM also has a significant negative impact on music sales in physical format in million units; (iii) internet penetration also has significant negative impact on the music sales expressed in rupees crores and physical format in million units; (iv) the per capita GNP has a positive significant impact on music sales in rupees crores as well as sales in physical format in million units. He submitted that his study does take into account the economic performance of the radio industry, factor responsible for the performance of the radio industry and piracy as a factor as regards the music industry. He submitted that he did study into factor of the use of music in mobile phones but did not incorporate the same in his study. He submitted that he has read the KPMG report and the same is more of a description rather than any analysis of media and entertainment industry including radio. To a question relating to the reason for USA not recognizing copyright for sound recordings in radio, witness replied that he is not an expert on the issue. Similarly, on a question as to the concept of 'payola', reply was that he is not trained in higher techniques of data analysis. In answer to the question as to his observations about the data disclosed in IMI letter dated 18th March, 2009 appearing as a document in his compilation showing that rate of losses from 2001 to 2005 were higher when there were only 4 cities and 21 FM radio stations than

2006 to 2008 when the cities went upto 91 cities and 284 stations, stock reply was that data is self explanatory and any trend or rate can be calculated as per the data. He submitted that he is not aware that PPL's revenues from digital sources are currently 99 crores and are increasing dramatically. Witness submitted that he is not aware that free to air radio does not pay any royalties for broadcast of sound recordings in USA. He submitted that he is not aware about the royalty rates in UK, Australia and Denmark or any other country. He knows about the royalty rates in India. He submitted that royalty rates should be determined only by market forces and not by a regulatory authority like the Copyright Board.

23. Parties on both the sides were given liberty, besides orally arguing their case, to file written arguments. Accordingly, oral arguments have been made and written arguments filed by all of them.

24. Learned counsel for Music Broadcast Pvt Ltd. (MBPL) in 1 of 2002, explaining the *raison d' etre* for the filing the present application under section 31(1)(b) of the Copyright Act, 1957 seeking compulsory licence submitted that the music is an essential ingredient for the survival of the radio industry as the industry is restricted to broadcast than any other kind of content. If copyright societies like PPL, respondent herein, demand unreasonable and exorbitant royalties for playing the same, it becomes unviable to run a radio station. All private FM radio channels are established pursuant to the terms of Grant of Permission Agreement (GOPA) entered into between the Ministry of Information and Broadcasting and the respective entities wishing to establish, maintain and operate FM radio broadcasting channels. There are various restrictions imposed under GOPA which include that a radio channel cannot broadcast news and current events and has to offer to serve "free to air". It cannot charge any subscription from the public at large. These facts are part of submissions of PW2 and PW3 appearing for MBPL and have not been challenged by the respondent, PPL. Thus music is an essential facility for the complainant to operate its radio station and PPL has the exclusive rights over its repertoire. Thus this being an essential facility, access thereto at reasonable and non-discriminatory terms should be provided by the respondent. Learned counsel relied upon the concept of "essential facilities" as developing at the hands of EC competition

law and referred to the following in the Competition Law, Richard Whish, Butterworths, Fourth edition:-

> "….control of the infrastructure give rise to what is often referred to as a 'bottleneck' problem : that competition is impossible where one firm, or a combination of firms, can prevent others from operating on the market by denying access to a facility which is essential and cannot be duplicated.".

24.1 He submitted that the economic life of songs exceeds their legal life of sixty years provided under section 27 of the Copyright Act, 1957. Thus the music companies and the respondent exploit their repertoire for a very long period exceeding the legal life of the copyright which subsists in them.

24.2 Learned counsel submitted that unlike other subscription based services such as television and download of music on mobile phones, music on the radio can be heard free of any charge. Furthermore, radio stations also promote culture by broadcasting regional content. GOPA has prescribed that every radio channel shall broadcast public interest announcements as may be required by the Central Government for a maximum of one hour per day and suitable and proportional time slots interspersed during the day shall be earmarked for this purpose. Very purpose behind the 'free to air' radio is public interest. Unreasonable royalty charged by PPL for its repertoire is against the interest of public at large.

24.3 Learned counsel submitted that the radio industry particularly MBPL is not doing well. As per FICCI-KPMG Media and Entertainment Industry Report submitted by the respondent, both inter-market as well as intra-market competition in the radio industry has restricted the gains, if any, received by radio channels in India. As per the said report, there is adverse impact on radio-revenues due to a possibly prolonged slowdown in the economy and the 'radio advertising spent' in India is half of 8-10% spent globally. Primarily because of the exorbitant music royalties charged by the music content owners including the respondent, as many as fifty radio stations in Phase II radio licensing have closed operations due to heavy losses. Primary witness of PPL, Mr V Suresh, RW1 has admitted in his cross examination that if Radio Mirchi, the only profit earning radio company at present, was to pay the tariff as prescribed by PPL, then, it would also go into loss.

24.4 Decline in the sale of physical formats (CDs, cassettes, etc.) is for other reasons and cannot be attributed to the radio industry. Gradual shift from physical formats to digitization in the music industry is responsible for the drop in sales of physical formats. Increasing use of MP3 formats by music companies as well as music pirates has led to actual de-growth of formats such as audio cassettes as evidenced from the FICCI-KPMG Media and Entertainment Industry Report relied upon by the respondent. Peer to peer sharing of music by use of websites and increasing use of portable storage devices for side-loading has also affected the music industry adversely as evidenced from the FICCI report. Ever increasing piracy in the music industry as evidenced through the submissions made by the witnesses of the respondent contributes to losses of the music industry. Inspite of all these, music industry has been projected to grow by 8% in 2013 in the FICCI report. Argument of the respondent that losses to the music industry are attributable to the radio holds no merit and is completely baseless.

24.5 Liebowitz reports relied upon by the respondent are not conclusive to support the respondent's case that radio has an adverse impact on music sales. Those relate to studies conducted in USA and UK and their findings are not applicable in India since data used in the studies, such as 'radio-listenership hours', 'demographic data', will differ greatly for India. Further, USA does not have copyright protection for sound recordings. Respondent's expert witness disagreed with the Liebowitz report which is recorded in his testimony. To the contrary, there is substantial evidence to establish that radio, in fact, has a positive effect on the music industry. Evidence shows that airplay is of value to individual companies to maximize sales and market share [AIRC & Anr v PPL & Anr (1994) RPC143]. FICCI report noticed that the increasing revenue from the mobile and online sales as well as radio royalties is now showing potential to offset the declining physical unit sales and push the industry towards higher growth rates. It has been stated by Profesor Fine, M that it is a universal truth in the music industry that radio airplay of music has a powerful promotional effect on the sale of sound recording. Respondent's own witnesses, Shri S. Suresh RW1 and Shri Girish Jain RW4, have submitted that the radio increases the popularity of music and artistes. Respondent's expert witness failed to establish the alleged relationship between the drop in music sales due to rise in private radio stations. His report suffers from the following flaws:

(a) expert witness submitted that he was given only 8 days for preparing the report;
(b) expert witness did not conduct any survey for the purpose of his expert report;
(c) expert prepared his report primarily based upon on the data provided to him by the respondent;
(d) expert acknowledged the other factors such as piracy, mobile downloads etc. to be relevant, but did not consider all factors while finalizing his report.

Witness, Shri Sanujeet Bujhbal, RW2, in cross examination admitted the fact that the music companies reward radio stations for playing their songs and the remuneration is general terms as 'payola'. Liebowitz report submitted by respondent indicates that the radio has a positive effect on music.

24.6 As per the findings of the complainant's expert witness, Prof Bibek Debroy, 0.25% of revenue attributable to radio is a reasonable royalty. Submission of Prof Debroy has not been rebutted or challenged by the respondent during his cross examination. It is submitted that the case of the complainant is not beyond pleadings as the complainant has sought relief 'on just and equitable' terms and conditions in the complaint. Hence, the complainant is entitled to propose the 'revenue share' model as it is a just and equitable method of charging royalty. Merits of the revenue-sharing model vis-à-vis pnh are as under:-

(a) Method is followed globally to determine radio royalty rates for the reasons indicated below:-

  (i) The overall weight of the evidence of the practices in overseas countries leans towards a percentage of revenue as being the proper basis of assessment - APRA re ABC [(1986) AIPC 90-282] and Singapore Broadcasting Corporation v The Performing Right Society Limited and Another, FSR[1991]573;
  (ii) Shri S. Suresh, RW1, in cross examination, stated that it is correct that most evolved private FM broadcasting industries around the world have a tariff based on a percentage of the revenue generated by the radio station;
  (iii) Kempton, P., Testimony, submitted by the complainant with the additional replication, p. 227 indicates that royalty rates vary between 0.4 % to 5% of revenue for sound recording world over;

(b) market results are reflected in the revenue-share mode because royalty charged is proportional to revenue earned;
(c) revenue share method is not prejudicial to the interest of either party;
(d) it takes care of inflation, depression and upturn of the economy;

(e) it takes into consideration the city wise differentials; and
(f) it is preferred by the Government as reflected in the FICCI report submitted by the respondent.

AIR-PPL agreement considered to be a good comparator by the expert witness of the respondent cannot be taken as the stencil while determining royalties to be paid by private radio channels for the following reasons:-

(a) AIR alone earns 40% of the total advertising revenue in the radio industry and other channels share the remaining 60% revenue as mentioned by RW1 in cross examination;
(b) AIR has been in operation for over sixty years unlike the complainant which has been in operation since 2001;
(c) AIR is not restricted in terms of content as private radio channels are;
(d) AIR has greater reach and therefore higher listenership in comparison with private radio channels.

Thus AIR earns much higher revenue than private radio channels and royalty rates paid by it to PPL cannot be applied to private radio stations.

24.7 Royalty rates proposed by the respondent are unreasonable and arbitrary. Royalty rates vary between 0.4% and 5% of revenue for sound recordings world over. However, the current rates charged by the respondent amount to 12% to 18% of the complainant's revenue. The argument of the respondent that royalty must be fixed in the present proceedings keeping in mind that the respondent's members have already incurred cost in obtaining the sound recording is ill founded. It is submitted that the respondent's members (record companies) are able to spread the cost already incurred by them in obtaining the sound recording over their portfolio of recordings and also the many avenues available to them to exploit the same. Further, the Copyright Tribunal (UK) order relied upon by the respondent in CSC Media group Limited v Video Performance Limited does not pertain to sound recordings. Therefore, it cannot be taken into consideration in the present proceedings on that ground alone. It is submitted that the current royalty rate charged by the respondent is unreasonable. Learned counsel drew comparison with the patent royalties and submitted that the patents generally have a much shorter life span and under the Patent Act, 1970 (prior to 1999 amendment), a cap of 4% royalty was fixed for patents. Therefore, royalties for sound recordings which have a long economic and legal life should be much lower than that charged for patents.

Royalties for radio vary from 0.4% to 5% globally. Even a developed country like Australia has a royalty rate of 0.4%. Therefore, based on the difference in levels of development between India and Australia, royalty at the rate of 0.25% of net advertising revenue attributable to radio is reasonable in the present case. Learned counsel submitted that the evidence affidavits filed on behalf of Shri Sanujeet Bhujabal, RW2 and Shri Girish Jain, RW4 are inadmissible based on the objections recorded during their cross examination as those lack in proper verification and affidavits as held by the Supreme Court in A.K.K. Nambiar v Union of India, AIR1970SC652.

24.8 In conclusion, he submitted that his suggestion for royalty based upon revenue sharing is as under:-

(a) 0.25% of net advertising revenue attributable to radio;
(b) 0.30% of gross advertising revenue attributable to radio.

He further submitted that India is in a peculiar position where there are more than one entity that own the songs that are played on the radio. For example, apart from PPL there are other entitles like T-Series, Yash Raj, SIMCA, etc. that also own their own songs and claim royalty for that. In this respect, it is submitted that in case the Board determines a percent based royal, then, it may fix such percentage for the complete royalty payable to all right owners and not just PPL since radio stations do not play their music alone.

25. Learned counsel for Entertainment Network (India) Limited (ENIL) in cases numbers 2 of 2002 and 3-5 of 2008 made a survey of evolution of the music industry in India and the events leading to Phase I and Phase II policies and the blue print prepared by the Government for the Phase III about expansion of FM radio broadcasting services through private agencies. She emphasized that there are different stakeholders about the music royalties in the Indian scenario like India Performing Rights Society (IPRS), Phonographic Performance Limited (PPL), South India Music Companies Association (SIMCA) and other similar bodies. There are music companies as stake holders those are not members of any industry association or society. She submitted that there is no <u>one stop window</u> for payment and collection of royalties and radio broadcasters are made to negotiate with various bodies or entities for payment of royalties. It was only after the First Licencing Case [Music Broadcast Pvt Limited vs Phonographic Performance

Limited, 2003(26)PTC70(CB)] that some sort of a benchmark, though not fully acceptable, was set for the first time within the radio industry for the payment of royalty to PPL. Rates set by the Copyright Board have proven to be extremely high and are in fact affecting the viability of several radio stations. The said royalty rates need a re-look and need to be rationalized because of the various factors.

25.1 Rates prescribed under the First Licencing Case do not take into account the difference in revenue earning potential of different stations operating in different cities. Current royalty cost for certain private FM players in small cities is between 45% and 100% of their revenues and in some cases it is even more than 100% of their revenues – examples are stations of ENIL at Mangalore and Panjim, MBPL at Sangli and Nanded and Puran at Hissar and Barielly. Radio is a free to air medium and its only source of revenue is from advertising. Advertising revenue for a radio station is dependent upon population of the city, the audience size, market potential, media exposure, media intensity, per capita earning of average consumer and number of radio stations in the city, etc. In Phase II, the average One Time Entry Fees (OTEF) received in relation to radio stations in different cities is indicative of its relationship with the category of cities. Even PPL admits and recognizes the fact that the royalty rates have to be different for different categories of cities. It is borne out of the rates being charged from AIR and evidence of RW1.

25.2 The said rates do not take into account the various alternative sources of revenue which have now become available for sound recording owners. Globally the music industry today is banking on emergence of new revenue streams including mobile music and digitized licence music. Music distribution using mobile phone as a platform is gaining popularity with increasing ownership of handsets embedded with music and music downloads, mobile ringtones and caller tune features. Learned counsel referred to a study conducted by S. Kantilal Ishwarlal Securities Pvt Ltd (SSKI) exhibited as PW5/A2 where it has been estimated that mobile music industry is expected to reach $ 14 billion worldwide by 2010 and that within estimated reach of 435 million subscribers by 2010 and with over 50% of the mobile handsets equipped with music download facility, India would be amongst world's most attractive telephony markets. It has also been stated in the said study that while currently 4-5 lakhs ringtones are downloaded

every day, the same is expected to grow multifold taking into account the aggressive promotional strategies being adopted by the service operators. This study also points out that the music companies are expected to gain Rs. 2.3 billion by 2010 through these services. Role played by radio air play in promoting music has not been taken into account in fixing the rates. In another study conducted by Internet and Mobile Association of India (IAMAI) titled "Mobile value added services in India", the mobile value added services market has been valued to be worth Rs. 5780 crores as of June, 2008. Principal witness of PPL, Shri Suresh – RW1, in his cross examination, admits that in recent times the revenue of music companies has increased considerably from digital (including mobile) sales and that with the growth of technology music companies have many more sources of income than mere physical sales like CDs or cassettes. RW2, Shri Sanujeet Bhujabal and RW3, Shri Ramesh Arora have, in cross examination, admitted that there are different ways in which music can be exploited which are physical format, publishing, public performance, digital, etc. In conclusion, the above evidence proves beyond doubt that the argument of music companies that physical sales have reduced and this is due to radio companies is a complete "red herring" in as much as it does not take into account the major gains being made by music companies through alternate sources of exploitation.

25.3 Every time when a new film is on the verge of release or music of a particular film is launched, radio broadcasters are flooded with requests from music labels or companies to promote the same. Today, it has become almost a trend for big production houses and music companies to tie-up with a radio broadcaster for the purposes of promoting a film and its music. In fact, the minimum number of times a particular song has to be played becomes the focal point of the agreement. Sony BMG had authorized ENIL to play song "Gal Sun" from the album "CULTURE SHOCK" exclusively. Similarly, Tips Industries had authorized ENIL to air songs of the move "Speed" exclusively from June to 15 June 30, 2007. Super Cassettes Industries Limited (T series) had permitted ENIL to play songs from the movie "The Train" exclusively from April 18, 2007 to May 1, 2007 with a request to air the songs on all its radio stations 7-8 times a day. Learned counsel drew our attention to pages 206 to 225 of documents filed by ENIL on 31.3.2009 in this regard. This is in sharp contrast with the allegations leveled by PPL

and music labels that the decrease in the physical sales of albums is attributable to the high number of play-outs by the radio broadcasters. Had this been the case, there was no reason for the music labels to approach radio broadcasters for increasing the number of play outs and asking for minimum number of play outs. A recent economic analysis done by former Standford Economic Professor Dr James Dertouzos shows that an increase in spins or play outs of a particular song resulted in a subsequent increase in the album and digital track sales. The findings of the said study clearly demonstrate that almost 14% - 23% of sales of albums and digital tracks were attributable to the radio airplay and further that the radio is providing the record industry with incremental sales revenues and promotional sale benefits. The said study is exhibited as Ex PW5/A1. Principal witness of PPL, Shri Suresh RW1, in his cross examination, admits that radio diffuses the songs. Shri Sanujeet Bhujabal, RW2, in his cross examination, admits that radio does contribute in popularizing and creating awareness for a film. Shri Girish Jain, RW4 has stated in his deposition "we promote the movie through radio because it is requirement for the movie to drive the sale of tickets through theatre and the artists/director desire to have the hype and mileage through radio. Therefore, to a little bit radio contributes to the popularity of a movie.". Principal witness of PPL, Shri Suresh, RW1 has stated that 55% of the physical sales is pirated and that the alternate sources of music alongwith piracy have led to decrease in physical sales. In conclusion, learned counsel submitted that it is established by evidence that on one hand radio airplay promotes music and the losses, if any, are due to piracy and are not attributable to radio in any manner whatsoever.

25.4 There had been considerable increase in number of radio stations since the decision in the First Licensing Case ensuring more revenues to the sound recording owners. Number of private FM radio licenses have increased from 21 frequencies in 12 cities in Phase I to 266 frequencies in 87 cities in Phase II of the radio broadcasting policy of the Government of India. In 12 cities where private FM radio stations were operational during Phase I of radio broadcasting policy, number of licensed frequencies increased to 66 in Phase II. The number of operational private FM radio stations has increased from 21 stations as on March 31, 2006 to 245 stations as on September 30, 2008. The financial statements of PPL reveal that the royalty so received by PPL from radio stations has increased from Rs. 57 lakhs in the financial year 2001-02 to Rs. 1,344

lakhs in the financial year 2006-07 recording a Compounded Annual Growth Rate (CAGR) of 88.3.%. The growth in royalties received from radio has recorded an annual growth rate of 112% in 2003-04 when number of private FM radio stations increased from 11 to 21 and 136% in 2006-07 when number of stations increased from 21 stations as at March 31, 2006 to 60 as at March 31, 2007. Learned counsel, in conclusion, submitted that there are more stations that are going to pay music companies and PPL compared to the numbers that existed in 2001 before the First Licence Case. The reduction of royalties is therefore a natural consequence in as much even if the per radio station royalty decreases, the gross royalties that will be earned by PPL will be higher. Also lesser royalties will help in expansion of radio and lead to higher number of stations which may even reach 1000s. This would also lead to huge royalty earnings to PPL. Thus, instead making radio stations pay high royalties leading to them being shut down, the royalty rates need to be reduced on the basis of paying capacity leading to growth of both industries.

25.5 Audience in relation to regional and local languages is limited necessitating a low rate for such music.

25.6 It is pertinent to mention that in the instant proceedings, PPL admittedly, for reasons best known to it, has not filed any of its financials or accounts. It was ENIL only which has filed the financials of PPL for the financial years 2001-02 to 2006-07 together with the affidavit of PW6, Shri Dalpat Raj Jain. Financial statements of PPL for the year ended March 31, 2008 were not available with the Registrar of Companies as on March 20, 2009. In PPL's financials, private FM radio has been stated to be the second biggest contributor in terms of revenue to PPL after mobile phone segment which is a subscription based service whereas private FM radio is a free to air service freely available to its listeners. Till about 2007, private FM radio was the biggest contributor in terms of revenue to PPL. It is no where stated in the financial statements of PPL that radio airplay has negatively affected the physical distribution market, that is, sales of CDs, cassettes, etc. – para 7 of the affidavit of Shri Dalpat Raj Jain, PW6. Financials of music companies – Yashraj Films Pvt Ltd., Sony BMG Music Entertainment Pvt. Ltd., Super Cassettes Industries Ltd., Saregama India Ltd., Tips Industries Ltd. – for the financial years 2005-06 and 2006-07 reveal that these companies have reported operating

profits for the financial years 2005-06 and 2006-07. Nowhere in the financial statements of these companies it has been stated that play out of music on private FM radio is affecting the sales of audio cassettes.

25.7 Financials for the financial years 2005-06 and 2006-07 of Adlabs Films Ltd., Music Broadcast Pvt. Ltd., Radio Mid-Day West (India) Ltd., Clear Media (India) Pvt. Ltd., Kal Radio Ltd., and South Asia FM Ltd. have reported operating loss during the financial year 2006-07.

25.8 According to the quarterly reports of the Telecom Regulatory Authority of India (TRAI) titled "The Indian Telecom Services – Performance Indicators", total revenues of the private FM radio industry have increased from Rs. 101.09 crores in the financial year 2003-04 to Rs. 463.65 crores in the financial year 2007-08. The said growth in the revenue is mainly due to the increase in number of radio stations from 21 as on April 1, 2003 to 205 as on March 31, 2008. The data further reveals that despite the growth in revenues, average revenue for a private FM radio station has dropped from Rs. 88 lakhs per month in the financial year 2005-06 to Rs. 26 lakhs per month in the financial year 2007-08. The drop in the average revenues per station is attributable to various factors including increased competition in the same cities, higher numbers of radio stations chasing the same advertisers and audience, launch of private FM radio stations in smaller cities (category B,C and D) where revenues are far lower than A+ and A category cities.

25.9 Radio industry, though perceived on par with the television industry, is extremely different from the television industry. Radio as a medium is a means of inexpensive and mass entertainment but the audience is limited. The radio stations cater to a specific city and hence to a definite population in a particular city. The contents of radio stations in different cities vary to cater to the cultural diversities in each of the cities. Radio is a local entertainment medium and not a national entertainment medium like television. The advertising on radio is also much localized as compared to television. Television signals on the one hand can be uplinked and simultaneously broadcasted across the entire satellite footprint which can even transgress geographical boundaries thus leaving enormous scope for international viewership. In the case of radio, however, the broadcast is on a particular frequency and the signal is different in each of the city. Radio survives

primarily on sound recordings and music in as much as of today the Government policy does not permit any other form of programming like news, current affairs, etc.

25.10 Argument of PPL and music companies to the extent that telecom industry and internet downloads pay royalties as high as 25% of revenues is not tenable. In the telecom industry, the basic survival of the industry is on rental and the billing for air time received from phone subscribers. Music based value added service is a separately identifiable service and the same is subscription based. For example, if a cell phone user wishes to download the particular tune as a ring tone, a specific amount is charged by the cell phone company for the specific download of that music (normally between Rs. 10 – 15 per song). Telecom industry primarily pays a part of the said revenue to the music companies. No part of the rentals etc. which the telecom company earns from the user is shared with the music company. Revenue from music downloads as ring tones or ring back tones are separately categorized. The only revenue with the FM radio is the advertising revenue by playing music. Telecom industry earns by the mere down load of music without contributing towards any value addition into the said music. FM radio stations provide a complete package to its listeners wherein the air time is packaged with music, talks by radio jockeys, information about local events, local weather, local happening like traffic jams on a particular road, jokes and interview with music and film related celebrities. Internet penetration is yet not very high as compared to radio in India. It is radio which promotes the internet based revenue stream for companies. If the music is not popular there will not be any search or hits for the said music. Other services like streaming of broadband, non interactive streaming and interactive streaming are subscription based services having a separate identifiable revenue.

25.11 Radio cannot be blamed for alleged high acquisition cost for music companies. The benchmark on acquisition cost has in fact been raised mainly due to producers of films and the music companies themselves who have identified alternative sources of revenue and have started payment higher to sound recording owners. A company like T-Series, for example, has voluntarily increased the benchmark for acquisition of content in order to retain the monopolistic position and also to earn greater profits by exploitation through alternative sources of revenue. Acquisition costs have also increased because of the fact that music has changed hands from one producer to

another over a long period of time. It would be extremely unfair to blame radio and charge radio companies on the ground of higher acquisition costs.

25.12 Since there are many claimants to royalties for music, the payment should be made on the basis of the usage and not on the basis of revenue. This is the situation prevalent in every other industry including the Telecom Industry. For example, when a particular song is downloaded for a ring tone, there is a onetime download charge and the music owner only gets a share of the same. There is no revenue sharing model in Telecom Industry. Revenue sharing models are full of ambiguities. Even within the proposed revenue sharing model there is a difference of opinion as to whether the same would be based on gross revenue or net revenue or net advertising revenue. In case of these revenue modes, there is a huge scope for disputes in future. Hence the royalty rates should be fixed and paid on the basis of usage. Usage based charge is the best model. Other claimants for music royalties like private companies Yashraj, T-Series, IPRS, SIMCA etc. are not represented before the Board and hence while fixing revenue sharing if only the common kitty is fixed, PPL's share of the said kitty is not determinable. In any event, a percentage of the revenue cannot be allocated to PPL separately which may lead to disadvantage qua others. For example, if 1% of gross revenue is fixed for PPL, without any reference to the albums owned, usage by the channel etc., then, each of the claimants would claim the same percent or more leading to huge payouts to music companies. Thus the radio stations may end up paying 5 or 6% of gross revenue which would be unbearable for the industry.

25.13 Current published tariff of PPL is Rs. 2400 per needle hour or 20% of the net advertising revenue, whichever is higher. No basis or justification has been given by PPL for its published tariff nor any evidence has been adduced by PPL in this regard. It is the admitted position that there was no consultation with radio industry prior to fixation of the published tariff by PPL. The unreasonableness of the published tariff of PPL can be judged at the outset from admission made by RW1, Shri Suresh, the principal witness of PPL who during the course of his cross examination admitted that taking the figures stated in the table in para 26 of his affidavit, if ENIL was to pay as per the current tariff demanded by PPL, that is, Rs. 2400 per needle hour or 20% of the net advertisement revenue whichever is greater, then, ENIL would possibly incur huge

losses. Even Prof Laroiya, RW5, the expert witness of PPL stated in his cross examination that the rate of Rs. 1500 and Rs. 2400 per needle hour were exorbitant and unreasonable.

25.14 Learned counsel by taking the base figure of average Rs 661 under First Licence Case when there were 21 stations has done the cost inflation under Wholesale Price Index and with 31 licenced private radio stations in A+ category cities has arrived at a figure of Rs. 337 per needle hour. Similarly, royalties, based upon population and One Time Entry Fee, have been worked for other categories of stations. She has taken the going rates in the industry like with ADLABS and AIR as another benchmark to get an estimate of the rates. She has given another comparison based upon IPRS rates referred to by PPL and orders of Calcutta High Court in case 3-5 of 2008. She has referred to that there is broad consensus between ENIL and PPL that the royalty rates have to be different for different cities, royalty rates have to be India specific and no reference to any factor in foreign countries would be of any relevance in the Indian market and rate have to be preferably fixed on the basis of usage and not revenue sharing.

25.15 On an analysis of the evidence of respondent witnesses, learned counsel has deduced as under:

A) ADMISSIONS BY MR. SURESH – RW1

- Radio is one of the cheapest forms of entertainment available for masses
- PPL has not filed its financials in the present matter
- Programming for a radio channel is different from city to city
- When asked as to which radio stations were consulted while PPL fixed the tariff for radio stations, said cannot answer since he was not part of PPL when the tariff was fixed
- Admitted that if ENIL was to pay as per the current tariff demanded by PPL (i.e. Rs. 2400/- per needle hour or 20% of the net advertisement revenue whichever is greater), then, ENIL would incur huge losses as per para 26 of his affidavit
- Radio increases the popularity of the singers and artists
- If the music is not played on the radio stations, then, these stations would be forced to close down as per the existing government policy.
- Content cost of radio cannot be compared with that of TV
- PPL is charging royalty at different rates for metro and non metro cities from AIR taking into account the difference in revenue generating capacity of these cities
- Royalty rates for non metro cities have to be different from metro ones
- As of today, all radio stations are paying the same royalty for all cities be it metro or non metro

- Since the revenue earning potential of all categories of states is not same, the royalty rates cannot be the same
- Except the NFO report, he/PPL had no role in preparation of the reports annexed to his affidavit
- In recent times the revenues of music companies has increased considerably from digital (including mobile) sales. With the growth of technologies, music companies have many more sources of income than mere physical sales like CDs and/or cassettes
- Alternate sources of music along with piracy have led to decrease in physical sales

B) ADMISSIONS BY MR. SANUJEET BHUJABAL – RW2

- Radio does contributes in popularizing and creating awareness for a film
- Internet piracy/Illegal download of music from internet exists in India
- There are different ways in which music can be exploited – physical format, publishing, public performance, digital exploitation.

He has not produced any document in support of his affidavit

C) ADMISSIONS BY MR. RAMESH ARORA – RW3

- No knowledge of operation/working of radio channels besides north India
- Admits selling Mp3 though rarely. Says most of the Mp3 discs are pirated
- Music companies have different streams of revenue apart from sale of physical formats
- Admits that internet, mobile phones, i pods etc. have contributed in declining physical sales

He hasn't produced any document in support of his affidavit

D) ADMISSIONS BY MR. GIRISH JAIN – RW4

- Admits that reach of radio is wider than TV
- Admits that his company has tied up with radio stations in the past to promote a movie

  Says ... "we promote the movie through radio because it is requirement for the movie to drive the sale of tickets through theatre and the artists/director desire to have the hype and mileage through radio. Therefore to a little bit radio contributes to the popularity of a movie."

He hasn't produced any document in support of his affidavit

E) ADMISSIONS BY MR. S.K. LAROIYA – EXPERT WITNESS – RW5

- He hasn't seen the accounts of any music company, radio company and also PPL
- No knowledge of the prevailing royalty rates in other countries.
- No knowledge of the published tariff of PPL
- Impact of internet on retail music sales is higher than that of radio
- On being asked about the meaning of per needle hour, said that the same means the number of spins of the music that a broadcaster plays of a particular track in a given hour
- There should be different royalty rates for different cities
- Partly agreed to the fact that rates of Rs. 2400/- and Rs. 1500/- per needle hour are unreasonable and exorbitant.

CROSS BY MBPL (CASE NO. 1 OF 2002) – ADOPTED BY ENIL

- Was engaged by PPL only 8 days ago, i.e. pursuant to the order dated 02.07.2010 passed by the Delhi High Court
- He has no book or international publication to his credit
- He has no formal training or education pertaining to radio/music industry
- Had no prior knowledge of the documents marked as "X"
- Factors like performance of radio industry, piracy, use of music in mobile phones etc. have not been taken into consideration for the purposes of his study and analysis
- When asked as to whether he is aware that US does not recognizes copyright for sound recordings in radio broadcast, he said he is not an expert on this issue

26. Learned counsel for Radio Mid Day West (India) Ltd. in 6 of 2002 explained that the present disputes have arisen because of the respondent raising its royalty rate for broadcast of sound recording on FM channels per transmitter to Rs. 1500 per needle hour of recorded music or part thereof, or 20% of the net advertising revenue related to recorded music based programmes, whichever is higher, as of May, 2001. Thereafter, the respondent in the year 2005 further raised the demand of royalty rate per needle hour to Rs. 2400. Rate of Rs. 1500 per needle hour of recorded music or part thereof or 20% of the net advertising revenue, whichever is higher, proposed by the respondent being entirely unjustified and highly excessive could not be accepted by the private FM Radio industry as it jeopardizes the very existence of the industry as a whole which is already reeling under severe financial constraints. Thus, the complainant and several other private FM radio broadcasters were compelled to file complaints before the Copyright Board seeking compulsory licence to pay the sound recording within the repertoire of the

respondent and challenging the royalty rate proposed to be imposed by the respondent. Royalty rate of Rs 1500 per needle hour of recorded music or part thereof or 20% of the net advertising revenue, whichever is higher, being unsustainable and unacceptable to complainant, the complainant proposes that the royalty rate should be fixed by the Board at 1% to 2.5% of the net advertising revenue of a private FM broadcaster. Net advertising revenue would be gross advertising revenue less taxes and levies payable thereupon to the Central and State Governments. The said rate takes into consideration the investment made by music companies and their profits. Further, the rate proposed by the complainant is also in keeping with international standards. Learned counsel identified the elements which the Board may take into consideration for settling a royalty, namely, the licence fee rate proposed by the complainant, the private FM radio broadcasting industry is loss making, promotion of music by the FM radio, piracy and the effect on the music industry, revenue earned and the revenue earning capacity of PPL, public interest and royalty rates in foreign jurisdictions.

26.1 Rate of 1% to 2.5% of the net advertising revenue proposed by the complainant takes into consideration the concerns of the respondent in terms of the investment made in songs and albums and the copyright owned by such members of the respondent society and the same is in keeping with international standards which vary between 1% to 5% of the revenue share. Rates proposed by the respondent does not take into consideration revenue earning capacity of a place and the difference between metro and non-metro places and the international royalty rates. Shri S. Suresh, RW1, the Chief Operating Officer of the respondent, in cross examination, did accept that the respondent charges different rates for metro and non-metro from AIR. Rates proposed by the respondent do not take into consideration the precarious financial condition of the private FM radio industry which admittedly has been suffering losses, with the exception of ENIL.

26.2 Learned counsel has submitted that it is clear from the financial statements and analysis placed on record that the complainant company has been suffering losses from its very inception. Complainant has been suffering losses due to the increasing costs which include higher licence fees, royalty payments and operating costs. FICCI-KPMG report filed by the respondent clearly brings out the fact that the size of the radio

advertisement industry as a percentage of the advertising industry as a whole is a mere 4% in face of a global average of 8%. This 4% of the ad spent on FM radio industry is to be shared between the ever increasing number of private FM radio broadcasters which is slated to go up in Phase III. Respondent's calculations take care of royalty payable to itself only and not considering the royalty payments payable to other copyright societies and music companies. Respondent witness, Shri S. Suresh, RW1, the Chief Operating Officer of the respondent has himself agreed during cross examination that the radio industry has been suffering losses. If the royalty were to be paid at the rate of Rs. 1500 per needle hour, it would be 25% of the net revenue earned by the complainant and in case it was to be paid at Rs. 2400 per needle hour, it would be 41% of the net revenue earned. Shri S. Suresh, RW1, COO of respondent, in cross examination, has admitted that out of all radio companies which are complainants before the Board, except ENIL, all have been incurring losses. ENIL has made profits only in the preceding two years.

26.3 Respondent has attempted to prove that FM radio channels have had an adverse effect on the sale of physical formats such as cassettes, CDs, etc. A reading of the economic analysis by James N. Dertouzos in his paper on Radio Airplay and the Record Industry released in June, 2008 clearly brings out the fact that radio promotes music and has a positive effect on the music industry.

26.4 Respondent has alleged that the losses being caused to the music industry have been on account of the drop in sales of music in physical format such as CDs and cassettes on account of the music being played on FM radio channels ignoring the fact that the real culprit behind the drop in sales of music, CDs, cassettes, etc. is rampant piracy in India. Respondent's own witness, Shri S. Suresh, COO of PPL has himself admitted, in cross examination, that, after 2005, 55% sale of music in physical format is pirated.

26.5 Shri S. Suresh, RW1, in cross examination, has submitted the gross royalty earning of PPL during 2006-07, 2007-08 and 2008-09 respectively had been Rs. 61 crores, Rs. 114 crores and Rs. 137 crores respectively signifying no fall because of drop in sales of music in physical format such as CDs and cassettes. Respondent society and its members have made huge profits from the sale of digital music – revenue from mobile and internet services in 2005-06 was only Rs. 14 crores and it shot up to Rs. 99

crores in 2008-09. It is supported by the fact that FICCI in its executive summary has stated that the key growth driver for the music industry over the next five years will be digital music.

26.6 Government, being cognizant of the fact that private FM industry is under par, came into active play and reversed the licence fee drastically in 2005-06. The fact has been acknowledged by Shri S. Suresh, COO of respondent, in his affidavit that significant changes were made in Phase II in respect of private FM broadcaster to ensure its survivability.

26.7 Demand of Rs. 1500 or Rs. 2400 per needle hour or 20% of net advertising revenue from private FM radio broadcasters is excessive and exorbitant and is not in keeping with royalty rates charged as per global standards. In UK, the traditional radio licence fee varies between 1% to 5% of the station's total net broadcasting revenue. In Sweden, commercial radio broadcasters are charged 4% of the gross income. In Russia, the Collecting Society charges private FM broadcasters at the rate of 1% of the revenue earned by such broadcaster. This fact was confirmed by Mr S. Suresh, RW1 in his cross examination. FICCI in its report on the Indian Entertainment and Media Industry 2008 has suggested to the Ministry of Information and Broadcasting, in a memorandum, that royalty should be in line with the international norms which is in the range of 4% to 5% of the annual revenue of a station.

27. Learned counsel for Shri Puran Multimedia Limited in cases No. 3-1, 3-2 and 3-3 of 2008 traced the evolution of private FM radio broadcasting in India. He submitted that Phase I of FM radio broadcasting started in May, 2000 was not successful since only about 20% of the successful bidders could become operational. Based upon TRAI recommendations, Radio Broadcast Policy Committee report, experiences of Phase I and wide range consultations, the Government introduced Phase II of FM Radio broadcasting scheme on 13th July, 2005. Phase II scheme, *inter alia*, has provision of payment of annual fee based upon revenue sharing and the validity of the licence provided was 10 years. Working Group Report of Eleventh Five Year Plan (2007-12) on Information and Broadcasting Sector lays down that FM radio broadcasting is considered as main medium to provide entertainment, information and education to the poorer

segments of the society. This is so since private FM broadcast is free to air, that is, no listener is liable to pay any subscription charges, unlike satellite TV.

27.1. Complainant is entitled to a compulsory licence under section 31 in terms of the law laid down by Supreme Court in Entertainment Network (India) Ltd. vs Super Cassette Industries Ltd and others (2008)13SCC30. An offer made on an unreasonable term or a stand taken which is otherwise arbitrary amounts to a refusal on the part of the owner of the copyright.

27.2. Scope and nature of proceedings before the Copyright Board has been elaborately laid down by the Division Bench of the High Court of Delhi in Phonographic Performance Limited vs M/s Radio Mid Day (West) India Ltd. 2010(43)PTC377(Del) (DB) to the effect that the inquiry postulated is quasi-judicial and quasi-adversial in nature. It has been further laid down that on first principles, there can be no doubt that the Copyright Board may devise its own procedure and while doing so, it is expected to adhere to the principles of natural justice. It has also been laid down that proceedings before the Copyright Board, therefore, cannot be converted into a trial or transformed into a formal adjudicatory process through some indirect process.

27.3. Learned counsel has given details of offers made by the complainant and correspondence relating thereto. In the meantime, two voluntary agreements were also entered into which were terminated before filing the present complaint for grant of compulsory licence.

27.4 It is argued that false pleas of infringement have been raised against the complainant. But respondent has not instituted any legal proceedings before any court of law seeking to assert that the complainant is an infringer and therefore should be prevented from playing its music. This has been admitted by Shri Suresh in his cross examination.

27.5 There is a great difference in the revenues earned by the complainant and the respondent. Complainant is in great losses whereas the respondent has clearly very strong financials. Net revenue of the complainant in 2006-07 was Rs. 3,75,484 whereas the expenses incurred were Rs. 8,09,975 resulting into a loss of Rs. 4,34,491. Similarly, in 2007-08, income and expenditure was Rs. 4,60,33,421 and Rs. 17,25,67,615 resulting into a loss of Rs. 12,65,34,194. In comparison, respondent's revenue in 2006-07 was

61.38 crores as compared to previous year figure of Rs. 29.59 crores. Main witness of the respondent, Shri Suresh has admitted in his cross examination that the entire industry except for one operator is running into losses. The said witness has also admitted that payment of royalty as per the published rates of PPL and even those prescribed by the Board in the First License case would only increase the losses.

27.6 Hon'ble Supreme Court has noticed in Entertainment Network (India) Ltd. vs Super Cassette Industries Ltd and others (2008)13SCC30 that free to air broadcasting either does not require any licence and if there be any provision of licence in any of the jurisdiction the licence fee is paid as a revenue share only.

27.7 Various reports filed by the complainant as well as respondent support the contention of the complainant. Entertainment and Media Report by S. Kantilal Ishwarlal Securities Pvt Ltd, June, 2007 hs stated that an irrational licensing policy had rendered the business unviable. However, after implementation of Phase II of FM privatization and movement to revenue sharing has changed the business dynamics and the space is now attracting significant participation from relevant players. Government to give radio business a boost has moved away from the fixed license regime to a revenue sharing model. Similarly, "India's FM Radio sector" Report by Ernst and Young 2008 for the Indian Radio Forum has stated that copyright owners are agreeable to a royalty regime based on a share of revenues earned by such station. While copyright owners are demanding around 20% to top line revenues, radio companies are agreeable to sub five percent rates as noted in several countries abroad. "Radio Airplay and the Radio Industry: An Economic Analysis" report by James N. Dertouzos for the National Association of Broadcasters released in June, 2008 has noticed a symbiotic relationship between radio and recording industries. The possible schemes include flat fees based on station size, fees based on the quantity of music played, fees based on music exposures (spin time audience) and fees based on revenues. Relative to other options this type of revenue based fee is likely to be favoured by the music industry if its goal is to gather the most fees possible while at the same time maintain the same level of music exposures. It is stated in the Indian Entertainment and Media Industry- Sustaining growth report 2008 by FICCI and Price Water House Coopers – exhibited by Shri S Suresh RWI – that approximately 60% of the revenues of the radio advertising industry comes from private

FM broadcasters and the balance from the State Broadcaster ALL India Radio. Other than regulatory hurdles facing the radio industry which seem to be getting resolved with the favourable recommendations by TRAI, royalty issues continue to confront both the radio and the music companies. In B,C or D category towns, royalty is the biggest operational expense for radio companies. FICCI in a memorandum to the Ministry of Information and Broadcasting has suggested that the royalty should be in line with international norms, which is in the range of 4-5 per cent of the annual revenues of a station. FICCI has also suggested a single collection agency for music rights fee or development of a mechanism where one rate is applicable to all agencies or royalty collection bodies. A number of factors are eating into the revenues of the music industry. With the number of music enabled portable devices on the rise, the practice of loading portable storage devices with unauthorized, unlicensed music – a practice commonly referred to as 'sideloading' is emerging as a substantial threat to industry revenues. Add to that the classical piracy of physical music formats and more recently compact discs with unlicensed music is hurting the industry. A consistent volume degrowth of physical formats coupled with factors such as price erosion, piracy and a robust growth in non-physical formats such as mobile value added services has contributed to the changes revenue mix.

27.8 It has been submitted that the complainant has suggested the revenue sharing model by which the royalty payable shall be dependent upon the net advertising revenue earned by the radio broadcaster and it shall be a specific percentage of the same. It is pertinent that all but one (ENIL) of the complainants in all the cases have supported and suggested the same model, even though the percentages suggested vary slightly. For instance Synergy Media and Rajasthan Patrika has suggested a percentage between 0.4% to 1% of the net advertising revenue. The complainant carried out an exhaustive research on the system prevalent in the countries where radio is already an established industry and 30-40 years old and in some countries even older. The complainant found out that in almost all the countries either the radio broadcasting was free to air and in all other cases the royalty amount payable was a fixed percentage of the royalty amount payable. The complainant prepared a chart setting out a comparison between the royalty rates payable in various proceedings. It is 2% to 5% of the net broadcasting revenue in

U.K., 1.75% of net broadcasting revenue in New Zealand, 0.4% of gross broadcasting revenue in Australia, 1.44% to 2.1.% of advertisement revenue in Canada, 1.3% to 4.76% of income in Ireland, 3.2% of net radio station revenues in Lithunia, 2.1% to 3.315% in Switzerland, 1.2% of total gross monthly income in Romania, 0.1.% to 4% of revenue in Hongkong, 1% of total revenue in Russia and 1.2% in Italy. The reason why the complainant has used and relied upon the comparisons in other countries is since they are extremely relevant for determining the fair royalty rate. Complainant has suggested a rate fixed as 1% of the net advertising revenue. It must be kept in mind that at present the only income for the private FM broadcaster is through advertisement revenue. Net advertising revenue, as held in the [1991]F.S.R.573 (Singapore) judgment is defined and meant as gross advertising revenue of the broadcaster less only actual advertising agency discounts and commission and selling agents' commission not exceeding in total 15% of such gross advertising revenue. In the event of the private FM broadcaster is also carrying on other businesses, a direction be issued by the Board to maintain a separate accounts for the private FM business of such broadcaster. It is also suggested that security in the form of bank guarantee be furnished by the broadcasters to PPL to be invoked in the event of failure to pay royalty at the prescribed rates. It is proposed that the amount of such bank guarantee should be decided on the same basis as for determination of royalty. Thus, the amount of guarantee to be furnished should be 1% of the net advertising revenue generated by the operator in a particular city to be upgraded or reduced on an annual basis depending on the revenue earned in that city. This would ensure that the bank guarantee has a direct nexus with the revenue generating capacity of a city and is not an ad hoc amount. Another query which now arises for consideration is how is the 1% royalty to be divided amongst the collecting societies. The answer is simple that the 1% royalty amount be divided as per the percentage of music of a society or a company out of the total music played by a particular broadcaster. For example, if the music played by the complainant herein comprises of 20% of PPL's music out of the total music played by the complainant, then, the royalty payable to PPL shall be 20% of 1% of the net advertising revenue and so on and so forth. The percentage of music can easily be calculated on the basis of which, as directed by the Board, Log Sheets to be provided on a monthly basis to be maintained both by the radio companies as well as the

society. There is also no chance of any manipulation in the same. A percentage of revenue has a long history of acceptance as a measure of the worth of copyright. It is also accepted in the area of literary works where the owners of the copyright in books receive a percentage of the box office receipts. The philosophy underlying this approach must be that over the years the copyright owner has been perceived to have an interest in the success or otherwise of his work. If it is highly successful and substantial returns are yielded, he should receive more. If his work is a failure, he will receive little or nothing. Further a revenue sharing model is a long term model and is not subject to limitations and infirmities. It demonstrates, at its best, the symbiotic relationship between the Copyright Owners (Music Industry) and the private FM Industry. A comparison may also be drawn with the income tax in our country which has a rationale of earn more, pay more, the same is true about the revenue sharing model it ensures stability. The same logic has been successfully implemented by the government in the Phase II of Licensing of FM Radio Operators.

28. Learned counsel for Synergy Media Entertainment Ltd. in 3-4 of 2008 and Rajasthan Patrika Pvt Ltd in 3-6 of 2008 submitted that in terms of the findings of the Hon’ble Supreme Court in Entertainment Network (India) Ltd. vs Super Cassette Industries Ltd and others (2008)13SCC30 to the effect that in a case where the respondent seeks to grunt a licence on unreasonable terms, it amounts to a refusal to allow communication to the public on terms which the complainant considers reasonable, the condition precedent to approaching this Hon’ble Board is satisfied. Rate demanded by the respondent is the higher of Rs. 2400 per needle hour or 20% of net advertising revenue. Complainant has also demonstrated through reliance on affidavit filed in rejoinder and in evidence of Shri Arup Gupta, affidavits and evidence of other witnesses in connected matters, cross examination of respondent’s witnesses and during the course of arguments advanced that the rate demanded by the respondent is highly unreasonable. Only argument of the respondent in the first licensing case as well as in the present case has been that they need to charge the amount demanded because the broadcast of music on radio will result (in the first licensing case) or has resulted (in the present case) in loss of sales of music cassettes and CDs and other physical formats of selling music. This argument automatically leads to the underlying acceptance by the respondent that the rate

demanded by the respondent, viewed objectively and independent of any other consideration such as effect of radio airplay, is unreasonable. The only justification, as has been stated above, is that the respondent is suffering losses in sales of physical formats due to broadcast of songs on the radio and hence they need to recover this loss from the radio stations. Respondent's members have multiple exclusive rights enshrined under section 14(e) of the Copyright Act, 1957. Music broadcast on FM stations is one of the option of use. Any erosion in sale in physical format, if any, has been off set by boost in sales of digitized form of music.

28.1 Since the base rate of Rs.1500 per needle hour has not been supported with any cogent evidence and in fact, the evidence adduced consists of conflicting, misleading, half baked and self-serving studies, hence, the additional consideration that prices of acquisition of content have increased in the music industry in India, is no justification for imposing the even higher rate of Rs.2400/- per needle hour by the respondent.

28.2 Respondent's witness also listed certain other factors in support of its claim of increase in the tariff rate from Rs.1500 to Rs.2400 per needle hour. These are (1) investments by respondent's members, (2) cost of acquisition, (3) value to broadcasting companies, (4) adverse effect of radio on sales, (5) availability of FM on mobile, (6) not playing radio edits but the entire song, (7) frequency of new songs is high (8) high revenue of radio (9) comparative cost of music to other media such as TV, internet, etc. It is submitted that whereas (1) and (2) are addressed by the respondent's members while buying the rights, since this is a factor that plays a role in determining the per unit price of music, with respect to (3), the value is the same for all approximately 300 stations, competing with each other, hence, these factors cannot be relied upon. Respondent has not been able to prove (4), as discussed above and in fact, contradicted its stand. Factor (5) has the effect of increasing the revenues earned by the respondent, from yet another medium and is hence not helpful to the respondent's argument. With respect to factor (6), this is a term that this Hon'ble Board may impose. It is denied that new songs are played more than the old songs, and importantly, this is a factor that is completely sidelined by the respondent, i.e., the airplay and continued exposure given to old repertoire of the respondent's members. Hence, factor (7) is inapposite. It has been the admitted position

of both parties to these inquiry proceedings that all the radio stations, except one, are in losses. Hence, increase in revenues of radio stations does not automatically translate into a demand for an exorbitant tariff rate. The other media listed by the respondent are not comparative for the purpose of this inquiry. It is also noteworthy that at least two principal witnesses of the respondent, that is, Shri S. Suresh and Shri Sanujit Bhujabal, have both admitted during the course of cross examination of the said witnesses that radio has some value as a medium of promotion of the sound recordings/music owned by the members of the respondent. In that backdrop, it is conflicting and antithetical for the respondent to claim that radio airplay has a negative effect on sale of music. Two pieces of evidence submitted by the respondent to the effect that radio airplay has negative effect on sale of only physical format suffer from inherent flaws. A survey relied upon purported to have been conducted between June 2001 and June 2002 had leading questions asked to the sample surveyed and it was not subjected to the scrutiny of the First Licensing Case. Another witness, Dr. Laroiya admitted to have neither any formal training nor experience with either the music or the radio industries. It is also noteworthy that Dr. Laroiya, respondent's own expert has opined that prima facie, a rate of Rs.1500/- per needle hour seems unreasonably high. This is because, he endorses a much lower rate paid to respondent by All India Radio. In view of the foregoing, it is submitted that the report and testimony of Dr. Laroiya does not merit consideration in support of the argument that radio airplay negatively affects sale of music. Respondent also argued that the rate demanded by the respondent is reasonable as it is comparable to rates charged by the respondent from users of its music/sound recordings in the digital context. Respondent has filed certain agreements that seem to have since expired between the respondent and some websites that claim to offer respondent's content on the internet by way of downloads or streaming. The rate suggested is Rs.0.05, i.e., 5 paise per download or 35% of net advertising revenue. When questioned, the respondent's witness admitted that in that industry, the 35% of the net advertising revenue of the website is more or less comparable or equivalent to 5 paise per download. In view of this admission itself, it is submitted that the rate cannot be comparable since the dynamics of the internet and radio industry differ drastically, at least in the current scenario. Put another way, if the complainant were asked to pay 5 paise per broadcast of a song, the complainant would

have no problem whatsoever, since a complainant radio station would end up paying only Rs.3500 in a year. Thus, clearly, the two users and hence the rates are not comparable. Lastly, respondent also argued that license fee paid by television is a good comparator for determination of license fee for radio broadcasters. However, it is submitted that there are various differences between use of music on TV and on radio that would lead to a conclusion that the use of music on these two respective media is not comparable. These differences include:

(a) Television broadcasters earn revenue both from subscription as well as advertisements, whereas radio stations earn only from the latter;

(b) Television has a reach of the entire country and perhaps even overseas, whereas radio is limited to a city;

(c) Television is not limited by content restrictions, unlike radio.

Accordingly, the comparators proposed by the respondent are not valid comparators.

28.3 Though not canvassed either in the pleadings or documents filed during the proceedings by respondent, the rate proposed by respondent's expert, Dr. Laroiya, as reasonable is the rate ostensibly being paid by All India Radio (AIR). This rate is Rs.600 per needle hour for metro stations and Rs.525/- for non-metro stations. It is submitted that the said rate cannot be made applicable to the complainant, for the following reasons:

(a) All India Radio is an established broadcaster that has been in operation for the past over 75 years, of which, it had a monopoly for a period of 65 years, whereas the complainant has been operating only for 4 years;

(b) All India radio has a reach of almost 95% of the country, whereas the complainant is active in 17 cities only. This has a tremendous impact on the advertisement revenue earning potential of the complainant. Even as per the report relied upon by the respondent, 40% of all advertisement revenue is cornered by AIR, whereas the other 300 odd private stations have to split the balance 60%. This inequality itself has a bearing on the determination of rate which ought to be lower than the rate paid by AIR;

(c) AIR is not constrained by content restrictions, whereas the complainant is, that is, AIR can broadcast news, but the complainant cannot;

(d) AIR is not burdened by license fee payments and taxes, unlike the complainant.

In view of the foregoing, it has been submitted that the respondent has not been able to demonstrate that any of the rates demanded by the respondent is reasonable.

28.4. With regard to the rates proposed by the complainant, whereas the complainant had initially based its offer on the rates being paid to a sound recording company, during the course of the present proceedings, the said company has become a member of the respondent and hence, the said rates are no longer applicable. Further, the complainant has come across data on payments made by radio broadcasters such as the complainant, to owners of copyright, such as the respondent herein, which has prompted the complainant to modify the proposal initially made by the complainant. It is submitted that since, as per the terms of section 31, these proceedings amount to an inquiry, and not an adversarial litigation, it is open to the Board to consider not only the rates proposed by the parties but also those that may be otherwise more reasonable. It is in this background that the complainant has proposed a rate of 0.4% to 1% of the net advertising revenue as the rate that the complainant considers reasonable. The complainant proceeds to give a justification for the said proposal because of the following reasons:

(a) Complainant pays a percentage of complainant's share of its revenue to the Government of India for use of the frequencies allotted to the complainant. The formula agreed to between the complainant and the Government of India is that the complainant shall pay 4% of the gross revenue earned by the complainant. Thus, the criterion that entitles the complainant to pay a percentage of its revenues is accepted even by the Government of India and is a fair and reasonable criterion for determining license fee;

(b) All over the world, owners of copyright, including but not limited to societies like the respondent, charge license fee as a percentage of net advertising revenues and not as a per needle hour rate. In this regard, a current comparative listing of rates of license fee paid by radio broadcasters to societies such as the respondent all over the world, as extracted from proceedings before the US Copyright Tribunal, is set out below:

	MUSIC COPYRIGHT ROYALTIES PAID BY RADIO		
COUNTRY	PHONOGRAPHIC PERFORMANCE COPYRIGHT ASS'N.	RATE	
USA	RIAA	NONE	

UNITED KINGDOM	PPL	2-5%[1]	
AUSTRALIA	PPCA	0.40%	
AUSTRIA	LSG	4.50%	
CANADA	NRCC	1.40%[3]	
FRANCE	SPRE	4.25%	
GERMANY	GVL	4.50%	
ITALY	SCF	1.20%	
NETHERLANDS	SENA	3.70%[6]	
NORWAY	NORWACO	3.00%	
SPAIN	AGEDI	2.00%	
SWEDEN	IFPI/SAMI	4.00%	
SWITZERLAND	SWISSPERFORM	2.10%[7]	
NOTES:			

1) Three rates correspond to three revenue bands. The lowest rate is paid by stations reporting up to 455,881 pounds, the second up to 911,764 pounds and the highest rates for stations reporting 911,765 pounds or more in annual revenue.

3) Canadian recording royalties exclude payments to US record producers, so only about half of the music
broadcast on Canadian stations attracts this rate. And a few record producers not members of NRCC negotiate separately.

6) This rate applies to the first five million florins in revenue. After that it declines .2% for every additional five million florins down to a minimum of 2.0%.

7) This rates apply for stations playing music 70-90% of total broadcast time.

(c) At least at this stage in the FM radio broadcasting industry where most of the content broadcast by the FM stations including the complainant is music (in view of restrictions imposed by the Government of India), the criterion of a percentage of revenues reflects a true co-relation between the content used by the complainant and the license fee payable by the complainant.

28.5. Complainant proposes net advertising revenue rather than gross revenue as a criterion for determination of tariff/license fee in view of the fact that deductions, including agency discounts and commissions, are fixed and not dependant on the content used. These are the only two deductions proposed to be deducted from the gross advertising revenue, which can also be capped at 15%. A percentage of net advertising revenue as a parameter for determining the license fee is also advantageous, since the same parameter may be used across the board and across categories of cities in which the various radio stations are situated. The license fee so payable will be an accurate reflection of the revenue potential in that city as against a flat needle hour fee across the board that proves to be onerous on the complainant's smaller stations. The quantum of percentage of net advertising revenue proposed by complainant as a reasonable license fee is between 0.4% and 1% of net advertising revenue, as these rates, among the lowest in the world, are considered reasonable in Australia and Russia respectively. One of the reasons as to why these rates are applicable to India is that the radio industry in India is in a very nascent stage and is suffering heavy financial losses. Complainant further states that the quantum decided by this Hon'ble Board should be the total quantum payable across the board by the complainant for all use of music and the payout to the individual owners should be prorated depending upon the amount of music used from their respective repertoire. It is also proposed that this Hon'ble Board may provide for a graded payout depending upon the amount of music that is used. These submissions are also in line with the international practice in this regard followed in certain countries of the world including U.K., Ireland and Hong Kong. Further justification of the aforesaid is based on the following amongst other reasons:

(a) In India there are multiple players that claim ownership of copyright in various different sound recordings, such as, the respondent herein, Super Cassettes Industries Limited, Yash Raj Films Private Limited, South Indian Music Companies Association, Big Music, etc. Further, the membership of the

respondent is in constant flux as is evident from the fact that in recent times, Movie Box and Speed records are collecting license fee for exploitation of their works separately, even though they are projected by the respondent as its members. Hence multiple parties are to be approached for license from time to time;

(b) There is also a complete lack of information as to the agreements between the respondent and various sound recording companies purportedly its members as also the extent of rights owned, identity of works, duration of rights etc. Complainant has already cited the example of two companies who have stated that they are not members of the respondent, despite the respondent claiming them to be its members.

It is submitted that the aforesaid rate proposed is reasonable in accordance with the rate in most other countries of the world where private radio broadcasters are licensed to broadcast music. The percentage proposed is also reasonable as radio industry plays a positive role in promoting music and talent associated with music, as is evident from the document filed by the complainant in the present proceedings in Volume II of the documents entitled "Radio Airplay and the Record Industry: An Economic Analysis" by Dr. James N. Dertouzos, dated June 2008. The same has also been reiterated by various other experts that have given testimony before Copyright tribunals in the USA and whose testimonies have been filed in Case No.1 of 2002.

28.6 Complainant further promotes music and talent in the following manner:

(a) Each new release gets a paid-for promotional showcase in the form of radio airplay which provides a vehicle to play the new music. This contributes to increase in the physical sales of CDs and cassettes and digital versions thereof, including ring-tones, ring-back tones, etc.;

(b) The music so played also results in popularity and promotion of the film and/or the album;

(c) The radio jockeys make announcements from time to time of the various players involved in making a successful musical product,that is, the singer, composer the lyricist etc. This leads to recognition and promotion of all these artists, who then get further opportunities to exhibit their talent at national and international concerts and hence earn even more goodwill, recognition and income;

(d) Radio airplay of songs also helps revive and popularize old content (viz. songs) which translates into a continuing stream of revenue through physical as well as digital sales;

(e) Telecom companies continuously request radio companies to insert caller tune tags at the beginning or end of songs which further promotes sale of music adding to the revenues earned by respondent's members.

As mentioned above, even the respondent's own witnesses acknowledge that radio airplay has some promotional value for the music of the respondent's members.

28.7 It is further submitted that the international trend is very well summarized in the decision of the Singapore Copyright Arbitration Tribunal in Singapore Broadcasting Corporation v. Performing Rights Society & Anr., [1991] FSR 573. This decision is relied upon for the following reasons:

(a) The scheme of the Singapore Copyright Act that empowers the Tribunal to act in matters such as the one in which the decision was rendered is very similar to the scheme of the Indian Copyright Act. This is because, as mentioned above, section 31 of the Copyright Act, 1957 makes it clear that the nature of these proceedings is an inquiry where the Board has to adjudicate whether the rate of license fee offered by the respondent/owner of copyright is reasonable or not. Page 5 of the decision in question records the scheme of the Singapore Copyright Act which is very similar to the Indian Act and which is set out below:

Section 163(2) of the Copyright Act reads:
"(2) A person who claims, in a case to which a licence scheme applies, that he requires a licence but that the grant of a licence in accordance with the scheme would, in that case, be subject to the payment of charges, or to conditions, that are not reasonable in the circumstances of the case may apply to the Tribunal under this section."

Section 163(6) of the Copyright Act reads:
(i) (6) Where an application is made to the Tribunal under subsection (1), (2) . . ., the Tribunal shall give to the applicant, to the licensor concerned and to every other party (if any) to the application an opportunity of presenting their cases and, if the Tribunal is satisfied that the claim is well founded, the Tribunal shall make an order specifying, in respect of the matters specified in the order--. . .
(ii) in the case of an application under subsection (2) or (3)--the charges, if any, and the conditions, that the Tribunal considers reasonable in the circumstances in relation to the applicant . . .";

(b) The definition of net advertising revenue on page 10 of the decision, is identical to the understanding of net advertising revenue in India, as mentioned hereinabove;

(c) After noting that the international trend is overwhelmingly in favour of using a percentage of net advertising revenue as the tool for license fee

calculation, the tribunal very clearly records (at pages 20, 21, 30 and 40 of the decision) its reasons for why percentage of net advertising revenue would be a good method of determination of the license fee payable. The excerpts of the reasoning are extracted below:

"A percentage of revenue has a long history of acceptance as a measure of the worth of copyright. It is accepted in the area of literary works where the owners of copyright in books receive a percentage of retail sales . . . And it is accepted in the theatre and concert areas where copyright owners receive a percentage of the box office receipts. The philosophy underlying this approach must be . . . that over the years the copyright owner has been perceived to have an interest in the success or otherwise of his work. If it is highly successful and substantial returns are yielded, he should receive more. If his work is a failure, he will receive little or nothing. This approach has particular application in commercial case, that is where the licensee, in this area of copyright use, the broadcaster, is a commercial entity . . . Percentages of revenue are also taken as the measure of the value of the broadcast right where the broadcaster is a public corporation providing a national service as is the case here . . ."

". . . the amount of the Parliamentary appropriation is the value which the community may be seen, through Parliament, to put upon the total operations of the ABC. Since music is an essential part of the various programs, the copyright owner should share in the total amount of the value which the community places upon the broadcasts. The only way this can be done is by application of a percentage to revenue or expenditure . . ." (at page 20)

"The evidence suggests a discernible balance in favour of a percentage of revenue as being the accepted measure of the value of the public performance and broadcast rights used by various broadcasting and television organisations in the world, whether commercial or governmental."

“The main exception to this is the decision of the English Tribunal in the *Independent Television Companies Association Ltd. Reference (PRT 38/81)*. Here, the Tribunal rejected percentage of revenue as a basis for commercial television broadcasts. As noted in the APRA re ABC case, the 1983 English decision appears to run counter to world wide trends. It also only concerned the position of television broadcasts and did not touch on the position of radio broadcasts where music clearly plays a more prominent role than in television broadcasts.” (at page 30).

28.8 In view of the above, the complainant proposes a method of determining royalty to be based on a percentage of net advertising revenue and reiterates its proposal that it should be in the range of 0.4% to 1% since these are currently recognized percentages in Australia and Russia and appear to be reasonable for a nascent FM radio

industry in India. It is further submitted that this license fee should be paid pro rata to all the stakeholders in the music industry depending upon the amount of music that is used from the repertoire of each such stakeholder.

28.9 Finally, the complainant has submitted that this rate should be applicable for all works, whether currently published or to come into existence in future, since it would lead to multiplication of proceedings, if the license directed to be granted by the Registrar of Copyright is limited to the works that have been published only till the date of grant of such license. It would be an absurdity if the license does not extend to future works. It is submitted that the reasons why future works should be included in this grant are also set out hereunder:

(a) The category of works that would be licensed by the order of the Copyright Board would not differ from the future works. Since the category is the same, forcing the complainant to seek a separate license for the later works would be arbitrary and unconstitutional;
(b) The Copyright Act, 1957 permits licensing future works under section 30 which is the provision for voluntary licensing and section 31 falls within the same chapter of licensing under the Copyright Act, 1957;
(c) PPL licenses in future rights also as there is no restriction in its tariff. None of the Gazette notified tariff schemes of PPL distinguish between present and future works. Entire repertoire is licensed, whether past, present or future.

29. Learned counsel for the respondent in all the cases, in the written arguments at the outset, has submitted that the issue before the Board is the reasonable determination of tariff to be payable by radio broadcasters for exploiting by way of broadcast the sound recordings administered by the respondent. He has relied upon the observations of Hon'ble Supreme Court in its order dated May 16, 2008 mentioning that different cases are required to be considered on their own merits. What would be reasonable for one may not be held to be reasonable for the other. The principles can be determined in a given situation. Relying upon rule 11D of the Copyright Rules, 1958, relatable to publications of works under sections 31A(7), 32(4)(i) and 32A(4)(i), he submitted the Copyright Board to take into consideration, *inter alia*, the norms laid down in that rule, namely, the proposed retail price of a copy of such work and the prevailing standards of royalties in regard to such works. He submitted that a "reasonable rate" for broadcasters cannot mean that it can be unreasonable to "right owners". He submitted that the Board ought to consider and ensure that the copyright owner gets a fair return for his creative

work, technological contribution and finally the costs and risk borne by the copyright owner.

29.1 While arguing his case in support of the tariff of the respondent, reliance was placed upon the recommendation of the Telecom Regulatory Authority of India regarding the 3rd Phase of private radio broadcasting in the context "FM radio broadcasting is a content oriented sector and content generation involves significant cost.". It was submitted that since the FM radio applicants do not create or foster any music content in the nature of sound recordings but simply exploit the said content, they do not suffer the risks involved in the generation of music. Reliance was put upon in this regard upon the submissions, in cross examination, of PW2, PW3, PW5 and PW7. PW11, while putting that the music is the backbone for any radio station, submitted but that that is not the only factor that helps radio station gain more popularity or advertisement revenues. There are other factors also apart from the music like in house produced jingles, promos, segments, radio jockey talks and other activations and marketing initiatives. Learned senior counsel for the respondent termed the assertion of the applicants as misleading that the restrictions imposed by the Government of India force them to broadcast only popular bollywood music. Rather the submissions by the applicants' witnesses that hit bollywood music forms a major chunk 40%-75% of the content broadcast clearly demonstrates that popular bollywood music attracts listenership. Music is an "input cost" for private FM radio and as in any other sector which exploits copyright content, which costs should be borne by them.

29.2 It was submitted that the failure of the applicants to file their audited balance sheets was malafide and motivated with the intent of suppressing the most crucial financial information that needs to be placed before the Board, namely, the financials of the MF radio applicants. It was further submitted that the Board should scrutinize the full and detailed accounts of the applicants filed before the Board by the respondent pursuant to the order of Hon'ble Supreme Court of India dated 13th May, 2010.

29.3 Since television is also in the business of broadcasting, learned senior counsel chose to make comparison of cost incurred by Zee TV television network. It was submitted that the lowest cost of content as a percentage of broadcasting revenue achieved is so far 39.3%.

29.4 Submissions in regard to comparison with tariff rates to the other users like mobile radio, non-interactive streaming on internet broadband, IVR/music dedication and DTH music subscriptions have been made. It has been stated that the rates there as a percentage of revenue share are much – somewhere in the range of 25% to 35%. Offering a subsidized or unreasonably low pricing to private FM radio operators as being demanded by the applicants, especially lower than the royalties having been agreed between the public broadcaster such as All India Radio, would throw the equilibrium out of balance with unwarranted consequences and market disturbances. Cost of acquisition, creation and production, marketing and promotion of sound recording content have gone up but the sale of physical formats has declined. Costs of certain high cost recent acquisitions of music rights in sound recordings, namely, "Singh is King" for Rs. 13.50 crores, "Ghajini for Rs. 8.50 crores, "Om Shanti" for Rs 4-5 crores, etc. have been mentioned. There is steady decline in sales of CDs and cassettes despite (i) no increase in consumer prices of physical products (compact disc or music cassettes); (ii) no significant increase in piracy; and (iii) no significant decrease in the number of music albums. Listeners of private FM radio broadcast stations are able to listen to music free of charge for 24 hours a day with a facility of recording the music. For the licence to use the spectrum, Government charges 4% of gross revenue or 10% of reserve OTEF, whichever is higher. Broadcasters are content with this fee which is to avail only the frequency or spectrum. Compared to this, the entire repertoire of the respondents' members amounting to lacs of sound recordings which is the most important input used by the broadcaster and is the bankbone of their business, the royalty for use of their main input ought to be much higher than the licence fees paid to the Government.

29.5 It has been submitted that FM radio broadcasting is purely a commercial profit driven venture and no public interest is served. The same is borne out of the fact that the applicants have only bid for the radio stations after considering all aspects of business including the nature and profitability of the business venture. Witnesses appearing for the applicants have submitted that private FM applicants do not create music content including local and folk or classical or traditional music and private FM applicants do not employ any artists for creating music content. Attempt of the applicants is to take undue advantage of the statutory provision of section 31 of the

Copyright Act, 1957 to demand low royalty rates from the right owners in face of their not having challenged the bidding process prescribed by the Government having acceded to the licence rates and bidding process. Thus that the applicants carry on the radio broadcasting activities contrary to the terms of the Grant of Permission Agreement (GOPA). Article 11.5 of GOPA clearly states:

> "The permission holder shall be generally guided by the objective of generating local and variegated or heterogeneous content and make available quality programmes with a localized flavour in terms of content and relevant."

29.6 It has been submitted that the radio industry is no longer in "infancy stage" as has been unanimously argued by the applicants and the growth phase of private FM is very much underway. In this regard, reliance has been placed upon pleadings and industry reports filed by the applicants before the Copyright Board, statements made by the President of the Association of Radio Operators in India, investor presentation by ENIL and industry reports such as FICCI, KPMG and articles. ENIL, the only profit making radio broadcaster in private sector in India, is stated to have mentioned in the application for the compulsory licence filed in 2002 that the radio industry would have crossed its infancy gestation period and would have travelled into a more matured established existence in the seventh year of its existence. Report titled SSKI India Research on Entertainment and Media Sector (June 2007) is stated to have reported that the Indian radio has taken eight decades to grow from infancy to adolescence but the irony is that it may not take more than eight years to reach full-blow maturity. Ms Apurva Purohit, the President of the Association of Radio Operators in India (AROI) is stated to have said that FM channels were making rapid strides by having presence in 91 cities as against 30 cities about two years ago and radio had reached 85% of the Indian audience. ENIL is stated to have said to its investors that the radio industry was in the growth phase since the year 2006. Reports of FICCI and FICCI-KPMG filed by the respondent show that the radio industry had grown at an impressive rate and that the same was no more at the infancy stage.

29.7 It has been stated that over exposure by FM radio of sound recordings directly and adversely affects the respondent's members sales of physical formats of sound recordings. Constant and repeated broadcast of contemporary popular bollywood

music by private FM broadcasters is leading to the cannibalization of the traditional forms of music dissemination through physical formats such as cassettes and CDs. Reliance in this regard has been placed upon the findings of the respondent's expert witness, Dr. S.K. Laroiya who has through an econometric analysis examined the causal relationship between sales of music and FM radio. Reliance in this regard has been placed upon the testimony of PW6 appearing for ENIL who stated that sale of physical market was shrinking due to preference of consumption of music on alternative medium and provided example like radio, TV. He further mentioned that piracy continued to be major threat to the industry with pirated music accounting for over 50% of the market. It has been stated that reliance of the applicants upon James Dertouzos regarding market in the United States of America is in the context of that country and cannot be relied upon.

29.8 It has been stated that the music royalty are a small percentage of private FM broadcaster's operating expenses and accordingly the respondent's tariff is reasonable. Reliance was placed upon para 123 of the order dated 19th November, 2002 of this Board (First Licencing Case) where the parties were directed to file the audited accounts alongwith the balance sheets for the years ending 31st March, 2003 and 31st March, 2004 as soon as the relevant accounts for the year 31st March, 2004 were finalized. Directions in this context were approved by the Hon'ble High Court of Bombay in appeal and the Supreme Court. Grievance of the respondent is that the audited accounts have not been filed. An analysis of three applicants, namely, Music Broadcast Pvt. Ltd. (1 of 2002), Entertainment Network India Limited (2of 2002) and Radio Mid-Day (West) Pvt Ltd. (6 of 2002) in matter of royalty payments made by them as a percentage of their expenditure have been given. It indicates an ever increasing trend over years. In 1 of 2002, it is 6.06%, 8.7%, 10% and 9.4% for the years 2005-06, 2006-07, 2007-08 and 2008-09 respectively. In 2 of 2002, it is 3.9%, 3.81%, 5.88% and 7.78% for the corresponding years. In 6 of 2002, it is 4.83%, 3.52%, 4.62% and 6.26% for the corresponding years. It has been stated in conclusion that none of the applicants have claimed that reducing the royalty payable to the respondent to NIL would result in making the operations of the applicants profitable. In view of the same, it is safe to presume that the cause for losses is the business mode of the applicants.

29.9 It has been submitted that all the applicants herein have raised inconsistent and contrary demands for royalty rates without proving any justification whatsoever. It has been submitted that the applicants have fundamental differences of opinion firstly on the model to be applied for determining the rate of royalty whether revenue sharing model or fixed needle hour rate and secondly on the rate of tariff so fixed. Respondent has further submitted that all the applicants in their compulsory license applications have proposed fixation of royalty as per needle hour royalty rates and then subsequently changed their demands to revenue share model. On the other hand, Entertainment Network India Limited (2 of 2002) being one of the largest radio broadcasters in India and reporting profits since the year 2006-2007 has argued and contended that revenue share model is incorrect, the international system is inapplicable in India and importantly has pressed for royalty rates on the basis of needle hour and not revenue share model. It is further submitted that none of the applicants before the Board have provided even an iota of economic or mathematical or logical calculation or comparators to justify the proposed rates. According to the tabular information given by the respondent, finally the rates asked for the applicants are as under:

Music Broadcast Pvt Ltd (1 of 2002) - 0.25% of net advertising revenue
Entertainment Network India Ltd (2 of 2002) -Different nph rates according to the categories of cities
Radio Midday West India Pvt Ltd (6 of 2002) – 1% - 2.5% of net advertising revenue
Puran Multimedia Ltd (3-1, 3-2 and 3-3 of 2008) – 0.4 % to 1% of net advertising revenue
Synergy Media (3-4 of 2008) – 0.4% to 1% of net advertising revenue
Entertainment Network India Ltd (3-5 of 2008) – Evidence affidavit filed in 2 of 2002 relied upon and no further evidence relied upon.
Rajasthan Patrika (3-6 of 2008) – 0.4% to 1% of net advertising revenue

29.10 It has been submitted there is a malafide conduct of the applicants in agreeing to rates by certain copyright owners who are not members of the respondent copyright society. They have not applied for grant of compulsory licence against Yashraj, T-Series and are contented in paying as per rates demanded by these music companies. Any comparison to 4% rate under the Patent Act is baseless and irrelevant.

29.11 It has been submitted that the international rates selectively suggested by the applicants are inapplicable and are irrelevant due to various factors. It has been

further submitted that the applicants have not put any comparators in the proceedings. The international rates cannot be used as comparator for the following reasons:

(a) Admission and statements have been made by the applicants during cross examination that international rates cannot be used as comparators. Prof Bibek Debroy, PW4 in 1 of 2002, in cross examination, has submitted that the range of royalty rates of 0.4% and 5% indicates a wide variance and there is no single accepted royalty rates as conditions would be different from country to country. Shri Prashant Panday, PW5 in 2 of 2002, in cross examination has submitted that while there is less commonality on demographic and economic characteristics in the US and Indian markets, what is common is the way that radio is consumed and the purpose and role that radio plays in the lives of people. In answer to a question as to whether there are other competitors who are similarly paying royalty and yet making operational and/or net profits, Ms Aarti Kathariya, PW7 in 6 of 2002 stated that she was not aware of the amount of royalty paid by other competitors;

(b) Foreign royalty rates are not considered as good comparators for fixation of royalty across the world. Even foreign courts and copyright tribunals while determining tariff or fixing of royalty rates do not consider foreign evidence. The courts have held that international royalty rates cannot be used as comparators since circumstances and the structure and functioning of the sound recording companies and the radio industry in other countries are vastly different. Association of Independent Radio Companies Ltd and Anr v Phonographic Performance Ltd [1994] R.P.C.143 has been cited to support the argument wherein in the context of the case under consideration foreign evidence was rejected observing that circumstances in other countries are vastly different and such a comparison should not be made. In Phonographic Performance Limited v The British Hospitality Association and Other Interested Parties, [2009] EWHC 209 (Ch), the Hon'ble Tribunal quoting an earlier judgment of the tribunal held that "[i]n a few cases, comparators, particularly comparators from overseas, have proved to possess very little probative value whatever." ;

(c) tariff rates charged to radio stations overseas by the overseas copyright societies is irrelevant and inapplicable to India which has completely different parameters such as socio-economic conditions, spending power of the consumer, consumer behavior and attitude to spending, level of piracy, type of music played, maturity of the music industry and the radio industry, etc. The piracy level in India is higher than that of the developed countries. Moreover, the average consumer has a limited spending power and budget towards entertainment and music. It is further submitted that each of the overseas countries have independently arrived at their respective tariff and that there is no uniform global tariff. Hence, any attempt to compare or average the overseas tariff rates/structure is meaningless, baseless, misleading and inappropriate. Radio content in foreign jurisdictions is much different from the content broadcasted by the applicants herein. In the radio broadcasts in foreign countries, music is just one feature and there is heavy reliance on news, interactive chats, celebrity interviews, weather updates, in-studio DJs, etc. to keep the audience tuned in. Music is not the sole source of

entertainment. In India, however, as evident from the admissions made by the applicants, music broadcast amounts to 70% to 80% of the total content. Songs forms the sole source of entertainment for the audience. The radio station of the applicants rely very heavily on the music with only intermittent talks by the RJ. Therefore, since the commercial reliance by the applicants is far greater on the music than the foreign counterparts, tariff rates of the foreign evidence cannot be used as comparators. It is further submitted that the radio stations in the foreign jurisdictions only play 'radio edits' unlike the applicants herein who play the full song, thereby significantly deterring the masses from purchasing music.

29.12 It has been submitted that the details of justification for tariff of Rs. 1500 per needle hour of the recorded music or 20% of the net advertisement revenue, whichever is higher, were given by the respondent in its reply to Case No. 1 of 2002, Case No. 2 of 2002 and Case No. 6 of 2002. It had been argued, leaving aside 25% for sales and marking, out of 75% of remaining revenue, 50% should be assigned for reach for setting of infrastructure and remaining 25% should go to content. Keeping apart 5% out of it for packaging, remaining 20% should go to the basic content. Thus tariff scheme formulated in 1999 was reviewed in 2005. It was found that ever increasing number of radio stations and availability of F.M. broadcast on mobile phone has brought in a paradigm shift in the way the music is consumed. The music companies saw the F.M. broadcast not as a complimentary medium (although it impacts its sale of physical products) but a important medium of consumption of music. Therefore, it expects a reasonable return from this medium by way of royalties from the broadcasters.

29.13 It has been submitted that FM radio broadcast in India has the following unique peculiarities:

(a) full length tracks are broadcasted and not the shortened "radio edits" as in the West;
(b) Music contents in broadcasting are as high as 75-80% of the total broadcast;
(c) entire repertoire of all the members of the respondent is offered as the blanket licence;
(d) only top 200 bollywood and other "hit" songs are repeatedly played leading to over-exposure and consumer satiation;
(e) clips of sound recordings are synchronized, without prior permission, by the FM station to their brand identity.

In view of the above consideration PPL members considered that a 10% increase per annum over the previous tariff was reasonable and necessary to sustain itself in

difficult market situation and thus a tariif scheme of Rs. 2400 per needle hour of recorded music or part thereof or 20% of the net advertising revenue whichever is higher was decided.

29.14 Relying upon the testimony of respondent's expert witness, Prof S.K. Laroiya, it has been submitted that the concept of 'willing buyer willing seller" should be followed. Reference has been made to British Phonographic Industry Ltd. vs Mechanical-Copyright Protection Society Ltd [2008]E.M.L.R.5 where it has been laid down "….it is however common practice to identify an existing tariff as a starting point. If such a licence exists (and particularly, if it is recent) and addresses comparable subject matter – and even better, if it was freely negotiated (rather than being as it were "imposed by the Tribunal), that may be particularly relevant and helpful in determining the right tariff (and other terms) of a licence.". Prevalent rate in this context has been referred to as that of one with Government broadcaster All India Radio entered into on willing buyer – willing seller basis where for FM metros a rate of Rs. 600 pnh and for FM non metros a rate of Rs. 525 pnh had been settled.

29.15 Learned senior counsel for the respondent, while concluding his arguments, on the last date of the arguments submitted the following as the alternative tariff plan:

A. Option for Needle hour rates

The needle hour rates as follows.

			After Bulk Discount for no. of stations of a Broadcaster			
		Below are our Base Rates, before any Discount	Discounted Base Rate (W/O Barter of Free Airtime)			
City class	City Class Rebate given	Base Rate per needle hour (after giving City Rebate)	Upto 10 station	11 to 20 station	20-30 station	30+ stations
A+		2400	2400	1800	1440	1320
A		2400	2400	1800	1440	1320

B	16.67 %	2000	2000	1500	1200	1075
C	40%	1440	1440	1050	850	775
D	50%	1200	1200	900	720	660
		Approx. % of Discount for no. of stations ::	0%	25%	40%	45%

Terms of discount:

- A discount upto 33% on above rates will be offered at the sole discretion of PPL, toward barter of free air-time of upto 5 minutes a day for PPL use, for public service campaigns, anti-piracy campaigns, music promotions or any other use.
- Above percentages City Class-wise Rebates are not absolute. These percentages are valid only where the Base Rate for "A" City Class is licensed at Rs. 2400 per hour.

B. Alternative Option of Revenue Share % (% of Gross Revenue)

Model B though an alternative model is always subject to a floor level of needle hour based revenue, computed at 75% of the royalty calculated on needle hour rate as per above Model A hereinabove, since PPL does not offer pure Revenue Share % option i.e. un-supported by minimum or floor level value. PPL offers uniform Rev. Share % for all Cities across Classes; differential rates for different City Class not offered.

The revenue share % (% of gross revenue) rates are as follows:

% usage PPL content (to total music airtime)	W/O Free Air-time barter	With Free Air-time barter & Infancy Discount	Free Airtime to PPL Mins per day
90% +	20%	15.5%	10 min
80-90%	18%	13.5%	9 min
70-80%	15.5%	11.5%	8 min
60-70%	13%	9.75%	7 min
50-60%	11%	8.25%	6 min
40-50%	9%	6.67%	5 min
30-40%	7.5%	5.5%	4 min
20-30%	6%	4.4%	3 min
20 – 30%	4.5%	3.3%	2 min
Less than 10%	3%	2.2%	1 min

.

Broadcaster has the option to choose Needle hour model for a City class; and Rev. Share model for another City Class.

C. Terms and Conditions:

Common Terms and conditions which are applicable to BOTH the aforesaid models:

a. Penal rate for rotation of a song more than 5 times a day
b. Penal rate for not playing radio edits in the 1st month of release
c. Annual increase of 6-8% p.a. for inflation and cost increases
d. Air-time barter is at the exclusive option of PPL
   Giving of rebates and discounts is only for "voluntary licenses";
   And re not offered for non-voluntary or litigation-based licenses.

e. Rs. 10-20 lacs Refundable interest-free security deposit per station

   License suspended in case of delay in logs; or Penalty
f. 2% p.m. interest for delayed payment.

30. All the nine cases relate to granting of compulsory licences under section 31(1)(b) of the Copyright Act, 1957 to communicate the work of sound recordings to the public by broadcast. Cases 1 of 2002, 2 of 2002 and 6 of 2002 were earlier decided by this Board on 19.11.2002 and after appeal to the Hon'ble Bombay High Court and ultimately to the Hon'ble Supreme Court were remanded back to the Copyright Board for fresh hearing. Rest of the six cases were filed in 2008. Since all the cases relate to common issues and in all nine cases respondent is the same, those were heard collectively. Section 31(1)(b) provides as under:-

> "31. **Compulsory licence in works withheld from public.** (1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work-
> (a)xxxxxxx
> (b) has refused to allow communication to the public by broadcast, of such work or in the case of a sound recording the work recorded in such sound recording, on terms which the complainant considers reasonable,
> the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyrights to grant to the complainant a licence to re-publish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the

> owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of Copyright Board, on payment of such fee as may be prescribed.
> Explanation.-xxxxxxx".

It shall be necessary to delineate the constitutional backdrop under which the above provisions under the Copyright Act, 1957 operate. Relevant activity is "communication to the public by broadcast". It is well settled in law now beginning with Romesh Thappar vs State of Madras, AIR1950SC124 and Virendra vs State of Punjab, AIR1957SC896 that communication through any media, may be, electronic, print or whatsoever else has its constitutional protection under article 19(1)(a) of the Constitution. Broadcasting through radio is well settled mode of media transmission. Activity of communication in the present context relates to "public" as the subject which includes citizens – an essential element for the availability of constitutional protection of fundamental rights under article 19. It is again well settled that it may happen that while a statute infringes the fundamental rights of a company, it indirectly affects the interest of its shareholders; in such a case the shareholders also can impugn the constitutionality of the statute (Charanjit Lal Chowdhuri v Union of India 1950SCR869; Cooper R.C. v Union of India AIR1970SC564). In the instant case, the ultimate beneficiary of the broadcasting through radio are the citizens and thus a corporation, though not a citizen for the purposes of article 19(1)(a), can legitimately seek for a compulsory licence with the ultimate purpose of effective delivery of right of speech and expression for the citizens. The Board is obligated to view the proposition from that perspective also.

30.1 Radio since its start in pre-independence era had been in state sector till 1995 when process of privatization in a small way started when certain time slots in AIR were given to some private channel. In the year 1999, Government of India in the Ministry of Information and Broadcasting launched the First Phase of private sector involvement in FM radio broadcasting with the following objectives:

(a) to open up FM broadcasting for entertainment, education and information dissemination by commercial broadcasters;
(b) to make available quality programmes with a localized flavour in terms of content and relevance; to encourage new talent and generate employment opportunities directly and indirectly; and

(c) to supplement the services of AIR and promote rapid expansion of the broadcast network in the country for the benefit of the Indian populace.

30.2 During the Ninth Five Year Plan, the Government of India adopted a policy for improving variety of content and quality of radio broadcasting. This heralded a technological shift from medium wave (MW) to Frequency Modulation (FM) radio broadcasting. The thrust areas for radio broadcasting were on improvement of programme content; providing wider choice of programmes; improving broadcast quality and enhancing technical features. In March 2000, the Government invited private sector into FM radio broadcasting by opening up the frequencies in the FM band (87.5-108 MHz). As part of Phase I of the policy on expansion of FM radio broadcasting services through private agencies, FM spectrum was made available to private broadcasters. Unlike earlier, when private broadcasters shared time slots on AIR's frequency, this time around, they were given their own frequencies to launch their channels. Frequencies were made available in 40 cities in India. A total of 108 frequencies were made available in these 40 cities. The larger towns had as many as 8 or 9 frequencies while many of the smaller stations had just 1 or 2. Since the demand for frequencies was higher than the number of frequencies available, the Government put a bidding process in place. As part of this process, interested parties were made to bid in a multi-step bidding process. The bid was for the "first year license fee". The bid started at the "reserve" price and the bid price was increased in fixed steps and at each step, interested parties were asked to bid. The bid price was increased in steps till the point when there were just as many interested bidders left as there were frequencies in that city on offer. At this point, the bidding was stopped and all successful bidders were allotted the frequencies. Unfortunately, as was only later realized, there was a flaw in the bidding process. Successful bidders had little to lose if they withdrew after winning a bid. They had paid only half the reserve price for the frequency before being allowed to bid and that was all that they lost if they withdrew. Serious players were left behind high and dry in as much as had the un-interested parties not bid at all, the successful bidding price would have been much lower. As a result of this flaw in the bidding process, the successful bidding price that was reached was unviable for the industry. In contrast, the revenue potential was much smaller. As a result

of this imbalance between costs and revenues, the radio business in India was in complete disarray with radio operators across India suffering huge losses. The licensing policy during Phase I was so designed that it was virtually impossible for the broadcasters to make any profit. The biggest drawback being the high annual license fee which was "fixed" i.e. not dependent on the revenue earned by the broadcaster. To add to this the same was to escalate by 15% every year. This rendered the radio business unviable from the very start. Thus only about 20% of the successful bidders could become operational.

30.3 Government accepted FM broadcasting as the preferred mode of radio transmission due to its high quality stereophonic sound. Therefore, the emphasis in the Tenth Five Year Plan was on substantially enhancing FM coverage from 30 per cent of the population to cover 60 per cent of the population. The following are the major thrust areas of the Tenth Five Year Plan:

a) Expanding the reach of FM radio to cover 60 per cent of the population by the end of Tenth Plan. Private operators to be encouraged to provide FM radio services in metros and small cities;

b) Encouraging private participation in providing quality services and replacing the existing system of bidding for licenses with a revenue sharing mechanism;

c) Automating all FM transmitters and all MW transmitters of 20 kilowatt (KW) and below capacity;

d) Strengthening and expanding the reach of radio in the northeastern states (including Sikkim) and island territories;

e) Use FM radio to spread literacy, because of better transmission and reception.

30.4 In July, 2003, the Government appointed a Radio Broadcast Policy Committee under the Chairmanship of Dr. Amit Mitra, Secretary General, Fedaration of Indian Chambers of Commerce and Industry (FICCI) to analyse the outcome of the Phase-I of FM Radio broadcasting and to provide recommendations on the second phase of Private FM Broadcast liberalization. The committee after delving through the lessons from the first phase and the relevant experience from the Telecom Sector as well as global experiences made a series of recommendations. These were primarily related to:

a) Entry and Exit mechanism.
b) License Fees structure
c) Enhancing the scope of services
d) Improving roll out and
e) Migration of existing licensees to Phase-II

30.5 In February 2004, TRAI was asked by Ministry of Information and Broadcasting to give guidelines for private FM Radio licensing permission under Phase II. Subsequently, TRAI submitted its recommendations on 11th August 2004 titled as "Licensing Issues relating to 2nd Phase of Private FM Radio Broadcasting. Based on the TRAI recommendations, Radio Broadcast Policy Committee report, experiences of Phase I and wide range consultations, the Government introduced Phase II for FM Radio broadcasting scheme vide its policy notification dated 13th July, 2005. Consequently 337 channels were put on bid encompassing 91 cities. Out of these 337 channels, 284 were successfully bid and after scrutiny, permission was granted for operationalisiation of 245 channels spanning 87 cities. Permission of one operator was cancelled subsequently. The highlights of Phase-II were:

(a)All the cities having population equal to or more than 3 lakhs were considered;
(b)Two stage selection process was adopted. First eligibility of bidders was determined and subsequently financial bids were called from eligible bidders. Reserve One Time Entry Fee (OTEF) was fixed at 25% of the highest bidding price in the city;
(c)The permission holder was liable to pay an Annual Fee to the Government of India charged @ 4% of the Gross Revenue for each year or 10% of the Reserve one time entry fee(OTEF), whichever is higher;
(d)The validity period of license was 10 years;
(e)The permission was for free to air broadcasts of audio on main carrier and data on sub-carriers, both excluding news and current affairs;
(f)The permission is non-transferable. The permission holder not granted a sub-permission.

As the cities covered in Phase II were having population above three lakhs, the need is being felt to cover the cities with lesser population considering popularity of FM Radio broadcasting. Therefore, there is a considerable scope for expansion of FM Broadcasting in smaller cities as well.

30.6 Highlight of the Working Group Report of the Eleventh Five Year Plan (2007-12) on Information and Broadcasting Sector are as follows:

(a) FM coverage remains at a level of 40% by population as against the 10th Plan target of 60%

(b)FM coverage should be enhanced from 40% to 75% by using Digital radio mondiale (DRM+) compatible transmitters

(c)Estimated 600 private FM Stations to come up in the 11th Plan (including Phase-I & II)

30.7 In July 2005, Government launched Phase II of the policy on expansion of FM radio broadcasting services through private agencies with a view to give FM radio business a boost. The major relief provided in Phase II was the change in the license fee structure from the fixed license fee to revenue sharing model. The existing players were also given an option to migrate to the revenue sharing model. The annual license fee payable to the government was converted from an onerous fixed fee to 4% of gross revenues. A new bidding process was put into place. As a way to select successful bidders, Government used the telecom model and started the concept of "One Time Entry Fee" (OTEF). The bidding process itself was modified to a single step closed tender process wherein the bidders had to bid for the OTEF for each city and those who made the highest offers got the license (subject to some conditions). The license was for a period of 10 years. In accounting terms, the OTEF was taken into the balance sheet as an intangible asset and 10% of it was amortized every year and taken to the Profit and Loss Account. In order to avoid the problems of "withdrawal" post bidding, Government enforced strict payment terms wherein 50% of the OTEF bid was to be paid along with the bid. A Bank Guarantee (BG) for the remaining 50% of the bid was also to be submitted with the bid. After winning, the 50% balance was to be paid in cash. The Bank Guarantee would remain alive till the balance cash payment was made. As a result of this, speculative bidding was eliminated and reasonably fair results were obtained. Phase II covered as many as 90 cities. There were a total of 338 frequencies offered for bidding in 90 cities. Since there were certain other bidding rules, all frequencies were not eventually taken up, but as many as 280 frequencies in about 80 towns were taken by private broadcasters. By launching Phase II of radio reforms, the Government recognized that radio business had indeed become un-viable and did its bit at reducing the burden of the license fee. As part of Phase II, Government also set up the broadcasting infrastructure.

It used the existing Prasar Bharati towers to host private broadcasters who paid rent to Prasar Bharati for the same. Equipment was shared amongst broadcasters and the set-up was called Common Transmission Infrastructure (CTI). Government also allowed cost cutting through provisions of networking (for smaller cities) and other similar steps.

30.8 Information in the preceding paragraphs relating to the development of FM industry culled out and collated from the submissions made in the pleadings and written arguments made on both sides and from other sources and the policy perspective of the Government at different stages gleaned through this development leads us to a conclusion without any iota of doubt that the Government all through had been normally pursuing the growth and development of FM radio broadcasting in private sector as a vehicle of societal development which was hitherto pursued only in the State sector. FM radio broadcasters, though organized as business enterprises, thus now owe a social obligation towards nation building.

30.9 Government has prepared a blue print for launching of Phase III which will see radio expanding into the remotest corners of the country. Industry has expressed skepticism about the expansion in Phase III because of the high level of royalty rates prevalent currently under the First Licence Regime.

30.10 Article 11.5 of Grant of Permission Agreement (GOPA) provides as under:

> "The permission holder shall be generally guided by the objective of generating local and variegated or heterogeneous content and make available quality programmes with a localized flavour in terms of content and relevance.".

30.11 Respondent's plea that it is entitled for a reasonable tariff cannot be lost sight of. But the question is that what is reasonable in the given context. Analogy given of rule 11D of the Copyright Rules, 1958 in the matter is inapposite. The said rule is about fixation of royalties in relation to publications including foreign publications. Trade of publications and for that matter issues relating to determination of royalties therefor has a developmental background of centuries in India since book publications started as the first subject matter of copyright in this country. Thus it has umpteen number of precedents – both judicially determined or otherwise – to help issues relating thereto. Compulsory licencing in the area of broadcasting of sound recordings is of

recent origin. First Licencing Case decided on 19.11.2002 by the Copyright Board is palpably the first judicial determination in this area. The same also as yet remains to be inconclusive. Of course, there had been a few voluntary licences which too are of recent origin. More important being one with state sector All India Radio. There are a few entered into in the post First Licencing scenario which bear the shadow of norms settled in that case which norms yet do not bear the stamp of judicial acceptability. The decision in that case has been set aside for fresh determination. Of course the inputs made through the voluntary determination hitherto in India will be valuable for determination in the present matter. However, the window in relation to practices being followed elsewhere in the world is not to be shut down.

30.12 Besides the observations of the Telecom Regulatory Authority of India regarding the 3rd Phase of private radio broadcasting in the context that FM radio broadcasting is a content oriented sector and content generation involves significant cost, there are too many findings and observations of the Government including Planning Commission and other related institutions to the effect that FM broadcast is a vehicle of social upliftment and education. Its reach has to be to the hitherto neglected areas like places in North East (including Sikkim) and island territories of India, namely, Andaman and Nicobar and Lakshdweep. It is again true that in the successive Government licencing policies, FM broadcasters in private sector are disentitled to variety of income beneficial broadcasts which are permissible to the state sector broadcaster, that is, All India Radio.

30.13 Any comparison of cost incurred towards the contents with a TV broadcaster like Zee TV, as done by the respondent, is inept for the reason that the situations in matter of both income and expenditure are different with TV broadcasters as compared to a FM radio broadcaster that too in private sector. TV broadcasting is generally not free to air. Viewers pay to the Cable operator or a Dish operating company who in turn pays to the TV broadcaster. Under the present licencing policy, TV broadcasters have a far greater liberty in matter of broadcasting. FM radio broadcasting in private sector is very restrictive in matter of programme broadcasts and the listener is not saddled with any cost except the cost to be incurred for buying a radio set.

30.14 Anology of mobile radio, non-interactive streaming on internet broadband, IVR/music dedication and DTH music subscribers given by the respondent is misplaced and rather works against it. In those cases also the fee charged is in turn passed on to the consumers. FM radio broadcast product consumers have not to pay any thing and thus nothing from that end is available to the broadcaster to pass in turn to the music provider. Voluntary agreement entered into with All India Radio long back does not make an appropriate precedent for the following reasons:

> (a) AIR is having big network of broadcasting set up through out India and thus huge listenership resulting into major share of advertisement income out of the whole industry;
> (b) Its broadcasts are not subject to restrictions imposed upon the private FM broadcasters resulting into more advertisement revenue to it;
> (c) Agreement with AIR was entered into when the present scale expansion of FM channels had not taken place;
> (d) With far bigger number of channels tied up with the music provider with licences, whether voluntary or compulsory, for the same product, it increases to the revenue of the music provider in that multiple as the number of agreements are with no added burden upon the music provider since the product to be provided is unlike commodities where that many fold of products are needed to meet the supply.

Respondent's lamenting about certain high cost acquisitions recently made by its members does not hold water for the reason that those are small accretions to millions of the old kitty with these members many of which may be 50 years old. All combined together are being sold or passed on at the same rate. Regular programmes on daily basis dedicated to old, even more than 50 years old, upon FM, MW and SW channels enjoy great popularity with the listeners on Hindi Service of Radio Srilanka (Radio Ceylon), Vividh Bharti, Urdu Service of AIR (all MW and SW Channels). Similar is the position with the new emerging FM stations. More than 50 year old songs find a prominent place with TV broadcasters also, in as much as, that English news channels like CNN-IBN and TIMES NOW now dedicate Saturday and Sunday evenings, instead for news and news analysis, to old Hindi songs. Even otherwise, product sellers cannot for all times to come thrive upon the old products. Acquisition of new products on an on going basis is the basic element of any business. Licence fee charged by the Government, whether under the First Licencing Policy or the Second Licencing Policy, is in the nature of a

State levy charged by the sovereign to go to the common pool of the Central Government under the Consolidated Fund of India to be expropriated for the purposes decided by the Government. Hence no analogy therefrom can be drawn. However, it is important to note here that having noticed that the levy charged under the First Licencing Policy did not fit well towards the achievement of socio-cultural developmental objectives, the Government has moved to revenue sharing mode under the Second Licencing Policy.

30.15 It has been contended by the respondent that FM radio broadcasting is purely a commercial profit driven venture and no public interest is being served since the applicants have submitted that private FM applicants do not create music content including local and folk or classical or traditional music and private FM applicants do not employ any artists for creating music content. Again, it has been contended that the applicants carry on the radio broadcasting activities contrary to the terms of the Grant of Permission Agreement (GOPA). Article 11.5 of GOPA clearly states:

> "The permission holder shall be generally guided by the objective of generating local and variegated or heterogeneous content and make available quality programmes with a localized flavour in terms of content and relevant."

It may be possible that the applicants may be violating the terms of agreement of licence entered into by them with the Government. But, for that default, they are liable for an action to be taken by the Government. Respondent has the liberty to take up the matter with the concerned department in the Government for necessary action. Licencee is still legally obligated to perform the obligations created under the terms of the agreement over which the umbrella of policy enunciations made by the Government from time to time have overseeing effect. Licencees, inspite of any violations, if there be any, are under obligation to make available quality programmes with a localized flavour in terms of content and relevance. It is true that FM radio broadcasting, while many social responsibilities having been cast upon it, is nonetheless a profit driven commercial venture.

30.16 Dialect of "infancy stage" or "growth phase being under way", as put by the respondent, loses its shine in face of the situation that the entire industry in private sector is in losses excepting one old unit which has registered profits only during the preceding two years. Some units who went in appeal to the Hon'ble Supreme Court

against the decision of this Board in the First Licencing Case are nowhere in the present matter since they in the meantime have gone out of business because of financial losses. These facts have been well recognized in the licencing policy of the Government and accordingly amends have been made in the revised licencing policy over the 1st licencing policy.

30.17 Reduction in sale of music in physical format like CDs and cassettes has been said to be as a consequence of expanding FM radio broadcasting. But it has nowhere been mentioned that the ever growing digital gadgets like IPods, mobile phones, TVs are responsible for it and how much of displacement has been caused by those gadgets. It has been acknowledged piracy of sound recordings continues to be of the level of 50%. Findings of the expert witnesses, Prof Loraiya restrict itself to the co-relationship of sales of music and FM radio stations in the context of physical format and nowhere tries to locate the diversion of sales to other form of new technology driven gadgets.

30.18 Respondent noticed an ever increasing trend in royalty payments made by the applicants as a percentage of their expenditure in 1 of 2002, 2 of 2002 and 6 of 2002 for four years beginning with 2005-06 and, in cross examination, asked the witnesses of these applicants and it was replied by none of them that reducing the royalty payable to the respondent to NIL would result in making the operations of the applicants profitable. Respondent has drawn a presumption that the cause for losses is the business mode of the applicants in all the cases. It is too simplistic inference that all these three complaints whose matters have been remanded back, other 6 fresh complaints in the instant case, some other who were party in the First Licencing Case and were the appeallant before the Hon'ble Supreme and ultimately have abandoned having gone out of business and many others who are not here on record, are all suffering business losses because of bad business mode.

30.19 Objection has been raised by the respondent that the complainants having in their complaints asked for nph mode cannot be seen asking for royalty sharing mode. Complainants, in arguments, have relied upon the concluding part of their complaints whereby "any other manner or relief as deemed appropriate" has been asked for and thus now there is nothing wrong in their asking for the royalty sharing mode in arguments.

Further, it is settled that the proceeding of the present nature before the Board are inquisitorial and not adjudicatory. With a view to arrive at a logical scheme of tariff determination and implementation thereof, the Board may by itself, after hearing the parties and without there being any prayer from the parties in a particular context, formulate the scheme. Range of revenue sharing as royalty payment asked for is 0.25% to 2% by 7 out of 9 complainants. In two of the complaints by ENIL, nph rates at different slabs have been asked for. No malafide can be imputed, as alleged, against a complainant seeking compulsory licence against the respondent only while not seeking similar remedy against other music providers.

30.20 It has been argued that foreign royalty rates suggested are irrelevant for the reason that the range told to be prevalent by the expert witness of 1 of 2002, Prof Bibek Debroy is too wide, being 0.4% to 5%. Thus there is no single accepted rate as the conditions vary from country to country. Secondly, in certain cases, the Tribunals have held that taking in consideration a particular context of the matter the precedent of a particular rate cited cannot be accepted. Thirdly, ground conditions in other countries are entirely different from India. It is true that the rates available somewhere else are not to be followed blindly. But there cannot be a case to suggest that we need not look into those at all.

30.21 "Willing buyer:Willing seller" concept explained by Prof Loraiya, expert witness for the respondent, for its working, needs certain objective conditions relevant specific to a particular commodity market. Firstly, it needs a long established market where there are enough precedents available to choose one from or to determine the rate based upon earlier settlements. There are not enough of these in the Indian situation. Two – three examples being cited are of recent origin. One relating to AIR being trotted is totally irrelevant to the given situation for the reasons earlier mentioned. Another couple of agreements entered in upon voluntary basis were entered in post First Licence decision scenario and bear its shadow. Decision in that matter has been set aside by the Hon'ble Supreme Court and cannot form a material of persuasion to any or some extent.

30.22 Submission of an alternative plan of tariffs by the respondent on the last date of arguments, notwithstanding doubts about its permissibility in terms of the order of Hon'ble High Court of Delhi dated 4th August, 2009, was opposed by the counsel for the

complainants for the reason that they did not have any advance information of the same and, as such, they were not in a position to react thereto. However, in view of the mandate for the Board being of an investigatory body, we will not shut the window to any thing coming even so belatedly though being conscious of the fact that it prejudices the right of parties on the other side. Proposed plan of alternative rates under nph mode and revenue sharing mode, in both regards, hits at the basic philosophy of the Governmental plans of infrastructure development in the matter. Undercurrent running through all the successive plans and reports of various Government committees is to reach the remote corners of the country through FM radio technology for the socio-cultural and educational development of these areas. Areas of North-East including Sikkim and island territories of Andaman and Nicobar and Lakshdweep are of high priority and have been specifically mentioned in these reports. Provisions of Sixth Schedule of the Constitution extend to the States in North-East. Special provisions have been made under that Schedule for the administration of the areas in these States in view of their socio-economic backwardness and distinctive feature of their socio-cultural life. Similarly, Fifth Schedule of the Constitution makes provisions for the Scheduled Areas to be notified for the purpose. These can be specific areas, other than areas in the North Eastern States, say in the States of Gujrat, Mahrashtra, Madhya Pardesh, Andhra Pradesh, Chhatisgarh, Jharkhand, Bihar, Orrisa etc. Vast parts of this central heartland of India and other parts of India inhabitating tribal societies are rich, besides being so in mineral wealth and bio diversity, in traditional knowledge in the area of art, folk songs and ballads. Inhabitants of these areas have their distinct culture and language. Government is in the state of activity to identify the elements of these facets of traditional knowledge with a view to have *sui generis* legislation to provide the benefit of intellectual property inherent therein to the collective tribal societies. Enactment of the Geographical Indications of Goods (Registration and Protection) Act, 1999, though not a piece of exact precedent herefor, is a small step in that direction. National Commission to Review the Working of the Constitution (2002), being cognizant of socio-cultural-economic-linguistic development of these areas, in para 10.7.4 of its report, recommended that all areas governed by the Fifth Schedule of the Constitution should be forthwith transferred to the Sixth Schedule with a view to extend the applicability of the higher level of

benefits of Sixth Schedule to the tribal societies of these areas. Prototype of the scheme put forth by the respondent, both in relations to nph mode and revenue sharing mode, makes the implementation of FM radio policy of the Government of India irrelevant in its beaconing of socio-cultural-economic-linguistic development of backward tribal areas in different parts of India. It is riddled with a proposition that a whole sale buyer is at a premium in the business and one who seeks for one or two units of stations and that too in the backward tribal areas shall be saddled with rates which are in effect higher than to those charged from the whole sale buyer. One who has big business of 30 or more FM radio stations gets a discount of 45% across the board over all the radio stations he operates. It militates against the objectives of the Government policy in having penetration into the backward areas where a small entrepreneur only can venture for it. Revenue sharing model offered by the respondent, besides being unrealistically high in percentages, is too weird in its layout. It is riddled with the conditionality of a minimum floor hour level of needle hour based revenue. Various instrumentalities of the State, both legislative and executive, have been actuated in the direction of giving preferential and protective reach to the vunerable sections of the society. The proposed alternative plan runs contrary thereto.

30.23 Keeping in view the policy framework enunciated through various policy papers brought out by the Government and the terms of the licence agreement entered into by the complainants with the Government mentioned hereinbefore, the fact which cannot be lost sight of is that the element of infrastructure development aimed at creating a network for preserving pluralistic socio-cultural matrix of the country is the core of the undercurrent philosophy of FM broadcasting in private sector. Content of FM radio broadcasts for that matter is very important in that direction. Sum totality of which is music to be broadcast keeping in view the exceptions carved out under the Government policy. Music is primarily to be bought from various music providers of which PPL is very prominent one. PPL and other music providers, while not losing sight of the limitations and policy frame work settled for the FM broadcasters, must have a reasonable cost of their products. Out of the two alternative modes of policy framework of tariff, that is, nph and revenue sharing, the former is riddled with its own complexities of operational nature in a heterogeneous society like India. Howsoever detailed

classifications of areas for the purpose of tariff therein is attempted, its reach and effectiveness gets stultified - more particularly in relation to vulnerable segments of society. Number of instances cited during arguments where cities in the higher category as per the classification under the First and Second Phases of Government Licencing Policy had lower revenue earning than those under the lower category under that policy. However, the reach of prospective policy has to be much beyond than what could have been identified under the First and Second Phases of Licencing Policy. It has to go to the small cluster of tribal areas with local content and some element of what is traditionally known as pure Hindustani and Karnatak music including music from bollywood.

30.24 "Needle per hour", as a concept, looks at the music as a bare deal in the nature of selling of goods by the licensor to the licencee. For licensor, the seller, goods have a unit price tag and he must get that and nothing less. It is oblivious of the fact that there are others also in the operation, namely, the advertiser and the listener. Listener is most important in the chain – both from the perspective of the Government policy and otherwise. Capacity of the licencee to pay to the licensor is dependent upon his advertisement revenue and the advertisement revenue has direct linkage to both the quantitative and qualitative aspect of the listeners. More listeners means more revenue. Not only that in a situation where the segment of listeners, even if greater in number, belongs to poorer classes of the society and are not buyers of the goods normally advertised for, it shall result into lesser advertisement revenue. In the given situation, where the FM broadcasting, though in private sector, is more a vehicle of governmental plan for socio-economic upliftment, the music providers should be satisfied with a revenue sharing plan allocating a fixed percentage of net advertisement revenue to be allocated to the various music providers in the proportion of their music used. If looked into as a package deal, it works to the advantage of the music providers. It shall prompt new breed of broadcasters to come into the field and have FM radio broadcasting in remotest corners of the country. Since PPL and other music providers supply the music to all the broadcasters throughout India, the aggregate revenue earning will be much more than they expect from a small number of broadcasters under nph mode. Music selling is unlike selling goods or commodities where you have to provide the end product in physical form and accordingly spend therefor in multiples of that unit numbers sold.

Here the core product remains the same entailing spending only once. If one increases the number of use by greater number of FM broadcasters, revenue earned will be much higher with no extra cost than what it is under the present high rate nph agreements having a limited number of FM broadcasters.

30.25 FICCI in its recommendations has suggested for a revenue sharing model and a single source of licencing as is available in certain other countries. However, setting up of a single source for licencing is not possible in the present legal scenario. Alternatively, the same can be achieved by pooling all the compulsory licence seekers against a single licensor under a common mode of revenue sharing. The core of revenue sharing mode, as it looks on the surface of it, is that different persons pay different price for the same product. But in reality it is not that. Product price linkage with the advertisement revenue has ultimate linkage with the volume of listeners. More listeners leads to more advertisement revenue which in turn leads to more price as a percentage to be paid to the licensor. In true sense, the licensor is getting the price from the licencees based upon the number of listerners served. Had under some mechanism licensor been directly charging the listerners for the unit broadcast, he would have been in the same position as is under the common pool of revenue sharing. All complainants, except ENIL, have sought for revenue sharing mode. Respondent through his earlier price notification of 20% of revenue sharing and the latest submitted on the last date of hearing is agreeable for a revenue sharing mode. As explained earlier, a revenue sharing mechanism as a compulsory licence against a common licensor, by virtue of its inherent in built limitations, has to be a combined exercise where all compulsory licence seekers are to be combined together in the licence formulation. However, individual complainants, if they so choose, are at liberty not to seek compulsory licence and rather go in for a voluntary licence with the licensor. In view of that, request of ENIL for nph mode cannot be acceded to.

30.26 In matter of determining the specific rate as percentage of revenue, we have been persuaded by various factors. Capacity of the licencees to pay and the financial health of the prospective licensors are at the first instance most important factors to be kept in view. It is true that FM radio industry is in a very bad state of financial health. Except one unit, that is, ENIL which has screeched through from a loss making unit to a profit

making unit over last two financial years, rest are all loss making all through since their beginning and many are on the road to go, or have gone, out of business. Their survival and growth is very much essential for nation building as the Government policy expects them to handle a priority area, that is, spreading literacy. Music providers, including the respondent herein, are in a very good financial state enjoying a robust compound annual growth rate (CAGR). Future prospects of the music providers are very much assuring as evidenced from inputs brought before the Board from various sources, more so, because of their increasing sales of advanced technology driven gadgets. We cannot lose sight of a news reported in the Hindu dated 19th August, 2010 from the sources of a global consultancy firm PricewaterhouseCoopers to the effect that "….mobile subscriber base in India would cross the 100 crore mark by 2014 while there will be over 10 crores 3G broadband subscribers by 2015….Indian telecom market has been growing at a compound annual growth rate of approximately 30 pr cent since 1995 and growing strong.". Music providers are one of the great beneficiaries of this economic development. FM radio industry, being in bad state of health, cannot be allowed to die in harness. It has been saddled with a welfare programme of the Government – spreading literacy and other social activist roles for the vulnerable segments of the society. Had it been a free lancer at the policy plank of the Government, it would have looked for newer vistas for increasing its revenue. Furthermore, we cannot also lose sight of revenue as a percentage being given in other jurisdictions throughout the world in both developed and developing societies. In view of that we are suggesting a very modest rate of 2% across the board over the net advertisement revenue. Linkage with advertisement revenue is easy to administer and has been preferred in other jurisdictions. Though Government under second phase of licensing policy has gone for a percentage of gross revenue, we have preferred linkage with advertisement revenue over gross revenue as it is truly reflective of response of the listeners. Again, if there be any other sources of the broadcaster, those will not be included and only the revenues arising out of advertisements will be taken for the purpose. We have preferred net revenue over gross revenue as it is truly reflective of the net receipt in the kitty of the broadcaster.

30.27 Accordingly, in exercise of powers conferred under section 31(1)(b) of the Copyright Act, 1957, the Copyright Board hereby directs the Registrar of Copyrights to

grant to the complainants separate licences 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 licence 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 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 licence 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 has been used for the month. However, payment for the period beginning with the grant of licence 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 licence 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 licence;

(h) The validity of the licence granted by the Registrar of Copyright shall come to end on 30th September, 2020.

Dr. Raghbir Singh

New Delhi, 25th August, 2010.

Sh. Satish Chandra,

New Delhi, 25th August, 2010.

Sh. Rajendra Kumar Mishra

New Delhi, 25th August, 2010.