COMPETITION COMMISSION OF INDIA
Case No. 40 of 2011

In Re:

M/s HT Media Limited **Informant**

And

M/s Super Cassettes Industries Limited **Opposite Party**

CORAM

Mr. Ashok Chawla
Chairperson

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Appearances: Ms. Pallavi S. Shroff and Mr. Naval Chopra, advocates for the informant.

Mr. Amit Sibal and Mr. Anand S. Pathak, advocates for the opposite party.

Order under Section 27 of the Competition Act, 2002

The present information has been filed by M/s HT Media Limited ('the informant') under section 19(1) (a) of the Competition Act, 2002 ('the Act') against M/s Super Cassettes Industries Limited ('the opposite party') alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act.

Facts

2. Factual matrix, as unfolded in the information, may be briefly noted.

3. The informant claims to be one of the leading media companies in India. As per the informant, apart from being engaged in the business of print media under the aegis of 'Hindustan Times', it has diversified its ambit into electronic media and has launched an FM radio channel called Fever 104, which is currently operational in Delhi, Mumbai, Kolkata and Bengaluru. It is stated that Fever 104 largely plays Bollywood film music and since its coming into operation in Delhi (October 2006), Mumbai (January 2007) and Kolkata (January 2008), it has developed a strong listenership in these metros.

4. It is averred that the opposite party, known under the brand name of T-Series, was founded by the late Shri Gulshan Kumar and is engaged in manufacture, production and publication of music and videos in India and internationally and also offers its repertoire of music to television stations, radio stations and mobile companies for use and broadcast.

5. The informant has alleged that the opposite party, which is the largest private publisher of Indian music and owns/ controls over 70% of the latest Bollywood music, is abusing its dominant position in contravention of the provisions of section 4 of the Act by (i) charging excessive amount as license fees/ royalty from the informant for grant of rights for the broadcast of the opposite party's music content on Fever 104 radio station; (ii) imposing minimum commitment charges ('MCC') to be paid to the opposite party per month irrespective of actual needle hour (each aggregate of sixty minutes of actual broadcast of sound recordings by FM radio station excluding commercials, advertisements, voice over, anchor time *etc*.) of broadcast of the opposite party's music content by the informant and (iii) making conclusion of licensing arrangements with the opposite party subject to the acceptance of license fees and MCC imposed by them. The informant has further alleged that such imposition of exorbitant license fees and MCC by the opposite party is an unfair condition imposed by it for granting license to broadcast its music

content on radio under the Act which limits and restricts the right of the informant to broadcast its music content of other music companies/ composers thereby limiting the choice of music for the end consumers to only the opposite party's music content and results in denial of market access for other music companies (publishers, copyright societies *etc.*) with less market share and bargaining power.

6. The informant has also alleged that the opposite party is infringing section 3 of the Act by requiring radio stations including Fever 104 to enter into a license agreement to broadcast its music content, the terms whereof are anti-competitive. As per the informant, the said agreement permits the licensee to broadcast music subject to acceptance of onerous conditions such as MCC obligations, which has the effect of restricting around 30-40% of the radio stations' broadcast to the opposite party's music content. Such conditions imposed by the opposite party have resulted in depriving consumers of their right to listen to their choice of music and also distort competition in favour of the opposite party as the conditions imposed force FM radio stations to predominantly broadcast the opposite party's music content thereby causing an appreciable adverse effect on competition in the relevant market in India.

7. The informant has further detailed the allegations against the opposite party which are summarized in the succeeding paras.

License Fee

8. The informant has stated that it was granted permission, through a bidding process, by the Government of India to set up and operate FM radio stations in four metro cities, and pursuant to grant of permission, the Government entered into a Grant of Permission Agreement ('GOPA') with the

informant. Accordingly, the informant entered into license agreements with copyright societies such as Phonographic Performance Limited ('PPL'), Indian Performing Right Society Limited ('IPRS') as well as music companies such as the opposite party, Reliance Big Music, Yash Raj Music *etc*., to acquire rights to broadcast their music on its FM stations.

9. The informant has averred that under the terms of such agreements, the license was based on the license fees as determined by the Copyright Board in its order dated 19.11.2002 in the case of *Music Broadcast Pvt Ltd.* v. *Phonographic Performance Limited* ('First Order of the Copyright Board'), under which compulsory licenses were granted and royalty was fixed at an average rate of INR 660 per needle hour. This First Order of the Copyright Board was challenged before the Bombay High Court by PPL citing the royalty rates as excessive, wherein the Bombay High Court had remanded the matter back to the Copyright Board for fresh fixation of rates. Aggrieved by the said order, the radio stations and PPL filed special leave petitions before the Supreme Court of India.

10. The informant has further alleged that as it lacked the bargaining power to negotiate license fees with the opposite party, the parties agreed to adopt the then existing market standard rate as the rate of payment of license fees *i.e*. an average rate of INR 660 per needle hour decided by the Copyright Board in its First Order. In the meantime, the Supreme Court set aside the First Order of the Copyright Board and referred the matter back to the Copyright Board to consider the issue of rates of royalties to be charged by PPL afresh. By way of order dated August 25, 2010 ('Second Order of the Copyright Board'), the Copyright Board determined the royalty rates as '*2 % of net advertisement of each radio station accruing from the radio business only for that radio station*..'

11. The informant avers that following the Second Order of the Copyright Board, the informant and other radio stations individually approached the

opposite party for applying the rates as fixed by the Second Order. However, the opposite party filed a writ petition before the Delhi High Court challenging the applicability of the rates and *vide* interim order dated September 15, 2010, the Delhi High Court granted an injunction in favour of the opposite party against the application of the Second Order of the Copyright Board on the ground that the opposite party was not a party to the proceedings before the Copyright Board.

12. The informant has submitted that since the opposite party refused to apply the rates as fixed by the Copyright Board, it filed an application before the Copyright Board for grant of compulsory license on reasonable royalty on September 24, 2010 which is pending adjudication.

13. The informant has submitted that since the license granted by the opposite party was scheduled to expire on October 25, 2010, the informant received a legal notice dated October 15, 2010 from the opposite party for renewal of license terms, which the informant agreed to do under the current rate, subject to the outcome of any orders of the Copyright Board. The informant has further submitted that in order to survive in the FM Radio industry, the informant had no choice but to accede to the unreasonable terms imposed by the opposite party, which has rights over premium music content.

MCC

14. The informant has stated that the opposite party imposes an amount of INR 1,25,000 per month each as MCC for sound recording and for performance rights. Thus, the informant is required to pay an amount of INR 2,50,000 per month equivalent to 189 hours per station to the opposite party, irrespective of whether or not it broadcasts the opposite party's music content and/ or the number of needle hours consumed by the opposite party's music. Hence, it is alleged that the informant was made to pay higher royalty rates as MCC than the amount actually incurred by it based on the actual amount of

needle hour consumed by the opposite party's music, which is unfair and abusive.

15. The informant has submitted that most of the radio stations are running into losses and therefore, in such a situation imposing exorbitant royalties and MCC obligations makes it unviable for radio stations to sustain let alone make profits. Furthermore, such imposition of MCC restricts the ability of radio stations to license music content of other owners thereby adversely affecting competition in India.

16. It is further stated in the information that music companies may register themselves with a copyright society entrusted with the administration of recording rights to provide blanket licenses to users or, like the opposite party, license the broadcasting rights of its music catalogue on its own and earn royalties in return. It is pointed out that the music industry grants different licenses to different users and based on such rights, earns its revenue from five main sources, which include physical sales through audio cassettes and CDs, mobile Value Added Services ('VAS'), radio broadcast, online download and public performance. According to the informant, different rights are provided to different users by music providers/ copyright societies, which constitute separate markets.

17. The informant has stated that the three main sources of broadcast of music are FM radio, television and mobile VAS. One of the main distinguishing factors of radio from other broadcasting sources is that it is free-to-air; non-subscription based and is easily and widely available to end consumers. Additionally, costs associated with radio are much lower. Thus, radio cannot be substituted with broadcast of music on television or mobile VAS. The informant has further submitted that with FM radio's superior audio quality and stereophonic sounds, cheaper availability, wider collection of radio channels, FM frequencies are not considered inter-changeable or substitutable with AM frequencies.

18. The informant has further submitted that there is no inter-changeability between music and non-music content as music is the essential ingredient for the survival of FM radio stations and furthermore, Hindi Bollywood music stands out as the most popular genre of music, and in fact 'new' Bollywood music is the most sought-after and heavily demanded music content in India. Hence, as per the informant, 'new' Bollywood film music broadcast on FM radio stations constitutes a separate product market. The informant has further submitted that as FM radio stations cater to a specific city keeping cultural diversities, consumer preferences, and tastes in mind and therefore, relevant geographic market should be each of the cities for which the operator has a license, however, for ease of reference, the geographic market may be limited to the metros.

19. The informant, after submitting that the relevant market should be '*broadcasting rights of new Bollywood film music over FM radio in the Metros'* has further claimed that the opposite party is in a dominant position in the said relevant market as it owns and commands a substantial share of the music market with a catalogue of over 200,000 songs; it is considered to be the largest non-governmental music copyright holder in India with a turnover of over 400 crores; it has acquired music rights of all major Bollywood films produced in the past; incomes of its competitors like Sony Music, SaReGaMa are one-fourth or less the size of the opposite party's turnover; FM radio stations are heavily dependent on the content owned by the opposite party and there are huge barriers to entry in the music industry as there are high sunk costs involved in establishing a successful music industry.

Directions to the DG

20. The Commission after considering the entire material available on record *vide* its order dated 13.10.2011 directed the Director General ('DG') to cause an investigation to be made into the matter and to submit a report.

Investigation by the DG

21. The DG, upon receiving the directions from the Commission, investigated the matter and filed an investigation report.

22. In the report, the DG, after presenting an overview of the music industry, determined '*sale of rights of Bollywood music to private FM radio in the territories of India where Bollywood music is prevalent*' as the relevant market. Further, after conducting a detailed assessment, the DG concluded that the opposite party is in a dominant position in the said relevant market.

23. The investigations revealed that the opposite party was abusing its dominance by imposing unfair and discriminatory conditions in supply of its music in the relevant market. The investigation also established that the opposite party by virtue of its dominance was charging excessive and unfair prices from the consumers *i.e*. private FM channels in the relevant market. Further, it was noted by the DG that the opposite party was abusing its dominant position in violation of the provisions of section 4 of the Act in the market for broadcast of Bollywood music on FM radio stations in the geographical areas where Bollywood music is prevalently played by FM channels. It was also found that conditions imposed on Radio operators like MCC and mandatory payment of performance license fee by T-Series bore no relation to the actual quantity of T-Series' music broadcast by FM channels. The conduct of the opposite party was also found to foreclose the market at both *i.e*. the upstream and downstream levels to other music providers and radio stations respectively, as by imposing the condition of minimum committed needle hours of its songs the opposite party was distorting the competition in the relevant market. Lastly, it was noted by the DG that the opposite party was not able to justify its conduct by way of any pro-competitive reasons for imposing these conditions.

24. In the result, the DG concluded that the opposite party contravened the provisions of section 4(2)(a)(i) and 4(2)(a)(ii) of the Act.

Consideration of the DG report by the Commission

25. The Commission, after considering the investigation report submitted by the DG, decided to forward copies thereof to the parties for filing their replies/ objections thereto. The Commission also directed the parties to appear for oral hearing, if so desired. Subsequently, arguments of the parties were heard on various dates.

Replies/ Objections/ Submissions of the parties

26. On being noticed, the parties filed their respective replies/ objections to the report of the DG besides making oral submissions. The parties have also filed written submissions.

Replies/ Objections/ Submissions of the opposite party

27. Assailing the findings of the DG, the opposite party, at the outset, has submitted that the reliance by the DG on EC's decision in *Universal/ BMG Music Publishing* case is erroneous because the said case was a merger decision and not an abuse of dominance case. A relevant market assessment for a merger is based on the narrowest market possible because a conservative regulator would like to assess competition concerns prospectively on the narrowest. In *Universal/ BMG Music Publishing* case such a narrow market was considered to be each of the five rights *i.e*. mechanical rights (for reproduction of a work in a sound recording); performance rights (for commercial users such as broadcasters including TV and radio stations); synchronization rights (for commercial users such as advertising agencies or film companies); print rights (for reproduction of work in sheet music) and online rights (combination of mechanical and performance rights for online applications). Even in that case, the market considered was the market for performance rights. *Universal/ BMG Music Publishing* case did not find that a

market could be assessed from the point of view of different genres of music, and the DG has gone a step further on the genre by concluding that the relevant product market for assessment is the market for sale of rights of Bollywood/film music to private FM channels and then relies on data relating to a narrower market (hit Bollywood music) to determine dominance. Such an assessment is incorrect as it is not based on sound principles of competition law as applicable to abuse of dominance cases.

28. The opposite party has submitted that while in most cases, relevant market will be delineated by referring to demand side substitutability, the fact that suppliers are able to switch production processes to produce the relevant products can have a considerable disciplinary effect on the competitive behaviour of the companies producing products which are demand substitutable. The DG has, therefore, failed to consider supply side substitutability and an absence of such assessment demonstrates the extremely narrow and internally conflicting approach in delineating the relevant market. Based on both demand and supply side substitution, it is evident that the product market should be defined in a broader manner as the market for licensing of all music content to FM radio broadcasters in India (including AIR FM).

29. The opposite party has submitted that the DG made a manifest error in assessing market dynamics at the stage of radio stations broadcasting to end consumers (the listeners) to assess competition issues at the higher level of licensing of music content by the opposite party to radio stations. The DG should have focused his attention on the market for the licensing of music content to FM radio broadcasters in India including AIR and not merely '*sale of rights of Bollywood music to private FM radio in territories of India where Bollywood music is prevalent*'. The DG has reached the conclusion on relevant market by considering the extent to which the medium of music are substitutable/ interchangeable for listeners/ consumers. However, this is the wrong level to assess the relevant market. The supply of goods where the

opposite party is alleged to be dominant is the upstream flow of A (content owners providing licenses to radio stations) and therefore, what is required is to test the extent of the opposite party's market power by looking at the ability of its customers (radio stations) to switch and the ability of its rivals (other content providers) to expand. However, the DG analysed the substitution in respect of the downstream flow of B (radio stations providing broadcasts to consumers). Even if the DG's methodology is adopted, the relevant market should have been defined in a broader manner. From an end consumer perspective, it is immaterial whether a particular song is played over a private FM channel/ station or over AIR FM as long as the consumer is able to listen to the song. The relevant market for assessment should therefore, be the market for licensing of music content to FM radio broadcasters in India, including AIR. The DG provides no relevant evidence to justify this exclusion. The DG claims that AIR is distinct from FM radio because (among other reasons), AIR has a wider range of content, a greater reach and less restrictions, however, this is not evidence to support a narrow market.

30. The opposite party has further submitted that the DG does not justify restricting the market to Bollywood music. The DG's conclusions are based upon the '*strong genre of preference by Indian radio listeners*'. This was stated to be the wrong level to consider substitution. From a demand side perspective radio stations may switch to alternative types of content. Although a given customer may be particular about the music he listens to, a radio station is likely to have weaker preferences. The ultimate goal of a radio station is to attract listeners in order for it to attract advertisers and therefore, the radio station is likely to be indifferent between types of content mixes so long as it can attract an equal number of listeners. The evidence shows that radio stations are prepared to substitute to alternative content. There are many stations that are not based on Bollywood music, as the report identifies around 20% of stations which are not based on Bollywood music. Even those stations that have a higher content of Bollywood music still play other types of popular music, so they could easily increase the amount of non Bollywood music they

play. Furthermore, it was submitted that there are examples of radio stations that have switched their focus from Bollywood music to other types of music.

31. The opposite party has submitted that in so far as the geographic market is concerned, sound competition law assessment can be carried out after delineating a clearly defined product and geographic market and then assessing the competitive conditions present therein. In the present case the DG has defined the geographic market as '*areas of Indian territory where the Bollywood music is prevalently played on FM channels*'. Such a definition is extremely vague and cannot be used for any competition law assessment as there does not exist any objectively verifiable standard of norm to determine what is '*prevalent'* form of music in any given territory of India especially considering the fact that the same music/ content is available through internet radio, mobile radio, TV *etc*., across territories of India.

32. The opposite party has submitted that even if the DG's definition of the relevant market is accepted, there is no evidence in the DG Report that the opposite party holds a dominant position in the relevant market. The DG fails to shows that the opposite party has held persistently high market share in the relevant market over a period of time and the DG also failed to provide any robust evidence of barriers to entry or expansion or other factors identified in section 19(4) of the Act to support a finding of dominance.

33. The opposite party also submitted that the DG has erred in concluding that the opposite party holds a dominant position. The market share data relied upon by the DG itself shows that the market share of the opposite party in the relevant market does not exceed 27%. It has been held by the European Court that very large market shares are in themselves, save in exceptional circumstances, evidence of a dominant position. A share of over 50% is generally considered as a strong evidence of a dominant position (*Akzo* v *Commission*). But the *Akzo* test is rebuttable and not conclusive. Numerous factors must be analyzed and evaluated and not merely market shares. A

market share of around 27% in the total music segment for all FM radio stations (*i.e*. FM radio stations that have been licensed by the opposite party and FM radio stations that have not been licensed by the opposite party) can never be considered as an indicator of dominance. The opposite party has further submitted that dominance is more likely when the firm has a persistently high market share which means it is more robust to look at the market shares over a longer period (3-5 years) based on verifiable, consistent data, which does not exist in this case.

34. It was contended that the DG has erred in concluding that the opposite party has the largest market share in the Bollywood film music or even for that matter the 'hit' Hindi film music and as such is the dominant player in the said market. The DG has further erred in not relying upon and taking into account the data showing the market share of the opposite party on an all India basis in respect of the private FM stations whether or not licensed by the opposite party.

35. The DG has erred in not taking into consideration and assessing the data which shows that the opposite party does not have the size and resources or economic power to be dominant. The category wise revenue generated alongwith the percentage of FM revenue clearly shows that the opposite party's revenue has been decreasing over the years, which information was ignored by the DG.

36. The data on revenues of the opposite party based on the category of cities where FM is played clearly shows that the revenues of the opposite party from FM radio stations have been decreasing over the years. The decrease in revenues of the opposite party despite increase in number of FM radio stations clearly shows that the FM radio stations are not dependent on the opposite party and as such the opposite party is not in a dominant position. It is further evident that the sales and revenues for the opposite party from the physical sales of cassettes, CDs, micro cards and others have gone down. Likewise the

revenue for the opposite party from license fees from radio broadcasters has also been falling substantially over the years.

SCIL (Segment wise Sales)

(Rs. In Lacs)	**2010-2011**	**2009-2010**	**2008-2009**	**2007-2008**	**2006-2007**	**2005-2006**	**2004-2005**	**2003-2004**
Physical Sales								
Consumer Electronics	7330.75	4916.84	5432.65	5527.95	6832.18	7292.30	6271.20	7784.32
Cassettes/ CD/ VCD/ DVD/ Blueray/ Pendrive *etc*.	6090.81	9592.53	12323.48	16252.78	17160.42	20272.92	21919.40	21552.51
Others	675.49	856.63	1023.34	1242.29	1678.24	1261.36	1177.05	921.25
Sub Total (Physical Sales (A)	***14097.05***	***15366.00***	***18779.47***	***23023.02***	***25670.84***	***28826.58***	***29367.65***	***30258.08***

37. It was argued that the DG has focused only on the customers of the opposite party and not on the competition faced by the opposite party. The DG should have noted that the opposite party faces competition at two levels, *i.e.* initially from the music companies at the stage of acquisition of content and subsequently from PPL and other music companies for licensing of such content. The DG should have realized that the opposite party is not foreclosing competition but creating and intensifying competition in the market. The biggest competitor of the opposite party at the stage of licensing of the music rights is PPL which has more than 200 companies as its members.

38. The DG has wrongly stated that the opposite party is a lifeline for the radio stations and that no radio station can survive without obtaining license from the opposite party. The data already before the DG showed that there were many radio stations that have not received any license from the opposite party and these radio stations are experiencing higher growth levels than other radio stations that have licenses from the opposite party.

39. The DG has erred in observing that the conduct of the opposite party has resulted in barriers to entry for the FM radio stations. In this regard, a review of the annual report of Big FM and Radio Mirchi shows that Big FM's (which does not have a license from the opposite party) growth in revenue was nearly 16% while radio stations with the opposite party's licensed content like Radio Mirchi and HT Media grew by only 10% and 6% respectively. The DG provides little evidence of barriers to entry and expansion. The DG also fails to consider the possibility of expansion by current rivals such as Sony. Many of the opposite party's competitors are vertically integrated (such as Sony and YRF) and have natural access to the music content of the films produced by their affiliates. The opposite party does not possess this strategic advantage and must vigorously compete and bid for every film's music content. The DG also makes no analysis of buyer power. The opposite party is becoming increasingly dependent on these radio broadcasters for revenues and that implies a degree of buyer power, which factor has not been considered by the DG at all.

40. The opposite party has submitted that a perusal of publicly available documents on the Radio Industry, annual reports of certain radio stations *etc*., demonstrates that this industry is growing at a steady (if not exponential) rate and does not reflect any indication of any anti-competitive injury or even a remote possibility of foreclosure as a result of the anti-competitive conduct of the opposite party. Such data itself should be sufficient to demonstrate that there exists no case of excessive pricing. As such, no anti-competitive harm can be found in an industry that is as robust as the radio industry due to the alleged conduct of the opposite party. Furthermore, the opposite party's alleged conduct does not have any impact on the end consumer. It should also be noted that exploitative conduct like excessive pricing, is no longer the focus area of anti-trust regulators in mature anti-trust jurisdictions like the EU and the US, where the focus is on exclusionary conduct.

41. The opposite party has submitted that under MCC clause, the licensee/ radio station is liable to pay an assured sum of royalty to the opposite party. It may be noted that since radio companies more or less end up playing music equal to and in most cases more than the amount that MCC accounts for, MCC raises no competition law issues. Thus, it is incorrect to say that radio stations are 'forced' to play the opposite party's content as a result of MCC clause. Opposite party has denied that it has imposed MCC of 50% on any FM radio station. Furthermore, the DG should not have relied upon the agreement with Big FM for the reason that an agreement is not an indicator of the true MCC charged by the opposite party. The approximate MCC charged by the opposite party does not exceed 35% of the total needle playout hours. The DG has failed to show how MCC is exploitative. It is based on the playout of the radio station for the previous year and therefore, rather than forcing customers to buy content that the broadcasters do not want, it reflects their actual demand. The DG has failed to show that imposing MCC is exclusionary as there is no evidence that rivals are being foreclosed.

42. The DG has erred in failing to consider the efficiency explanations for MCC. There are potential efficiency benefits from MCC that arise from inherent uncertainties in the music industry. The content owners invest in new content before knowing what value listeners will place on that content. This uncertainty is a cost to investors and creates a disincentive to invest in new content. The MCC reduces the uncertainty that content owners face. Knowing that there is more certainty around the amount of airplay they can expect, content owners can invest in new content with more confidence.

43. The opposite party has lastly submitted that assessment of the DG is incorrect as there are conflicting decisions of various High Courts on this issue and the Supreme Court is presently seized of the matter. The DG has failed to note that dominance has no causal link to the payment of performance license fees. At present the opposite party does not charge any performance license fees from radio broadcasters and is awaiting the Supreme Court's decision in

the matter. There is no decision or court order, to which the opposite party is a party which prevents or prohibits it from charging a performance license fee and there is no court order that makes the charging of performance license fees illegal.

Replies/ Objections/ Submissions of the informant

44. The informant has submitted that the DG has conducted a thorough investigation and that the DG's conclusion is correct and well founded. On the issue of relevant market, the informant has submitted that FM radio is distinct from other forms of music media for the following reasons:

(a) FM radio stations are free-to-air

Given that radio is free, a consumer would not consider other forms of paid for entertainment as being substitutable with radio as a source of entertainment. If one were to conduct a Small but Significant Non-transitory Increase in Prices ('SSNIP') test to radio, consumers (*i.e.* listeners) would not switch to television or mobile VAS. Further, if one were to conduct a SSNIP test on radio, this would not cause advertisers to switch to advertising on television or mobile VAS. This is because the localization and ease of access of radio is far more than the other modes of broadcast and since consumers do not consider the two mediums as substitutable, advertisers would not switch their advertising preferences.

(b) Broadcast restrictions imposed on radio

Pursuant to GOPA entered into between Government of India and private radio stations, the content allowed to be broadcast on radio is severely restricted. FM radio stations are prohibited from broadcasting news or current affairs except for music. This places private FM stations on a different plane compared to television broadcasters, as television has far greater liberty in

relation to the content it is permitted to broadcast. Further, mobile VAS is an ancillary service to primary telecommunications services. Mobile VAS also has fewer restrictions than radio and does not have the scale, content, ease of accessibility or usage that FM Radio currently has across India.

(c) Penetration

Radio broadcasting is therefore, localized and specific to a particular city. On the other hand, TV channels transcend national boundaries and mobile VAS is increasingly becoming available nationally and also does not require licenses to operate in cities.

45. Accordingly, the informant has submitted that in addition to reasons of expenditure incurred, accessibility, broadcast restriction, licensing requirements also indicate that music entertainment on radio and TV/ mobile VAS are not substitutable and therefore, radio as a medium for music broadcast is in itself an altogether different product market.

46. The informant has also submitted that AM is a distinct market from FM. Transmission over radio can take various forms such as Amplitude Modulation ('AM') and Frequency Modulation ('FM'). These are two different and most popular methods of broadcasting content. Due to the inherent limitations of AM radio (low quality, lack of clarity, susceptibility to deteriorate due to weather conditions, interference with other channels), a new model of transmission was introduced (FM). Further, since GOPA permits private radio stations to only use FM frequencies and since FM license holders cannot switch to AM, the two are very different forms of radio broadcast in India. With FM radio's superior audio quality and stereophonic sounds, cheaper availability, wider collection of radio channels, FM frequencies cannot be considered as interchangeable or substitutable with AM frequencies.

47. The informant has submitted that AIR is distinct from private FM channels. AIR is a nationally available radio station run by Prasar Bharti and has been in operation for over 60 years whereas FM radio stations by comparison have been in operation since 2001 and are granted licenses for limited geographies. The DG has found that AIR is distinct from private FM radio stations *inter alia* because of (i) no restrictions on content (ii) pan-India presence and (iii)huge listenership and earns approx. 40% of total advertising revenue of the FM industry. The informant has supported the finding of the DG that private FM radio stations are not substitutable for AIR in India.

48. The informant has submitted that non-music content is broadcast on FM radio for the purposes of complementing music content and therefore, is not substitutable or interchangeable for music content. All music channels advertise themselves as music channels or have tag lines relating to more music content than their competitors. Thus, it can be seen that the main focus of radio stations is on music and it is an essential branding and marketing proposition for them to have the latest music content. As a result, music content is an essential ingredient for the survival of FM radio stations besides being the most popular and primary source of entertainment on free-to-air radio. The informant has further submitted that the very demand for FM radio stations is to broadcast music, which is not substitutable for non-music content and therefore, music and non-music content are not inter-changeable and cannot be said to form part of the same relevant market.

49. The informant has submitted that Bollywood music is a distinct relevant product market on FM channels. In the radio industry, markets can be delineated by different genres/ categories of music. This is because a listener's tastes *i.e.* consumer preferences can be strong enough to warrant segmentation of markets. Such an approach has been followed by the EC in *Seagram/ Polygram* case and *Thorn EMI/ Virgin* case, where the EC has identified different relevant markets according to the genre of music concerned. Similarly, the DG has also found Bollywood music to constitute a product

market separate from other genres of music as (a) 80% of the 240 private FM radio stations in India play a majority of Bollywood music (b) the most popular songs on radio are Bollywood songs and (c) a majority of radio listeners in India are under 50 years old and therefore, the target audience for radio who strongly prefer Bollywood music.

50. The informant has submitted that out of the various genres of Indian music, Hindi Bollywood film music stands out as the most popular genre of Indian music.

51. The informant, therefore, has submitted that in India, access to Bollywood music is necessary for FM radio stations to be viable and operate successfully. This is evidenced by the falling revenues of Radio City, Radio Mantra and Big FM, during the periods that the opposite party had terminated its licenses to these radio stations, which had resulted in Radio City having to renew its license with the opposite party in order to operate and remain financially viable in the radio market. The informant submits that Bollywood music is a separate relevant market for the purposes of assessing conduct under the Act.

52. The informant has submitted that the DG has erred in finding that a lack of clarity on the definition of 'new music' does not allow it to conclude that 'new' Bollywood music is a separate relevant market. It was submitted that the popularity of Bollywood music in fact stems from 'new' music which is broadcast on private FM radio stations and this forms the essence of a private FM radio stations' revenue. Any radio station which wishes to carry on a viable and successful business in a market where they provide Bollywood music to listeners must necessarily broadcast the latest songs demanded by the youth or 'new' music which the opposite party has admitted has a shelf-life of only 6-8 months.

53. The informant has also submitted that 'new' can be defined as music which is released in the last 6-8 months as that is the normal shelf-life for Bollywood music in India. However, a longer period of reference, say around one year would also yield no different competition law analysis as the opposite party owns or controls the majority of Bollywood music in India. The vast catalogue of music allows the opposite party to control what content FM radio stations necessarily require to stay in business. In any event, the informant has submitted that the Commission need not come to a definite determination of 'new' music even if the DG's product market definition were to be adopted, the opposite party would still be found to enjoy a dominant position.

54. On geographic market, the informant has submitted that while it agrees with the market definition of the DG, the relevant geographic market can be defined even more narrowly due to the unique regulatory environment and strong customer preferences which form an integral part of the FM industry in India. In India, customer preferences vary from city to city and from State to State. As radio stations are licensed to operate in particular cities and do not broadcast on a nationwide basis, their programs and scheduling are tailor-made to particular cities. It is for this reason that the songs played in Chennai are different to those played in Delhi even if the same company has a radio station in both cities. While it is the informant's position that the geographic market to assess the opposite party's conduct in the licensing of Bollywood music rights to private FM radios is the '*individual cities in which FM radio stations are granted licenses to operate*', the DG's geographic market definition of areas '*where Bollywood music is prevalent*' would nonetheless demonstrate the opposite party's dominant position in such geographic market.

55. The informant submits that the DG's findings on the opposite party's dominance are correct and conclusive.

56. Supporting the findings of the DG it was submitted that the opposite party's website itself announces that the opposite party is India's dominant

music label which represents over 70% of upcoming Indian entertainment content including Bollywood. Publicly available reports also state that the opposite party commands a lion's share of 80% of the music market with a catalogue of over 200,000 songs. The informant submits that in terms of '*relativity of market shares*', it is important to look at the largest firm's market share relative to its competitors and in this case the opposite party's market share is a multiple of its competitors' market shares which clearly establishes its dominant position. Evidence provided by the opposite party itself demonstrates that the market share of total songs played on 210 radio stations is between 32.5% and 34.1%. Evidence provided by the opposite party also demonstrates that it owns the rights to approximately 46% of the top 100 songs played in category 'A' cities between July 2011 to June 2012. The informant has also submitted that the opposite party's position in the market allows it to purchase the highest percentage of films and in relation to blockbuster of 'hit' films, the opposite party holds the rights to the music of most of these films which cements its position in the market as a dominant enterprise.

57. The informant has submitted that the opposite party's size, resources and economic power place it in a position of dominance in the relevant market. The opposite party is considered to be the largest non-governmental music copyright holder in India with a turnover of over 400 crores of the 750 crore Indian music industry. Furthermore, the opposite party has acquired exclusive music rights of all major Bollywood films produced in the recent past. The DG has compared the turnover of the opposite party to the turnover of its competitors and found that the opposite party's turnover is almost 3 times that of its closest competitors SaReGaMa.

58. It was submitted that it is evident from the investigation carried out by the DG that private FM stations cannot survive in the relevant market without the opposite party's music. FM radio stations play contemporary hit music to

attract listeners which attracts advertisers who provide their sole source of revenue. The informant has further submitted that private FM radio stations are dependent on the opposite party in view of its music repertoire, strong preference of their listeners and the lack of viable alternative options. The dependence of radio stations can clearly be demonstrated by how Radio Mantra, Big FM and Radio City's businesses have been affected by the opposite party's refusal to license on fair and reasonable terms to them.

59. The informant has argued that there are significant barriers to entry in the music industry. There are large sunk costs involved in establishing a successful music company, including the infrastructure set up, acquisition of music rights, marketing and promotion and above all, breaking into the tightly knit fraternity which deters and prevents new companies from entering the music industry. It is not easy to obtain ownership rights of music due to the high costs involved and the vast distribution network required to exploit such rights. In fact, the opposite party has increased acquisition costs to protect its dominant position in the relevant market.

60. The informant has submitted that the opposite party has abused its dominant position by excessively and unfairly licensing its music content. Excessive price is covered under the Act as an 'unfair price' under section 4(2)(a)(ii) of the Act. The informant has further submitted that excessive pricing by a dominant undertaking is universally recognized as abuse of dominant position. The European Court of Justice has explicitly recognized that excessive prices imposed by a dominant undertaking will be an abuse of a dominant position in cases such as *General Motors, United Brands*.

61. The informant has further submitted that that in order for the copyright license to be fair it must bear a reasonable relation to the economic value that the license provides to the licensee and consequently it must correspond to/ reflect a proportion of the revenue generated by the exercise of a license. It was submitted that the broadcast license fee of INR 660 per needle hour and

performance license fee of INR 666 per needle hour which is not payable as per the recent judgements of the Delhi, Bombay and Kerala High Courts imposed by the opposite party is unfair and excessive and in violation of section 4(2)(a)(ii) of the Act.

62. The informant has argued that imposition of MCC on the informant is an unfair condition in violation of section 4(2)(a)(ii) of the Act. An enterprise is held to abuse its dominant position if it exploits the opportunities arising out of its dominant position in such a way so as to reap trading benefits which it would not have reaped had there been normal and sufficiently effective competition. The MCC imposed by the opposite party has no relation to the music content that is actually broadcast nor is it necessary or indispensible for such broadcast and the opposite party is abusing its dominant position by imposing unfair and discriminatory conditions which are unconnected to the actual service provided by the license.

63. It was submitted that the opposite party as a holder of the copyrights to a majority of 'new' Bollywood music is an unavoidable trading partner for FM radio stations. As a result of the dominance in the relevant market, the DG has found that the opposite party is the only music company that dictates such unfair conditions for provision of its license to FM radio stations. No other music provider including PPL requires the payment of MCC from FM stations for grant of a license to broadcast their music. Given this overwhelming dependence of the informant and other private FM radio stations and the weakness of their position *vis-a-vis* the opposite party, it is submitted that the opposite party is imposing an excessive and unfair condition in violation of section 4(2)(a)(ii) of the Act.

64. The opposite party's insistence on payment of a performance license fees is an abuse of its dominant position under section 4 of the Act. It is now settled law that FM radio stations do not have to pay a performance license fee for broadcast of music on radio stations. This position has been clarified by the

High Courts of Kerala, Bombay and Delhi. However, the opposite party's position has been that it is entitled to performance license fees contrary to the rulings of the High Courts. The opposite party's conduct leads to a foreclosure of market at the upstream level of music providers and the downstream level of radio stations. This foreclosure adversely affects the final consumer as it discourages entry at both levels and has led to exit in the downstream level, causing consumer harm.

65. The informant has contended that the anti-competitive terms and conditions imposed by the opposite party amount to refusal to supply its music on fair terms in violation of the Act. The DG noted that section 31 of the Copyright Act provides radio stations adequate safeguards to approach the Copyright Board for a compulsory license, and the opposite party is not in a position to refuse to supply radio stations. The informant disagrees with the findings of the DG and submits that the informant's ability to approach the Copyright Board under section 31 of the Copyright Act is not mutually exclusive from the Commission being able to come to a finding that the opposite party has abused its dominant position by constructively refusing to supply music to radio stations. In fact, the terms and conditions of a license agreement can be unfair or unreasonable *qua* the Act and separately, the Copyright Act.

66. The informant has further submitted that excessive royalties charged by the opposite party, MCC and the imposition of performance license fees which the opposite party is not entitled to in the license agreement are unreasonable restrictions on competition and consequently the license agreement between the parties is an anti-competitive vertical agreement in violation of section 3(4) of the Act. Furthermore, these restrictions can neither be considered to be 'reasonable' nor 'necessary' to protect the rights of the copyright owners whose music are being licensed to the informant and therefore, cannot fall under the exemption under section 3(5) of the Act.

67. The parties, apart from filing detailed replies, have also submitted reports of economists in support of their respective submissions. Further, the parties filed written submissions and a gist thereof is noted below:

Written submissions of the opposite party

68. The opposite party filed detailed written submissions reiterating its stand and a brief note thereof is made below.

69. It was urged on behalf of the opposite party that the DG has defined the relevant market in an arbitrary, vague and narrow manner. The opposite party also challenged the submission of the informant taking relevant market for 'new' Bollywood music. It was submitted that a relevant product market for competition law assessment cannot be defined in terms of business model of one single consumer.

70. It was further contended that the assessment made by Genesis, the economist hired by the informant, which argued that 'the tastes and preferences of listeners in the preferred demographic determine what content the particular station is willing to purchase' and that the 'station is further constrained by the format and content positioning it has chosen to attract its demographic', is flawed as a radio station in India is not constrained to a particular genre or the target demographic in the musical content it broadcasts. Additionally, it was submitted that though the Genesis Report observed that the opposite party engages in price discrimination while supplying content to AIR and private FM stations, it failed to show that price discrimination has occurred or why price discrimination would imply a narrow market definition in this case.

71. In so far as the relevant geographic market is concerned, the opposite party submitted that a relevant geographic market is required to be defined in a clear manner, delineating an area where the competitive conditions are largely

homogeneous. The present case involves an intangible item, the right to play certain musical content. Given that any radio station can choose to broadcast any musical content it desires (based on the repertoires available to it), the relevant geographic market cannot be taken as '*areas where Bollywood music is prevalent*'. The relevant geographic should be the entire territory of India.

72. On the issue of dominance, the opposite party reiterated the pleas taken in the reply filed to the report of the DG and impugned the findings of the DG on this count besides making a detailed rebuttal to the assessment done by the DG in terms of the provisions contained in section 19(4) of the Act.

73. On the abusive conduct also, the opposite party made detailed submission and the same are noted below.

74. According to the opposite party, clearly the entire focus of the DG has been on the fact that the opposite party, by virtue of not being a part of the Second Order of the Copyright Board has continued with rates determined over a decade ago without adjusting for inflation and this conduct of the opposite party has been held to be an abuse of dominant position. It may be noted that the opposite party's agreements with radio stations contain a clause to the effect that if there is an order of the Copyright Board then the terms of the license agreement will be automatically replaced by those terms. There is no contradiction in the opposite party's conduct because of the presence of the above mentioned clause. Furthermore, given that Copyright Board has the sole jurisdiction to set the rate for licensing of content, the Commission is not and cannot be in a position to exercise jurisdiction or make a finding with respect to the rate of licensing of content and therefore, cannot rely on the Second Order of the Copyright Board as a benchmark for the market price in connection with licensing of content. There can be no case of excessive pricing because there is a sectoral regulator present that can set the reasonable terms and conditions for licensing of content.

75. The opposite party has further submitted that the DG has erred in observing that the opposite party has abused its position in the market by continuing to charge 'per needle hour' and not the royalty rate fixed by the Second Order of the Copyright Board. The DG report fails to comprehend that the said order is against PPL and not the opposite party. Furthermore, PPL has challenged the said order. It is also submitted that DG has failed to demonstrate any anti-competitive harm resulting from the alleged conduct of the opposite party. The data demonstrates that even after the license was cancelled, Big FM saw a high growth in revenue of about 16% whereas radio stations licensed by the opposite party like Radio Mirchi and the informant grew only by 10% and 6%. Perusal of annual reports of certain radio stations clearly shows that this industry is growing at a steady rate. In fact, the end consumer is not at all affected by the alleged conduct of the opposite party because the content is available for free to the end consumer. The conduct of the opposite party only affects the profitability of radio companies and any intervention by the Commission will only help to increase the profits of such stations and adversely affect the income of composers/ lyricists who have not been called upon for their inputs as also the income of the opposite party and its ability to compete in the market of music content licensing.

76. The opposite party has further submitted that exploitative conduct like excessive pricing is no longer the focus of area of anti-trust jurisdictions like the EU and the US where the focus is on exclusionary conduct.

77. It was contended that there was no objective assessment by the DG. The competition authorities in Europe have devised a two stage test to determine whether a dominant form has abused its dominant position by charging excessive prices as laid down in *United Brands* case. They are first required to assess whether the difference between the cost incurred and the price charged is excessive and if the answer to the question is in the affirmative, they must assess whether a price has been imposed which is either unfair in itself or when compared to the prices of competing products. It was

therefore submitted that the DG did no such assessment to determine whether the rates charged were reasonable and conducted no assessment with respect to the costs involved in promotion and acquisition of content. Data demonstrate that the opposite party has not even recouped its costs for the movie *Rockstar* and *Zindagi Na Milegi Dobara* which was considered a 'hit' in terms of music.

78. The opposite party also submitted that rate per needle hour is not a flat rate and bears a reasonable relation to listenership and hence, advertisements revenues, 600 being simply a weighted average.

79. Further, MCC was neither 'imposed' nor 'unfair' and that the business rational for imposing MCC was simply that the opposite party could now be assured of some revenue to offset costs. The MCC was based on objective criteria, the basis being the previous year's playout. This is itself sufficient evidence that the same is not imposed on radio stations.

80. The opposite party has submitted that the very fact that MCC are negotiated annually and based on the playout of the previous year, in itself sufficient evidence that the same is not 'imposed' on radio stations. Furthermore, MCC have been declining over the years which further demonstrate that they are the result of negotiation between the opposite party and radio stations. It is critical to note that despite the fact that several radio stations have given evidence before the DG, yet for the period 2006-2011, there is no request on record before the Commission by any radio station to modify or eliminate MCC, which has not been accepted by the opposite party.

81. Dealing with the argument that the opposite party has established a 'grand scheme' to entrench its dominant position in the market by charging MCC from radio stations so that it can artificially inflate the cost of acquisition of content by bidding higher than rivals and thereby exclude rivals from the market and use the content to impose higher prices on radio stations,

it was submitted that not a single competitor of the opposite party has stated on record that the opposite party's conduct is exclusionary. In fact, it was submitted that the 'grand scheme' described by the informant is in reality a failure because the opposite party's revenues from the radio business have witnessed a sharp decline since 2012 from approximately INR 33 crores to INR 18 crores. Furthermore, numerous companies have entered and thrived in the market since the introduction of MCC in 2008 and therefore, evidence of the informant does not support its allegations.

82. The opposite party has further submitted that MCC are only contained in some contracts and those contracts only require around 33% or less airplay. Thus, with whatever MCC are, the actual playout of the opposite party content is 27% in 2011 and declining year-on-year. Therefore, the part of the market that is actually affected by MCC is only 27%. In other words, the opposite party's rivals can compete to supply nearly 73% of the market which percentage is increasing year on year. Given that such a large part of the market is fully contestable, it is highly unlikely that MCC are capable of foreclosing rivals.

83. The opposite party has further submitted that loyalty rebate argument of the informant is incorrect. A loyalty rebate is typically designed to either entrench an existing dominant position or assist the dominant enterprise in gradually increasing market shares. In the present case, both the factors are absent. The opposite party has further submitted that the Genesis Report fails to provide any evidence that MCC are exclusionary. The only evidence that the Genesis Report offers is a speculative theory that MCC might function in the same way as a conditional or loyalty inducing rebate. As mentioned before, no competitor has complained about exclusion, nor is there any evidence to support exclusion of competitors.

84. The opposite party has further submitted that the argument of the informant that it is engaging in discriminatory conduct by imposing discriminatory MCC on radio stations in the same city is misleading. If in a

particular city a radio station wishes to play more content from the opposite party's repertoire then MCC may be set at a higher playout limit as opposed to a radio station in the same city that wishes to use less of the opposite party's repertoire. This aspect cannot be viewed as discriminatory conduct as discrimination requires treating like entities in an unlike manner, not treating different entities with different business models.

85. The opposite party has submitted that whether a performance license fee is chargeable or not for underlying literary and musical works is purely a legal issue. The informant's submission on this aspect leads to the absurd situation that the performance license fee will be held to be abusive as a matter of competition law if the chargeability of the same is held to be not valid by the decision of the court and at the same time performance license fee will be held to be not abusive as a matter of competition law if the court rules that the same is chargeable by the opposite party.

86. The opposite party has further submitted that the informant had never raised the issue of performance license fees in the information except for one paragraph. The opposite party has further submitted that at present it has stopped the practice of charging performance license fees from the radio operators subject to the radio operators furnishing a bank guarantee to that extent.

Written submissions of the informant

87. The informant has submitted that defining markets on the basis of a particular genre finds support in European competition assessment and the EC in *Seagram/ Polygram* case and *Thorn EMI/ Virgin* case recognized that it was possible that different music genres could constitute separate markets.

88. The informant further submitted the following arguments in response to the opposite party's contention that the relevant market should not be

limited to Bollywood music because radio stations have the ability to shift to non-Bollywood music:

(i) *Radio stations' decisions are intrinsically linked to their customer preferences*

Once a radio station has positioned itself to attract a certain demographic, repositioning away from that demographic is risky and costly. The informant's ability to substitute one genre of music for another is constrained by its targeted listener demographic. Further, the only form of revenue for private FM radio stations is the advertising and broadcast decisions are based on potential listener base. Additionally, costs of switching from Bollywood to non-Bollywood music can be significant and therefore, they should result in defining narrower markets.

(ii) *Music providers cannot easily switch to providing increased Bollywood content*

Assuming that supply side substitutability could be considered, the opposite party suggests that that all music providers offer a repertoire of music which consists of Bollywood and non-Bollywood music and therefore, it is easy for the informant to increase or decrease the amount of Bollywood music purchased at the upstream level depending on market circumstances. As per the informant this is a failed hypothesis because to 'create' songs, music providers would have to expand into film production.

(iii) *New Bollywood music*

The DG has erred in finding that a lack of clarity on the definition of 'new' music leads to a conclusion that 'new' music cannot be a separate relevant market. The opposite party itself has put on its website that it represents 70% of upcoming Indian entertainment content including Bollywood and therefore,

considers it to be a separate market. The informant has shown that most popular songs on FM Radio in India are those which are recently released.

(iv) *T-Series offers its entire repertoire*

In response to the contention of the opposite party that since its competitors offer their entire repertoire to radio stations, one particular genre cannot be demarcated as a relevant market and since the informant also plays devotional music, it cannot be said to be playing only new Bollywood music; the informant has submitted that it does broadcast Ghazals and Bengali music in Kolkata and Punjabi music in New Delhi; however, the fact that radio stations play limited amounts of non-Bollywood music on their radio stations does not take away from Bollywood music being defined as a relevant market. It is important to note that the music relevant for every private FM radio station is limited to a particular genre and FM radio stations do not compete for obtaining the entire repertoire of music companies.

89. The informant has submitted that private FM channels constitute a distinct relevant product market and AIR FM should be excluded because the opposite party's ability to price discriminate justifies the delineation of a distinct product market on the basis of different customer groups and AIR FM's content and social motives make it distinct from private FM Radio stations.

90. The informant has submitted that markets are regularly defined on the basis of customer groups and if one set of customers receives a wholly different price from others, such customer does not participate in the same market and therefore, be excluded from competitive assessment. This is confirmed by European Commission's position that '[a] distinct group of customers for the relevant market may constitute a narrower, distinct market when such a group could be subject to price discrimination'. As per the informant, on the basis of statement of Shri Neeraj Kalyan, the opposite party

has admitted that rates charged to the Government. FM stations is approximately INR 400-450 per needle hour, which is different from the rates charged to private FM stations and in fact rates charged to private FM radio stations are at a significant premium of 47-65% more therefore, making it clear that the opposite party price discriminates.

91. The informant has submitted that listeners tune into AIR FM for educational and entertainment content which cuts across society. It is for this reason that no AIR FM station focuses on 'new' Bollywood music in the way that private FM radio stations do. The opposite party's contention that the private FM stations can broadcast news is misleading, as the implementing notifications have delayed the process even further. Private FM radio stations and listeners do not consider AIR FM to be a competitor as a lack of broadcast restrictions and its social mandate make its content substantially different and therefore, not substitutable/ interchangeable for that of private FM. The opposite party also does not consider AIR to compete with private FM radio stations as its content is provided at a significant price differential with wholly different negotiation abilities and market dynamics at play. Thus, according to the informant, AIR FM is a distinct product market from private FM radio stations.

92. On the geographic market, the informant submitted that the relevant geographic market for assessing the opposite party's conduct in the present case is '*individual cities in which radio stations have licenses to broadcast*'. This is because the Government of India only licenses radio stations on a city by city basis. In addition, radio station owners are only allowed to own one radio station per city. If a listener is not within city limits, they cannot receive a radio broadcast.

93. The informant has submitted that in applying SSNIP test to a geographic market definition, the question to be asked is if the price of the opposite party's music were to increase in New Delhi would a radio station

shift its operations to a music company in another city? The answer is no, especially since Government grants licenses to private FM stations on a per city basis and regulatory barriers preclude a radio broadcaster from operating in another city. Further, if SSNIP test was applied to advertisers in New Delhi, such advertisers would not shift their advertisements to a radio station outside New Delhi. This is because advertisers target local preferences. Lastly, applying SSNIP test to listeners, if there was a price increase in the price of receivers in New Delhi, listeners would not switch to receiving content from another city as the regulatory and technical restrictions imposed on radio stations do not allow them to do the same.

94. In view of the above, the informant has submitted that the relevant geographic market should be limited to individual cities where radio broadcasters are licensed to operate and therefore, the relevant market to be investigated is the '*market for the broadcast of new Bollywood music on FM radio stations in every city in which FM radio stations are licensed to operate*'.

95. The informant has submitted that it is important to note that the test for dominance is contained in section 4 of the Act and that the factors listed in section 19(4) of the Act are relevant only in as much as they aid the application of the section 4 test. In the event that the informant can provide direct evidence of the opposite party's ability to act independently of competitive forces, it need not establish dominance on the basis of such factors. The informant has also submitted that the opposite party's conduct in the instant case satisfies the test for dominance laid out in explanation (a) to section 4 and on the basis of factors listed in section 19(4) of the Act.

96. The following actions of the opposite party have been shown by the informant to demonstrate that the opposite party is unconstrained by the conduct of its competitors:

(i) The opposite party's royalty rates are set on a needle per hour basis, whereas PPL and most other competitors provide licenses at a rate either determined by or equivalent to the Second Order of the Copyright Board.

(ii) The opposite party's royalty rates are approximately 63.6% higher than those paid by the informant to other music providers. This however, has not led to a shift in demand from the opposite party to its competitors.

(iii) The opposite party imposes MCC ranging from 30%-50% of playout which radio stations are required to pay irrespective of whether they play that amount of music. No other music provider can or has imposed such MCC.

(iv) The opposite party imposes performance licensee fees whereas numerous High Courts in India have held that companies have no right to impose performance license fees. The opposite party is the only music provider which imposes performance license fees despite the High Court orders holding the contrary.

97. The informant has further submitted the following actions show that the opposite party is acting independently of its customers:

(i) During oral arguments, the opposite party stated that it lost contracts with 82 of the private FM radio stations (not necessarily radio companies/ broadcasters) after the Second Order of the Copyright Board, which reduced its market share by 15%. The informant has contended that what is important to note is that this reduction has not led to any change in behaviour, rates or terms and conditions offered by the opposite party. This is direct evidence that indicates that the opposite party is unaffected by losing 1/3rd of its customers (due to the supra normal profits derived from the other 2/3rd).

(ii) Radio City (one of the contracts that were terminated as a result of the opposite party's conduct) returned to the opposite party after a year on unchanged terms. This shows that even when one of the largest radio broadcasters in the country with 20 radio stations seeks to return after a year of not playing the opposite party music, the terms and conditions offered remain unchanged by the opposite party, indicating a blatant disregard for customers including the ability to act independently.

(iii) The opposite party argued that Big FM's listener ratings increased when it switched from new Bollywood music to retro music. The opposite party however, failed to inform that Big FM suffered a reduction in their revenue by a substantial margin of INR 4,38,92, 761 over the January-March quarter of 2012 compared to 2011, where Big FM was licensed with the opposite party. Big FM stated that the major cause/ reason for the fall in revenue was on account of its inability to play the opposite party's music and compete with other radio channels present in the same cities on a level playing field. As per the informant this shows that more listeners do not necessarily translate into more revenue, if the content broadcast is not as desirable. It is also evidence of the opposite party's ability to be unaffected by the loss of radio stations which may gain additional listeners, but cannot monetize the same without the opposite party content.

(iv) MCC imposed on customers range from 30-50% of playout when actual playout of the opposite party music was lower. Radio stations are therefore, required to play the opposite party content more than they would have in a counterfactual without MCC. Radio stations have indicated a strong resistance to the imposition of MCC. The fact that MCC are still imposed by the opposite party indicates that it can act independently of its customers.

(v) The imposition of performance license fees, which are not payable to the opposite party, forces radio stations to pay double the royalty they normally have to pay music providers. The fact that despite such a gulf in royalty

payments, radio stations have not been able to effectively switch to non-opposite party music is indicative of the opposite party's ability to act independently of its customers.

(vi) The opposite party also conveniently decides to follow the rate set by the First Order of the Copyright Board as a 'market standard' while disputing the rate set by the Second Order of the Copyright Board by the same authority. The opposite party's argument that the rate set in the Second Order of the Copyright Board does not apply to it as it was not a party to the proceedings applies equally to the First Order of the Copyright Board, where the opposite party again was not a party. The opposite party is the only music provider who is charging such rates to radio stations. This is despite the fact that the entire industry has expressed dissatisfaction with these rates and has applied to the Copyright Board for a compulsory license.

(vii) In terms of the opposite party's business model, the opposite party artificially increases acquisition costs of music so much that its competitors cannot afford the same. Higher acquisition costs make the opposite party more attractive to composers and film producers, but also distort market dynamics. Normally, such a price increase would be fraught with risk of not being able to recoup the same; the opposite party, however, can guarantee that radio stations will play between 30-50% of its music through its MCC scheme, minimizing the risk of not being able to recoup the high costs of acquisition. In addition, by imposing both broadcast and performance license fees, the opposite party earns double the revenue per song than any of its competitors.

(viii) The only reason why the opposite party can implement such a nefarious scheme is its dominant position in the market. No customer can force the opposite party to negotiate its terms and conditions as the opposite party, by its own admission, is unaffected by 1/3rd of its customers moving away.

98. The informant submits that in addition to the direct evidence highlighted above, an analysis of the factors set out in section 19(4) of the Act is also demonstrative of the opposite party's dominance.

99. Market share is an important factor in assessing dominance of an enterprise. As per the DG Report, the opposite party owns more than half of the popular content that has become the staple diet for music played by FM stations run by the informant. There has been a considerable dispute between the parties as to the opposite party's market shares in the relevant market. The opposite party has questioned the veracity of the data but it has never requested cross-examination of any radio station though such a request is provisioned for under the Act. The opposite party should not be allowed to question the veracity of the data provided while at the same time having given up its right to cross-examine all the radio stations which provided evidence.

100. Market shares in terms of playout are relevant and important basis on which dominance can be assessed. The opposite party's own evidence shows that its market share of total playout on 210 private FM radio stations licensed by it is between 32.5% to 34.1%. This evidence however, includes radio stations licensed with the opposite party but which do not play much Bollywood music, such as stations in South India which may play a few Bollywood songs, but focus on South Indian music. Therefore, when analyzing the opposite party's market shares in the relevant market, all stations which broadcast non-Bollywood music should be excluded. The informant also submits that calculating market shares on the basis of all licensed FM stations is inaccurate because radio stations licensed with the opposite party are a better reflection of the opposite party's position in the market because they are more likely to constitute the relevant market. Radio stations which play no or minimal Bollywood music should be excluded from the relevant market. Consequently, by reducing the number of radio stations to more accurately account for the relevant market, the opposite party's share of the same would consequently be higher.

101. Furthermore, an analysis of the opposite party's market share based on the most popular songs may be an even better and more accurate indicator of the opposite party's market power as this would focus on the relevant market. Data provided by AirCheck shows that the opposite party held rights to 46% of the top 100 songs played in 18 A category cities between July 2011 and June 2012. It is important to reiterate that broadcasting the Top 100 and Top 20 songs per week are essential for radio stations to remain viable in the business and therefore, highlights the market power of the opposite party.

102. The informant submitted that the opposite party acquires the rights for the maximum number of films (almost 4 times that of its nearest competitor, YRF) and that CBFC data is only for films certified and not released and the number of films in a year are likely to be fewer than the number of films certified for release. Furthermore, any discrepancy between the two is likely to be minimal and the opposite party's market share of approximately 38% as a result of the data submitted by private FM stations is not inconsistent with the data provided by the opposite party itself. The opposite party focuses its attention on films of bankable 'superstars' which maximize the possibility of the music being a hit and minimizes the risk of losses.

103. It was also submitted that the opposite party has a turnover of approximately INR 400 crores in the INR 750 crore music industry. That is approximately 700-1300% higher than that of its competitors. The Commission has previously recognized a turnover of 300-700% higher than competitors is indicative of dominance in *Belaire Owners' Association* v. *DLF Limited, Huda & Ors.* (Case No. 19 of 2012). In response to the opposite party's contentions to the DG report, the informant submits that the DG has analyzed the opposite party's data compared to the turnover of PPL and IPRS and found that the opposite party's turnover is still higher. Secondly, PPL represents over 200 music companies and therefore, the opposite party's actual position in the market *qua* individual music providers is considerably

enhanced. Thirdly, IPRS and PPL redistribute fees to their members whereas the opposite party provides no evidence that it redistributes its fees for owners of the underlying works. Finally, it is the radio stations position that the opposite party and IPRS are not entitled to performance license fees and accordingly, the informant is not paying IPRS and the fact that the opposite party imposes the same, makes it liable to be included in calculating its turnover. The informant further submits that the opposite party's conduct shows that it acts independently of such powerful and vertically integrated competitors which are dispositive of dominance.

104. It was argued by the informant that the opposite party has alleged that there are no barriers to entry or expansion and competitors like Sony are significant competitors. The opposite party has failed to explain why in an industry with no barriers to entry or expansion and where the opposite party's prices are considerably higher than its 'significant competitors', the market shares of those competitors have not increased dramatically as a result of a shift in demand. The conduct of the opposite party in increasing acquisition costs, focus on superstar films and imposing performance license fees and MCC on radio stations are significant barriers to entry and expansion in the market.

105. The informant has submitted that it agrees with DG's finding on excessive pricing and further states that the opposite party has abused its dominant position by charging unfair and excessive prices of INR 1260 per needle hour as broadcast and performance license fees for the broadcast of the opposite party's music on fever 104 radio stations in Delhi, Mumbai, Kolkata and Bangalore.

106. Challenging the submissions of the opposite party on 'excessive price', it was argued that the concept of excessive price has been recognized by the European Union in *United Brand*, *General Motors*, *Scadlines* and *British Horseracing Board* cases as well as other cases. In fact, in the music industry

itself, there has been recognition of excessive royalties as amounting to an unfair price and an abuse of dominance.

107. *United Brands* case, which is the seminal case on excessive pricing, has laid down the test for excessive price, first limb of which is that the price bears no reasonable relation to the economic value of the product. This economic value is the value of the product to both the seller and the purchaser. An equitable royalty rate would be one that bears a correlation to the revenue generated by the informant by exercising the license provided to it by the opposite party. In fact a revenue share arrangement has been expressly found to satisfy the *United Brands* case test as bearing a reasonable relation to the economic value of the service provided by the licensor (*Kanal 5* v. *STIM*). Just as the copyright board has recognized in Second Order, the informant submits that a revenue share structure takes into account the listener and the advertiser, two important components of the radio licensing stream, which a flat fee fails to account for. A flat fee also fails to account for inflation or increasing revenues.

108. The second limb of the *United Brands* case test is whether the difference between the costs actually incurred and the price actually charged is excessive. However, this exercise is not possible because of the opposite party's failure to provide its costs to the DG, despite being expressly asked to do so. In response to the DG's request, the opposite party had stated that the cost analysis for fixing up royalty rates is not possible. The situation is similar to the *MCX Stock Exchange* v. *National Stock Exchange of India Limited & Ors*. case where the Commission has held that '*this cavalier attitude of not allocating cost of operation for a clearly segregated operation can come from a position of strength*'.

109. The last limb of the *United Brands* case argument lays down the benchmarks to compare an alleged excessive price *i.e*. the assessment of whether a price is excessive is by comparing the excessive price to other

competitive prices. The Genesis Report has conducted this exercise and has compared the opposite party's broadcast license fee of INR 661 per needle hour and has found that the opposite party charges a premium ranging from 45-65% in comparison to (a) an industry standard (Second Order of the Copyright Board) (based on the informant's playout of PPL music in the year 2011-12 the license fees payable to PPL equated to a rate of INR 404 per needle hour); (b) different customers such as AIR FM (INR 400-450 per needle hour); and (c) competitors such as YRF (INR 450 per needle hour for the year 2011-12). Thus, it is evident that a royalty of INR 661 per needle hour is excessive.

110. The very fact that the opposite party can continue to charge higher license fee per needle hour to private FM stations despite losing 82 of 245 private FM stations and which loss results in no change to its pricing model, shows that there is no competitive pressure to drive the opposite party prices down to competitive levels-such conduct is in itself demonstrative of dominance and consequent abuse. The very fact the opposite party's profits are approximately 700-1300% higher than that of its competitors is demonstrative of the excessiveness of the opposite party's prices.

111. It was urged that the opposite party's primary argument on why its license fees are not excessive and should be considered as an abusive practice is based on increasing revenues of radio stations. It would be noted that if revenues of radio stations were indeed growing at an exponential rate, a revenue share model would also reflect corresponding exponential royalties to the opposite party. The opposite party's reliance on the informant's growth rate of 62% is incorrect as the informant has incurred losses for the first 8 years of operation, which losses were caused by the excessive royalty rate of INR 661 per needle hour.

112. The opposite party has stated that it incurs significant acquisition costs but has provided no evidence to justify the same with the exception of a few

carefully selected sample albums which it is yet to recoup costs. Furthermore, the opposite party is not a lone artist or creative enterprise which faces uncertainty in the acquisition of music. The portfolio licensing model in fact corrects for any uncertainty/ risk incurred by the opposite party in the acquisition of music.

113. The loss of revenues from physical sales cannot be attributed to music being played on the radio and more importantly cannot be used to justify why excessive license fees are important. While the opposite party's revenues arising from the physical sales of CDs, cassettes *etc*., may have been decreased its sales through digital exploitation of music rights has also increased multi-fold over the last 3 financial years.

114. The argument that price set by a regulatory authority cannot be abusive cannot be accepted as the very fact that the opposite party was not a party to the First Order of the Copyright Board itself shows that this argument should be rejected.

115. According to the informant, from 2006 to October 2012, the opposite party imposed MCC on the informant as a necessary precondition for the grant of a license to its music repertoire. No other music provider charges MCC, which are both exploitative and exclusionary and their imposition, an abuse of a dominant position.

116. Further, MCC are exploitative on customers as they are forced to play the opposite party content for a minimum amount of playout irrespective of how much of the opposite party's music it wishes to actually broadcast. The opposite party has alleged that MCC is not exploitative as radio stations in any event broadcast the pre-determined amount. This is a blatant attempt to mislead the Commission. For example, in the year 2009-2010, the informant has, with the exception of the month of November (for all three radio stations)

and in December for the Kolkata radio station and January for the Mumbai radio station, never broadcast the full MCC target. Therefore, the informant was forced to pay the opposite party MCC amount in excess of actual music broadcast for three radio stations and furthermore, similar submissions have been reiterated by Big FM and Radio One.

117. The informant has further submitted that MCC also result in significant exclusionary effects. Since radio stations are coerced into paying the opposite party a minimum guarantee, they would naturally broadcast the amount of music that they are forced to pay for. Therefore, a certain amount of music playout on private FM radio stations is already fixed for the opposite party. This results in the opposite party competitors being other music providers not being able to compete for and being foreclosed from broadcasting their music on this prefixed playout of 30-50% reserved for the opposite party.

118. The informant has further submitted that MCC is a carefully designed loyalty rebate scheme imposed by the opposite party to perpetuate and abuse its dominance to the detriment of competitors. As a result, a radio station which was already paying for 40% of the opposite party's airtime would naturally play 40% of the opposite party's music. In addition, where a radio station achieves MCC target, it is provided an additional 20% of free airtime of the opposite party's music. As a result of the 20% of free airtime granted, a radio station would face the same choice between zero additional cost the opposite party music as against the positive additional cost songs of all other music channels. As a result, whenever possible the opposite party's song would be substituted for a non-opposite party song. This business model or scheme ensured that the opposite party's content is a must-have content for radio stations.

119. According to the informant, the opposite party has stated that it imposed MCC to compensate for losses in physical sales. If the opposite party was genuinely concerned about the repeated playout of its music why would it

reserve an MCC and furthermore, offer another 20% of free playout. Furthermore, the opposite party has sought to justify the clearly anti-competitive MCC on the grounds that no radio station has complained of it, which is incorrect as DG Report finds that Radio One, My FM, Radio Mantra and Radio Mirchi had requested the opposite party to do away with MCC.

120. The informant has submitted that the opposite party's position is that the issue regarding performance license fees is purely a legal issue pending before courts and is not a competition issue at all. The informant submits that the opposite party's insistence on the payment of performance license fees, when it is clear that the same are not payable, is an abuse of its dominant position for being an unfair condition in the purchase of goods and for making the conclusion of contracts subject to acceptance of supplementary obligations which have no connection to the subject of such contracts. The DG has concurred with the informant that imposition of performance licensee fees is an abuse.

121. The informant has further submitted that all High Courts other than the Madras High Court have held that performance license fees are not payable for the broadcast of sound recordings on FM radio stations. The matter is currently pending before the Supreme Court. Till the Supreme Court determines this issue, the law in 3 out of 4 High Courts is that such fee is not payable.

122. The informant has further submitted that being the only music provider who is imposing performance license fees, the opposite party earns twice the royalty than its competitors for the same type of music. This impedes effective competition from existing competitors as the opposite party has used this increased revenue to raise acquisition costs of music and controls most of Bollywood music output. Furthermore, such conduct dissuades new radio stations from entering the market, since entrants cannot maximize the expected revenue on making an investment in the radio business due to the

imposition of an illegal requirement to pay royalties. Therefore, the conduct of the opposite party results in foreclosure, both at the upstream and downstream levels.

123. The informant has submitted that that licensing Bollywood music to all private FM radio stations are 'equivalent transactions' as the opposite party bears no additional cost in providing a license to its music repertoire to such stations. The opposite party also does not gain any efficiencies by licensing its music content to multiple radio stations owned by the same radio broadcaster. This being the case, the opposite party should offer identical terms and conditions to radio stations in the same city. In fact during their rejoinder on excessive pricing, the opposite party stated that it applies identical terms to radio stations in the same city. According to the informant, this is untrue due to many reasons including that Shri Neeraj Kalyan has admitted that they do charge differential rates for the underlying works for many reasons.

124. The informant has submitted that the anti-competitive terms and conditions imposed by the opposite party amount to refusal to supply its music on fair terms in violation of the Act and further those terms and conditions can be unfair *qua* the Act and separately unreasonable *qua* the Copyright Act. Therefore, while section 31 of the Copyright Act provides for a statutory ground to apply for a compulsory license, section 4 of the Act prohibits the abuse of dominance including a prohibition on the denial of market access under section 4(2)(c) of the Act.

125. The informant has further submitted that excessive royalties charged by the opposite party, MCC and the imposition of performance license fees which the opposite party is not entitled to in the license agreement are unreasonable restrictions on competition and consequently the license agreement between the parties is an anti-competitive vertical agreement in violation of section 3(4) of the Act. Furthermore, these restrictions can neither be considered to be 'reasonable' nor 'necessary' to protect the rights of the

copyright owners whose music is being licensed to the informant and therefore, cannot fall under the exemption under section 3(5) of the Act.

Jurisdiction

126. Before adverting to the competition concerns projected in the present case, the Commission deems it appropriate to deal with the jurisdictional challenges raised by the counsel for the opposite party to the present proceedings. It has been contended by the opposite party that the Commission does not have the jurisdiction to entertain the present matter for the following reasons:

(i) Under section 4(2)(a) of the Act, there is an abuse of dominant position if the dominant enterprise imposes unfair or discriminatory conditions in the sale of goods or service or the price of goods or services. The present case involves a license of rights, and such a right cannot be considered to be a 'good' or a 'service', it cannot be brought under the purview of the section 4 of the Act.

(ii) The appropriate authority to address the grievances of the informant is the Copyright Board. The present dispute is a blatant case of forum shopping where the informant is seeking to obtain what would in effect be a compulsory license indirectly through the Commission, and that the facts stated, issues raised and reliefs prayed for before the Copyright Board are identical/ substantially overlapping.

(iii) The exclusive jurisdiction in the matter vests with the Copyright Board as the Copyright Board is the only authority to decide whether the terms (not just rates) of a license between copyright owner and a radio broadcaster are reasonable, and set new terms if existing terms are unreasonable. The Copyright Act is a complete self-sufficient sectoral regime and all issues pertaining to copyright including and especially issues relating to the reasonableness of copyright royalty as well as all other terms of licenses

between copyright owners and users of copyrighted works are contained within the four corners of the provisions of the Copyright Act.

(iv) The appropriate sectoral regulator is already seized of the dispute a year prior to instituting the present information as the informant itself had approached the Copyright Board for a compulsory license on terms considered reasonable by the complainant.

(v) The opposite party has further submitted that even if the Commission does indeed have the jurisdiction to hear the matter, it should not exercise jurisdiction for the simple reason that any finding of the Commission will heavily prejudice the proceedings between the parties at the Copyright Board, the Delhi High Court and the Supreme Court. For instance, the issue with the performance license fee is presently before the Supreme Court and if the Commission were to hold that charging of performance license fee by the opposite party is reprehensible and should be prohibited; such finding may be used against the opposite party before the Supreme Court.

(vi) The opposite party has further submitted that where the free play of the forces of demand and supply do not give rise to a market price but instead the market forces of demand and supply are suppressed by the orders of the Copyright Board and which is then opportunistically used by the informant as a benchmark for an abuse of dominant position, it would be a travesty of justice to invoke the competition rules of section 4 of the Act to regulate the opposite party's conduct. Where the market is so overwhelmingly regulated by the Copyright Board and where the market mechanism is nearly substituted by a regulatory body, the role of competition law is greatly diminished and in this case completely ousted.

127. To recapitulate the events, it may be noted that the Commission *vide* its order dated 22.12.2011 dismissed the application of the opposite party for framing and deciding the issue of jurisdiction of the Commission as a

preliminary issue. Aggrieved thereby and dissatisfied therewith, the opposite party approached the Hon'ble High Court of Delhi by way of Writ Petition No. 1119 of 2012, *Super Cassettes Industries Limited* v. *Union of Indian & Ors*. The Hon'ble High Court *vide* its order dated 04.10.2012 directed the Commission to determine and pass an appropriate order on the issue of jurisdiction of the Commission after hearing the parties. Accordingly, the Commission heard detailed submissions of the parties pertaining to the jurisdiction and *vide* order dated 28.01.2013 held that it had the jurisdiction to consider the issues raised before it by the informant. The opposite party once again approached the Hon'ble High Court of Delhi by way of Writ Petition No. 2037 of 2013, *Super Cassettes Industries Limited* v. *Union of Indian & Ors.*, challenging the said order dated 28.01.2013 and praying for a stay on the proceedings before the Commission. The Hon'ble High Court, *vide* its order dated 01.04.2013, while dismissing the application for a stay of the proceedings before the Commission held as follows:

> *Having examined the impugned order, in my view, prima facie the CCI has considered the aspect of jurisdiction. In this respect, they have referred to their earlier order wherein after considering the scope and ambit of the Copyright Act and the Competition Act (see paragraphs 7 and 8 of the impugned order) it has opined as follows:*
>
> > *'9. A reading of the above section would show that none of the areas covered by section 3 of the Competition Act is covered by the Copyright Act. No doubt under the Copyright Act, the Copyright Board has a right and obligation to determine licence fee and the reasonableness of the licence fee but apart from that none of the other issues as envisaged by section 3 of the Competition Act can be decided by the Copyright Board. Similarly, Section 4 of the Competition Act casts an obligation on the*

Commission to adjudicate the issue of dominance of an enterprise and to give a finding on the alleged abuses due to dominance. Abuse may be there due to one sided, discriminatory or unfair terms of the agreement or otherwise. The Copyright Board has no such jurisdiction.

10. The rights of a person protected under the Copyright Act have also been taken care of by section 3(5) as is evident. It is true that the applicant has also made a prayer in the information about unreasonableness of the licence fee, but that was not the sole criteria for referring the matter. The Commission had referred the matter for observing as under:-

The Commission finds merits in the submission of the informant that the radio stations have no choice but to accede to the arbitrary and unfair conditions imposed by T-Series because of it being a dominant enterprise. Considering the fact that T-series is the only music company which charges MCC from the radio stations unlike any other licensers including PPL, IPRS, SIMCA etc., prima facie it appears that T-series is in position to dictate such terms only because of its position of dominance. Considering the facts and allegations in the information and position discussed as above, the Commission feels that an investigation in the matter by the Director General, CCI is required.

11. From the above initial order of the Commission, it is apparent that the Commission had intended to exercise its jurisdiction only within the four walls of the Competition Act and had no intention to encroach upon the area where

the Copyright Board has sole and exclusive jurisdiction. The Competition Commission is well within its domain of jurisdiction while considering the issues raised before it and rightly exercised its jurisdiction of referring the matter to Director General for investigation.'

Having regard to the above, I am of the view that no case is made out for grant of interim stay of the proceedings before the CCI. This was also what was agreed to by the petitioner when it had approached this court in the earlier round; a fact which is recorded hereinabove. At this stage, Mr Sibal says that while he does not seek a stay of the proceedings before the CCI, all that the petitioner is seeking is that no final order be passed. This submission of the petitioner cannot be accepted. The only protection that the petitioner can be given is that, if CCI were to come to a conclusion, which is adverse to the interest of the petitioner, the CCI will give at least a week's time to the petitioner to approach the appropriate forum for grant of relief, if any, in the matter. With the aforesaid observations, the captioned application is disposed of.

128. In light of the aforesaid observations of the Hon'ble High Court noticing the order of the Commission holding jurisdiction nothing survives in the jurisdictional plea of the opposite party.

129. Suffice to note that as per the legislative framework, the duty of the competition authority as envisaged in section 18 of the Act is '……*to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India*', thereby giving the Commission a very wide mandate. It is therefore, the duty and responsibility of the Commission to eliminate practices in the market that have an adverse

effect on competition and to promote and sustain the competition so as to protect the interest of consumers and ensure freedom of trade.

130. As observed in the earlier order, none of the areas covered under section 3 or 4 of the Act is covered under the Copyright Act. Therefore, the powers of the Commission and Copyright Board govern different aspects of law and the Copyright Board cannot serve as an effective instrument for promotion of competition. The Copyright Board is a body constituted under section 11 of the Copyright Act for the discharge of certain functions under the Act. The main functions of the Copyright Board as per the Copyright Act include deciding whether a work has been published or as to the date on which the work was published for the purposes of chapter V; deciding whether the term of copyright for any work is shorter in any other country than that of the Copyright Act; settling disputes related to assignment of copyright; granting compulsory licenses in respect of Indian works withheld from the public; granting compulsory licensing to publish unpublished works; granting compulsory license to produce and publish translation of literary or dramatic works; granting compulsory licenses to reproduce and publish certain categories of literary, scientific or artistic works for certain purposes; addressing the complaints of the aggrieved persons or the Registrar of Copyright, for rectification of the Register of Copyright *etc*. A review of the functions of the Copyright Board reveal that while the Board obviously performs important judicial/ *quasi*-judicial functions, under no circumstances can it be said that the Copyright Board is tasked with eliminating market practices which have an adverse effect in the market of works protected by the Copyright Act.

131. Having said that, the Commission notes that it recognizes the role and importance of sectoral regulators and exercises its jurisdiction keeping in mind the role of sectoral regulators. Therefore, the allegation of the opposite party of encroachment by the Commission on the powers of the Copyright Board is completely without merit. The Commission is a market regulator and has the

jurisdiction to look at all issues affecting competition in the market. Furthermore, it must be understood that the exercise of jurisdiction of a regulatory authority to consider a matter and the crafting of remedies by the same authority in the matter, after considering the impact of such remedies on various ongoing proceedings before other sectoral regulators/ courts are two very different and distinct issues. The concern of the opposite party therefore, as to the nature of remedies that the Commission will prescribe and its consequences thereof on matters before other sectoral regulators/ courts is not relevant for the determination of the jurisdictional question.

Issues for determination

132. The Commission has given due consideration to facts given in the information, the investigation report of the DG, the detailed written and oral submissions made by the concerned parties along with opinions and analysis of experts relied upon by the informant and the opposite party. The relevant material available on record and the facts and circumstances of the case throw up the following issues for determination in this case:

(i) What is the relevant market in the present case?

(ii) Is the opposite party dominant in the above relevant market?

(iii) If so, is there any abuse of its dominant position by the opposite party in violation of section 4 of the Act?

Determination of Issue No. 1

133. The edifice of competition law rests upon dynamics of competition in one particular market. Benefits or harm to competition has to be assessed with respect to that market. In the Act, the term used for such a market where the status of competition has to be evaluated is 'relevant market'. This term has been defined in section 2(r) of the Act read with sub sections (s) and (t) of section 2. Furthermore, 'relevant product market' is defined in section 2(t) of

the Act as 'a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use'. Furthermore, the Commission shall, as per section 19(7) of the Act while determining the 'relevant product market', have due regard to all or any of the following factors, *viz.*:

(a) physical characteristics or end-use of goods;
(b) price of goods or service;
(c) consumer preferences;
(d) exclusion of in-house production;
(e) existence of specialized producers;
(f) classification of industrial products.

134. Since the allegation of the informant pertains to certain conduct of the opposite party in licensing its repertoire of songs to the informant, the market for licensing of music content (protected as intellectual property) is a good starting point for determination of the relevant market in this case.

135. The Copyright Act is the statutory enactment dealing with copyright in India. There are four categories of works in which copyright subsists namely (i) original literary, dramatic and musical work (ii) original artistic works (iii) cinematograph films and (iv) sound recordings. It may be noted that section 14 of the Copyright Act, which lays down the exclusive rights available to each category of work, states as follows:

> *Section 14. Meaning of copyright: For the purposes of this Act, 'copyright' means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:-*

(a) in the case of a literary, dramatic or musical work, not being a computer programme,--(i) to reproduce the work in any material form including the storing of it in any medium by electronic means; (ii) to issue copies of the work to the public not being copies already in circulation; (iii) to perform the work in public, or communicate it to the public; (iv) to make any cinematograph film or sound recording in respect of the work; (v) to make any translation of the work; (vi) to make any adaptation of the work; (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,-- (i) to do any of the acts specified in clause (a); (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) in the case of an artistic work,-- (i) to reproduce the work in any material form including depiction in three dimensions of a two-dimensional work or in two dimensions of a three-dimensional work; (ii) to communicate the work to the public; (iii) to issue copies of the work to the public not being copies already in circulation; (iv) to include the work in any cinematograph film; (v) to make any adaptation of the work; (vi) to do in relation to an adaptation of the work

any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) in the case of a cinematograph film,-- (i) to make a copy of the film, including a photograph of any image forming part thereof;(ii) to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions; (iii) to communicate the film to the public;

(e) in the case of a sound recording,--(i) to make any other sound recording embodying it; (ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions; (iii) to communicate the sound recording to the public.
Explanation.--For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.]'

Thus, it is evident that copyright consists of a bundle of different rights in the same work, which can be exploited by the owner of the work collectively or separately.

136. The object of copyright law is to encourage authors, composers and artists to create original works by rewarding them with the exclusive right for a limited period to reproduce the works for the benefit of the public. Authors/ owners commercialize these rights i*nter alia* by licensing or assignment. Each such right conferred upon a protected work is distinct and cannot be interchanged or substituted with another right. For example, exclusive rights available to the owner of a musical works include *inter alia* the right to perform the work in public, to communicate the work in public, to make any

translation of the work or any adaption of the same. If a customer wanted to translate a song into a different language, such a customer would have to procure a license to translate the work from the owner; procurement of a license to communicate the work would not be usable. From a demand-side perspective there is clearly no substitutability between the different categories of rights. Therefore, different types of rights may constitute different markets based on the facts and circumstances of the case and markets involved.

137. The issue of narrowing down the relevant market based on the medium of broadcasting may now be considered.

138. The Commission notes that DG has concluded in his investigation that radio is distinct from other media of broadcasting. According to the DG the main distinguishing factor between radio and other forms of media which broadcast music such as TV and mobile VAS is that radio is free-to-air while TV broadcasting and VAS are subscription based services. Furthermore, as per the DG, radio broadcasting is more localized whereas TV broadcasting and mobile VAS is available nationally; and costs associated with radio as a source of entertainment is much lower than TV and/ or mobile VAS as a radio operates by way of a receiver which is cheaper and more easily available as opposed to TV or mobile VAS which are expensive and subscription based. Additionally the DG has also observed that TV channels generate revenue through advertising and subscription fees whereas radio being free-to-air is limited to advertising revenues. On the other hand, the DG has also observed that in case of mobile VAS, it is an ancillary service to the main service of providing phone facilities and is subscription based where a part of revenue generated by the telecom industry is shared with the music company. Furthermore, as per the DG, the contents of radio stations in different cities cater to the cultural diversities in each city.

139. The informant has agreed with the DG in this regard and submitted that due to the fact that FM radio stations are free-to-air as opposed to TV or

Mobile VAS, consumers would not consider other forms of paid for entertainment as being substitutable with radio as a source of entertainment; furthermore, pursuant to the GOPA entered into between Government of India and private radio stations, the content allowed to be broadcast on radio is severely restricted which places private FM stations on a different plane compared to television broadcasters, as television has far greater liberty in relation to the content it is permitted to broadcast; additionally radio broadcasting is localized and specific to a particular city. On the other hand TV channels transcend national boundaries and mobile VAS is increasingly becoming available nationally and also does not require licenses to operate in cities. The opposite party has not made any specific arguments on the issue of distinction between different media of broadcasting.

140. In view of the distinguishing features as detailed above, the Commission holds that radio as a medium is distinct from other media of broadcasting.

141. The issue whether music content played on radio can be considered substitutable/ interchangeable with non-music content, may now be examined. The DG has also examined the content played on radio channels and observed that since inception the radio companies, to broadcast over FM waves, have had various restrictions imposed on them including with regard to the content including news and current affairs on their channels as a result of which they have no alternative but to play entertainment content in the form of music. Furthermore, as per the DG, other than news and current affairs (which is prohibited under the Government policy), the main non-music content is in the nature of radio dramas, jokes, interview, weather news, games and contests. However, majority of the listeners tune into radio stations to follow music content.

142. The informant has agreed with the DG and submitted that non-music content is broadcast on FM radio for the purposes of complementing music

content and therefore, is not substitutable or interchangeable for music content. All music channels advertise themselves as music channels or have tag lines relating to more music content than their competitors. Thus, it can be seen that the main focus of radio stations is on music and it is an essential branding and marketing proposition for them to have the latest music content. The opposite party has not made any specific arguments on the issue of distinction between different forms of content broadcast on radio.

143. After considering the rationale advanced by the DG and the informant, the Commission is of the view that music content cannot be considered as substitutable/ interchangeable with non-music content.

144. The Commission now considers whether in the radio industry, a distinction may be made between AIR and FM radio, and if further, also between AIR FM and private FM channels. However, before dealing with the issue, it would be apposite to notice evolution of the industry as highlighted in the report of the DG.

145. AIR was established in 1936 which is one of the largest radio networks in the world. Radio broadcasting is a one way transmission over radio waves intended to reach a wide audience. The transmission over radio takes various forms, AM and FM. AM is the oldest of the technologies used to broadcast music, while FM is a development over AM broadcasting. FM receivers are cheaper than those with AM receiving capabilities. FM radio has superior audio quality and stereophonic sounds, cheaper availability, wider collection of radio channels in comparison to AM radio.

146. In 1999, the Government of India launched the first phase of private sector involvement in FM radio broadcasting with the following objectives: (i) to open up FM broadcasting for entertainment, education and information dissemination by commercial broadcasters; (ii) 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 (iii) to supplement the services of AIR and promote rapid expansion of the broadcast network in the country for the benefit of the Indian populace.

147. In July 2005, the Government of India launched the second phase of the policy on expansion of FM radio broadcasting services through private agencies with a view to give FM radio business a boost. Phase II covered as many as 90 cities. It is seen that the FM radio stations across the country have entered into licenses with the Government on the same terms and conditions provided therein. Consequently out of these 337 channels, 284 were successfully bid and after scrutiny, permission was granted for operationalization of 245 channels spanning 87 cities. The number of operational private FM stations has increased to 245 stations as on September 30, 2008.

148. AIR has been in operation for over 60 years as opposed to FM channels which have been in operation since 2002 and that AIR is not restricted in terms of content and can broadcast news programmes *etc*., wherein FM channels can broadcast only music. AIR earns about 40% of the total advertising revenue in the radio industry and other channels share the remaining 60% and that AIR is having a big network of broadcasting set up throughout India and thus has huge listenership resulting into major share of advertisement income out of the whole radio industry.

149. Based on the documents filed by the parties, the Commission observes that the technical distinctions between AM and FM frequencies as well as the fact that private FM stations can only broadcast on FM and not on AM as per Government policy coupled with the limitation on content imposed on private FM stations makes it clear that AIR and FM radio channels are distinct. The Commission therefore, concludes that for the purposes of determination of the

relevant product market, AIR (AM as well as FM) is distinct from private FM stations.

150. The next question which arises for consideration is whether the market needs to be further restricted in terms of the type/ genres of music that are broadcast on the radio. The DG observed that the music business in India is different from the rest of the world as film music has a history of more than 70 years and is part of the Indian culture. The DG further observed that India has a vast range of music but the most popular is Bollywood music which accounts for about 70% of music sales in India, and that it is an established fact that out of 240 FM channels about 80% of the channels are largely based on Bollywood music and it is also established that more than 200 channels play the music of the opposite party. The DG also found that the maximum music played on more than 200 channels is Bollywood music.

151. The opposite party has alleged that the DG has assessed the wrong level of the market. The DG has reached the conclusion by considering the extent to which the mediums of music are substitutable and/ or interchangeable for listeners/ consumers. However, this is the wrong level to assess the market. The supply of goods where the opposite party is alleged to be dominant is the upstream flow of A (content owners providing licenses to radio stations) and therefore, what is required is to test the extent of the opposite party's market power by looking at the ability of its customers (radio stations) to switch and the ability of its rivals (other content providers) to expand. However, the DG analyses the substitution in respect of the downstream flow of B (radio stations providing broadcasts to consumers). The customer for purposes of competition assessment is the radio stations and therefore, the assessment should have been done at level A.

152. Section 2(t) of the Act defines relevant market as 'a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or

services, their prices and intended use'. For the purposes of an effective competition law analysis, the Commission must look at the working of the radio industry to understand the radio station-listener-advertiser dynamic. The Commission notes that the purpose/ function of a radio station is to provide content to its listeners and the number of listeners that they attract has direct implication on their ability to attract advertising, which is a radio stations main source of revenue. Therefore, in order to attract more listeners, the radio stations will attempt to provide content that is popular with the listeners. Since private FM channels are restricted to certain type of content that may be broadcast due to government policy, they are largely focused on broadcasting music. The role and tastes of the audience in music therefore, becomes relevant. Since majority of the listeners like to listen to Bollywood music, and given the cultural importance of Bollywood films music in the Indian context, as has been established by the DG, and also by the evidence of the radio stations, the radio stations as customers of the opposite party, who are dependent on the patronage of their listeners to attract maximum advertisers, will not consider Bollywood music substitutable with other kinds of music. The opposite party's contention that around 20% of the stations are not based on Bollywood music is without merit. Simply because there is a market for content that is non-Bollywood music does not imply that such content is substitutable with Bollywood music from the point of view of the customer who broadcasts Bollywood music based on tastes/ listening preferences of its audience. Furthermore, the contention of the opposite party that even those stations that play Bollywood music also play other types of music and can therefore, increase the amount of non- Bollywood music is also without merit for the same reason. The opposite party has further submitted that from a demand perspective, what is considered substitutable by radio stations are the various repertoires made available to it by the various music companies and stated how RAM data shows that Big FM, Radio City and Radio One switched to playing music from repertoires other than the opposite party's repertoire without suffering any appreciable dip in the market share. Even if this is accurate, the Commission notes that 3 radio stations (even though Radio City

switched back to the opposite party's repertoire and should not be counted) out of a total of 210 stations which have a license with the opposite party do not constitute a sufficient number of customers switching to indicate that any attempt by the firm to increase the prices for a product becomes unprofitable, which is an important consideration for market definition purposes.

153. The Commission therefore, holds that Bollywood music can be distinguished from the possible alternatives comprising of non Bollywood music by virtue of specific characteristics as a result of which Bollywood music is not interchangeable with non Bollywood music. Therefore, the Commission concludes that the relevant product market in this case is the '*market for licensing of Bollywood music to private FM radio stations for broadcast*'. For the purpose of section 4, the boundaries of relevant market freeze the moment the products cease being interchangeable or substitutable. In the instant case, non-Bollywood music and Bollywood music cannot be said to be 'interchangeable or substitutable'. It must be kept in mind that market definition is not a mechanical process and is specific to the facts and circumstances of each case.

154. The Commission notes that one of the major objections of the opposite party in determination of the relevant product market is that the DG has failed to consider supply side substitutability. Supply side substitutability considers whether other content owners in the market would switch to providing Bollywood music. However, the opposite party's argument fails to consider the dynamics of the industries in question. In order to provide effective competition constraints in the downstream market of licensing of music, the licensors would have to acquire more Bollywood music, which would require them to either purchase more film music or produce more films. As the dynamics of the film industry are such that sums of money involved in the acquisition of music/ production of films are huge, with the opposite party already being the largest buyer of film music, the opposite party's contention

of supply side substitutability is not probable in the context of the industry in question and therefore, without merit.

155. Insofar as the relevant geographic market is concerned, the DG concluded that the relevant geographic market in the present case as the '*territories of India where Bollywood music is prevalent*'. As per the DG, the music played by FM channels in each station depends upon the choices and preferences of listeners on the basis of local language, dialect and preferences and although the film music dominates the music played on FM channels across the country, yet the music played on FM can be categorized on the basis of region:

(a) Region where Bollywood/ Hindi music occupies the maximum share: Maharashtra, Gujarat, Madhya Pradesh, Chhattisgarh, Uttar Pradesh, Uttaranchal, Bihar, Jharkhand, West Bengal, Rajasthan, Haryana, Himachal Pradesh, Punjab and Jammu & Kashmir

(b) Region where regional language film occupies the maximum share: Tamil Nadu, Kerala, Andhra Pradesh, Karnataka

(c) Regions where a mix of Bollywood, English and regional language music are played: Bangalore, Hyderabad, Odihsa and North-East States

According to the DG, the relevant geographic market cannot be taken as India, as the music played in the southern and eastern part of the country is distinct from the music played in the rest of the territory where Bollywood is the choice of radio listeners. The opposite party has, however, contended that such a definition is extremely vague and cannot be used for any competition law assessment as there does not exist any objectively verifiable standard or norm to determine what is 'prevalent' form of music in any given territory of India especially considering the fact that the same music/ content is available through internet radio, mobile radio, TV *etc*., across territories of India.

156. The Act defines 'relevant geographic market' in section 2(s) of the Act as '*a market comprising of an area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas*' and as per section 19(6) of the Act, the Commission shall, while determining the 'relevant geographic market', have due regard to all or any of the following factors, namely:

(a) regulatory trade barriers;
(b) local specification requirements;
(c) national procurement policies;
(d) adequate distribution facilities;
(e) transport costs;
(f) language;
(g) consumer preferences;
(h) need for secure or regular supplies or rapid after-sales services.

157. The Commission notes that the 'relevant geographic market' is the area in which conditions of competition for supply of goods or provision of services or demand of goods or services are 'distinctly homogenous' from prevailing areas. Geographic market definition involves the identification of those firms, selling the products within the relevant product market, to which customers in the area will turn in the event of a significant price increase, and may also include firms that would enter the geographic area in response to such an increase. Since any radio station operating in any city in India can purchase a license from the opposite party or any of the opposite party's competitors, the geographical area should be the entire territory of India. The Commission therefore, conclude that the 'relevant geographic market' is the 'territory of India'.

158. The Commission therefore, concludes that the 'relevant market' in this case is the 'market for licensing of Bollywood music to private FM radio stations for broadcast in India'.

Determination of Issue No. 2

159. Having delineated the relevant market in consideration for the instant case, it is now possible to examine facts to determine whether the opposite party enjoys a 'dominant position' in such relevant market. 'Dominant position' is defined under explanation (a) of section 4 of the Act. The same is reproduced below for ready reference.

'*Dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.*'

160. Unlike in some international jurisdictions, in India, the evaluation of the strength has to be ascertained not merely on the basis of the market share of the enterprise but on the basis of a host of factors such as size and importance of competitors, economic power of the enterprise, entry barriers *etc*., as mentioned in section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position.

161. Thus, 'the position of strength' is not some objective attribute that can be measured along a prescribed mathematical index or equation. Rather, it has to be a rational consideration of relevant facts, holistic interpretation of statistics or information and application of several aspects of the Indian economy.

162. In view of the aforesaid, the Commission now examines as to whether the opposite party has a dominant position in the relevant market.

Market share of the enterprise

163. As per the DG, the market share of the opposite party in terms of the relevant market is about 50% in terms of revenue. According to the DG, the revenue of the opposite party from FM Radio when compared to its competitors PPL, YRF, Sony and SaReGaMa shows that the opposite party has been enjoying more than 50% market share from the relevant market over a long period. Furthermore, the information collected during the investigation shows that even the combined revenue of PPL and IPRS (INR 31 crores during 2010-11) from radio license fee is less than the revenue of the opposite party (INR 33.23 crores) during the same period. The DG has found that in terms of songs played on all the FM channels across the country varies from between 25% and 60% from one station to other. The information submitted by the opposite party shows that the overall percentage of the needle hours of all the songs played on 210 channels where it has granted license is about 30% during 2012-11.

164. According to the opposite party however, the DG erred in not relying upon and taking into account the data showing the market share of the opposite party on an all India basis in respect of the private FM stations whether or not licensed by the opposite party. If such data is considered, then the market share of playout of the opposite party is 28.11 % (2008-2009); 27.34% (2009-10) and 26.85% (2010-11) and not 34.11%, 32.84% and 32.58%. Therefore, clearly with just an average of 25% market share on overall playout of the music on all private FM radio stations, whether or not licensed by the opposite party, the DG was in error in holding that the opposite party had a dominant position by virtue of market share.

165. As per the opposite party, the data relied upon by the DG clearly indicates that the revenue derived by the opposite party from FM radio stations

is almost comparable to the revenue from the FM radio stations derived by PPL. DG does not appreciate that the total revenue of the opposite party is higher because the opposite party charges both for sound recording and performance license and PPL is based only on sound recording license fee.

Size and resources of the enterprise

166. According to the DG, as compared to the opposite party, which has a turnover of approximately 400 crores, incomes of competitors like Sony, SaRaGaMa and TIPS are almost one-fourth or less than the size of the opposite party's turnover. The fact that the opposite party has acquired music rights from the major movie production houses provided the opposite party with sufficient market power to dictate terms to the private radio stations.

167. The opposite party has contended that the data showing the revenue of the opposite party for the period 2003-2011 shows that revenue from physical sales has gone down and likewise the revenue from radio have also been falling substantially over the years and therefore, the DG wrongly concluded that the opposite party is dominant. The opposite party has contended that according to the DG, in 2012 and 11, the opposite party purchased rights about 48 Bollywood Films in each year while the closest competitors, SaRaGaMa and Sony were not able to purchase more than 10-11 films every year during the same period. However, it may be noted that as per the annual report of the CBFC, the total no. of Hindi films released during 2009-11 were 656 as compared to 464 stated by the DG. The opposite party therefore, owned music content of about 25% of the Hindi Films released as per the data released by CFFC. It is therefore, denied that the opposite party is dominant based on the acquisition of Bollywood film/ music. DG report stated that the opposite party has purchased the rights of the big budget and star cast films and the opposite party controls 'hit' Bollywood music. The opposite party submits that there cannot exist any segment such as hit Hindi film music and in any event, DG has not relied upon credible data to arrive at the conclusion that the opposite party has dominance in the 'hit' hindi film music segment. Furthermore, the

assessment made by the DG presupposes that at the stage of the acquisition of the music rights in a film, the music is a hit. This observation of the DG is without merit, since at the stage of the acquisition of the music rights in a film, more often than not the songs are not even in existence.

Size and importance of the competitors

168. The data gathered during the investigation has revealed that none of the competitors of the opposite party are comparable in terms of size and importance. The revenue of the opposite party is 4-5 times of its nearest competitors. In terms of the number of Bollywood films acquired by the opposite party in a year, none of its competitors have been able to acquire more than 10-11 films in year. Thus, in terms of relevant market, the opposite party is in such a position that no competitor is able to demand the terms and conditions for sale of its music to FM channels.

169. As per the opposite party, the DG has erred in not analyzing the vertical integration of the competitors of the opposite party such as YRF and Sony. DG should also have noted that the opposite party faced competition at two levels, from music companies at the stage of acquisition of content and then from other licensing agencies such as PPL. The opposite party is therefore, not foreclosing competition but creating it in the market. The biggest competitor of the opposite party at the stage of licensing of music rights is PPL which has more than 200 companies as its members. The royalty income of PPL for the last 3 years as well as the turnover of PPL shows that it is the opposite party's biggest competitor.

Dependence of consumers on the enterprise

170. As per the DG Report, the information gathered during the investigation has confirmed that the radio stations are dependent upon the opposite party. The data provided by the opposite party itself shows that as per AirCheck Top 100 and Top 20 songs/ music broadcast on radio, the opposite party owns majority of the music labels and that it has 58% share of the top

100 songs played on private FM channels. If the radio stations were to discontinue playing the opposite party's music, there being no demand side substitutability of latest Bollywood songs, it would cause irreparable damage to the market share of the radio station as customers would immediately switch to other radio stations. This aspect was confirmed by the radio stations during the course of the investigation.

171. According to the opposite party, there is data which shows that there are many radio stations that have not received any license from the opposite party and these radio stations are experiencing higher growth levels than other radio stations that have licenses from the opposite party. DG has merely relied upon statements made by radio stations to arrive at a finding about over dependence of the radio stations on the opposite party. However, responses filed by radio stations are contradictory and not supported by verifiable data.

Barriers to entry

172. The DG has noted that although there are no major entry barriers to become a music company or music producer in the Indian music industry and to grant license in the relevant market, yet in Bollywood music Industry it is not easy to obtain the ownership rights on account of the huge cost and distribution network is required. Every film producer want to either sell his music at a higher price which may go up to 10 crores for a film and also wants to take advantage of distribution network of companies like the opposite party. According to the DG Report, the opposite party is the only independent music company which holds a lion's share in the Bollywood film music and due to its dominance has the ability and the bargaining power to deal with broadcasters, independent of industry organizations and copyright societies.

173. According to the opposite party, the DG fails to consider the possibility of expansion by current rivals such as Sony. Many of the opposite party's competitors are vertically integrated and have natural exclusive access to music content produced by their affiliates. Notably, the opposite party does

not possess this strategic advantage and must vigorously compete and bid for every film's music content. Furthermore, the Report only addresses the threat of entry and not the threat of expansion

174. As per the informant, the opposite party has failed to explain why in an industry with no barriers to entry or expansion and where the opposite party's prices are considerably higher than its 'significant competitors', the market shares of those competitors have not increased dramatically as a result of a shift in demand. The conduct of the opposite party in increasing acquisition costs, focus on superstar films and imposing performance license fees and MCC on radio stations are significant barriers to entry and expansion in the market.

175. Having heard the submissions of the parties and considering the report of the DG and other material available on record, the Commission proceeds to determine the issue of dominance.

Market share

176. The market share of the opposite party in terms of revenue from FM Radio for the last 3 years is over 50%.

Revenue from FM Radio by major music providers (Rupees in crores)

Year	OP	PPL	YashRaj	Sony	Saregama
2008-9	36.75	8.19	3.29	3.52	6.6
2009-10	36.29	23.72	2.43	3.39	5.4
2010-11	33.23	21.87	1.62	1.58	2.7

The table above reveals that as compared to its main competitor companies YRF, Sony and SaReGaMa, the market share of the opposite party is over 50% for the last 3 years. The fact that the revenue of PPL is close to the revenue of the opposite party in itself does not detract from the market power

of the opposite party because PPL is a copyright society which has over 200 members and collects royalties on behalf of their members, and then distributes it to them. On the other hand the opposite party is a single entity which is directly earning such revenue.

177. The market share of the opposite party in terms of playout of Bollywood music on FM channels across the country is disputed by the opposite party. The Commission notes that based on the information collected by the DG, the market share of the opposite party in terms of playout cannot be determined with any kind of exactitude. Even if the contention of the opposite party is accepted and the market share in terms of playout of music of 25% is accepted, this does not detract from the fact that songs of the opposite party played on all the FM channels across the country varies from between 25% and 60% from one station to other, and that the opposite party has been able to maintain this share over the last few years.

178. It is important to consider that market shares provide information about a firm's past market success in relation to its competitors. Market shares provide useful first indications of the market structure and of the competitive importance of various undertakings active on the market. In most markets, an enterprise's absolute market share is an important factor that allows for initial indications about its market power. However, market shares alone do not determine whether an undertaking is dominant or has substantial market power. Therefore, these initial indications are put in perspective by other factors when making an overall assessment of the market power of the firm under investigation.

Size, resources and economic power of the enterprise

179. As compared to the opposite party, which has a turnover of approximately 400 crores, incomes of competitors like Sony, SaRaGaMa and TIPS are almost one-fourth or less than the size of the opposite party's

turnover, which is an important indicators of the economic strength of the opposite party.

180. It has been established that the opposite party purchased rights about 48 Bollywood Films in each year in 2010 and 2011 while the closest competitors, SaReGaMa and Sony were not able to purchase more than 10-11 films every year during the same period. Even if the percentage of films that the opposite party has purchased in the last 2-3 years cannot be determined accurately due to the disputed fact of the number of films which have released every year, it is clear that the opposite party managed to purchase the rights of almost 4 times the number of films of its closest competitors. Furthermore, the opposite party has purchased a number of films of bankable stars (as per the DG, investigation has found that the opposite party has procured almost all the films of Sharukh Khan, Salman Khan and Aamir Khan), and while the Commission notes that the purchase of music rights of films which have 'bankable' stars does not guarantee that the music is a hit, it has to be recognized that because of the presence of 'bankable' stars, the interest in such movies is a much more than a normal film without superstars and therefore, the likelihood of its success is more than a film which has lesser known actors. The Commission, therefore, notes that the superior financial strength in the market coupled with superior resources as in this case is an important indicator of dominance of an enterprise.

Size and importance of competitors

181. The Commission notes that when compared to its competitors in terms of revenue, acquisition of movies, ownership of popular content, the opposite party is definitively is a superior position as the opposite party's revenue of the opposite party is 4-5 times of its nearest competitors. In terms of the number of Bollywood films acquired by the opposite party in a year, none of its competitors have been able to acquire more than 10-11 films in year. The opposite party has also been able to purchase the movies of most of the

superstars. These factors again indicate that the opposite party is in a position of strength in the market.

Dependence of consumers on the enterprise

182. As per DG, the data provided by the opposite party itself shows that as per AirCheck Top 100 and Top 20 songs/ music broadcast on radio, the opposite party owns majority of the music labels and that it has 58% share of the top 100 songs played on private FM channels.

Top 100 Songs Analysis in 18 Cities Analysis

(Ahmadabad, Bengaluru, Chennai, Coimbatore, Delhi, Hyderabad, Indore, Jaipur, Kanpur, Kolkata, Lucknow, Nagpur, Pune, Surat, Thiruvanthapuram, Vadodara, Visakhapatnam)

Week	**Total Songs**	**T-Series Song**	**Percentage**
04-10 July 2011	85	49	57
11-17 July 2011	79	46	58
18-24 July 2011	86	46	53
25-31 July 2011	85	45	52
01 Aug 07 August 2011	85	49	57
08-14 Aug 2011	85	49	57
15-21 Aug 2011	83	46	55
22-28 Aug 2011	76	47	61
29 Aug – 04 Sep 2011	78	44	56
05-11 Sept 2011	80	50	62
12-18 Sept 2011	78	52	66
19-25 Sept 2011	81	47	58
26 Sept – 02 Oct.2011	77	42	54
03-09 Oct 2011	79	40	50
10-16 Oct.2011	80	39	48
17-23 Oct 2011	71	43	60

24-30 Oct.2011	78	42	53
31 Oct -06 Nov.2011	76	42	55
07-13 Nov.2011	84	44	52
14-20 Nov. 2011	77	45	58
21-27 Nov.2011	79	45	56
28 Nov.04 Dec.2011	82	43	52
05-11 Dec. 2011	74	46	62
12-18 Dec. 2011	77	47	61
19-25 Dec. 2011	78	47	60
26 Dec.01 Jan.2012	81	51	62
02-08 Jan.2012	83	42	50
09-15 Jan.2012	78	44	56
16-22 Jan.2012	84	44	52
23-29 Jan. 2012	79	43	54
30 Jan. - 05 Feb.2012	79	51	64
06-12 Feb.2012	80	53	66
13-19 Feb. 2012	77	49	63
20-26 Feb.2012	74	49	66
27 Feb -04 Mar.2012	77	49	63
05-11 Mar. 2012	80	49	61
12-18 Mar 2012	81	50	61
19-25 Mar 2012	80	46	57
26 Mar– 01 Apr 2012	80	46	57
02-08 Apr.2012	73	48	65
09-15 Apr 2012	79	48	60
16-22 Apr.2012	81	48	59
23-29 Apr.2012	80	47	58
30 Apr – 06 May 2012	81	48	59
07-13 May 2012	79	50	63
14-20 May 2012	84	48	57
21-27 May 2012	83	48	57

28 May – 03 Jun 2012	84	50	59
04-10 Jun 2012	82	51	62
11-17 June 2012	84	52	61
18-25 June 2012	77	56	72
TOTAL	**4073**	**2395**	**58**

While the Commission notes that AirCheck data changes from day to day, and is only collected in 18 cities, the data gathered is a strong indicator, coupled with other factors that the opposite party's repertoire comprises of Bollywood music that is extremely popular with the listener and resultantly popular with the advertisers and that due to such popular content, the opposite party commands a position of a strength. Due to the ownership of popular content, the opposite party's customers are heavily dependent on the content of the opposite party, as is also evident from the evidence collected from the radio operators.

Barriers to entry

183. The Commission notes that there are significant barriers to entry in the market. In order to be successful in the business of licensing of music, particularly Bollywood music, a company needs to buy the music rights of Bollywood movies which according to the evidence can go upto 10 crores. Even after the purchase of music rights, vast investments are required in the promotion of music as well in a distribution network. Finally, in order to become competitive in the market, a music company needs to be able to build a repertoire of music that takes time and more investments. There are therefore, barriers to entry in the market and the Commission holds that in this case there are substantial barriers to entry which make it impossible/ more difficult for a firm to enter the market.

184. In addition to the above, the Commission considers certain evidence in the relevant market which shows, that in fact, the opposite party was in a position of strength in the relevant market.

185. Moreover, the following factors and the conduct of the opposite party further strengthen that the opposite party is indeed in a position of strength in the market which is allowing it to operate independently of competitive forces.

186. The opposite party's royalty rates are set on a needle per hour basis, whereas PPL and most other competitors provide licenses at a rate either determined by or equivalent to the Second Order of the Copyright Board. The opposite party also conveniently decides to follow the rate set by the First Order of the Copyright Board as a 'market standard' while disputing the rate set by the Second Order of the Copyright Board by the same authority. The opposite party's argument that the rate set in the Second Order of the Copyright Board does not apply to it as it was not a party to the proceedings applies equally to the First Order of the Copyright Board, where the opposite party again was not a party. The opposite party is the only music provider who is charging such rates to radio stations. This is despite the fact that the entire industry has expressed dissatisfaction with these rates and has applied to the Copyright Board for a compulsory license.

187. The opposite party imposes MCC ranging from 30%-50% of playout which radio stations are required to pay irrespective of whether they play that amount of music. No other music provider has imposed such MCC. The evidence of the radio stations also reveals that they have showed a strong resistance to the imposition of MCC; however, MCC continue to be imposed.

188. During oral arguments, the opposite party submitted that it lost contracts with 82 of the 245 private FM radio stations (not necessarily radio companies/ broadcasters) after the Second Order of the Copyright Board, which reduced its market share by 15%. However, the Commission notes that

the loss of contracts did not lead to a change in the prices or imposition of MCC by the opposite party.

189. In this connection, it is instructing to notice that Radio City (one of the radio stations whose contract was terminated as a result of the opposite party's conduct) returned to the opposite party after a year and that too on unchanged terms. When asked about Radio City's license, the response of Shri Neeraj Kalyan is telling:

'.....As regards Radio City, their license expired in December 2010 which they refused to renew unless we agreed to apply the rates stated in the Copyright Board Order. We refused to accept the same. However our refusal had no effect on their profitability and RAM ratings. On their own accord they once again approached us for a license in January 2012 which we granted on mutually agreed upon terms which shows that we have never refused a license to anyone provided that they are reasonable in their negotiations with us'.

190. This shows that even after refusing to apply rates of the Second Order of the Copyright Board, Radio City renewed their contract with the opposite party. According to Radio City, '…….*As a result of the termination/ expiry of the MOU dated 26th December (that stood amended from time to time) our company's business was considered hampered as we were able to broadcast a huge repertoire of music owned by SCIL.....Further, during the entire period, i.e. 2011, when we were not broadcasting the music of SCIL but the other radio stations were, the other radio stations performed considerably better than our radio stations in terms of revenues as we did not have the license to play the music of SCIL, which included most of the top songs of that period and as such was detrimental to our interests*'. Radio City's response is also evidence of the fact that the radio station could not effectively compete without playing the opposite party's music.

191. Based on the above assessment, the Commission concludes that it is clear that the opposite party is a dominant enterprise, having the strength to operate independently of competitive forces and affect its competitors and customers in its favour.

Determination of Issue No. 3

192. The Commission now looks at the allegations of abuse of dominant position by the opposite party.

Excessive Pricing

193. The DG's investigation has revealed that post the Second Order of the Copyright Board there are 3 rates prevailing in the market: (i) rate of PPL as per the Second Order of the Copyright Board; (ii) rates negotiated by FM channels with other music companies like YRF; and (ii) the rate that the opposite party charges, which have been found to be the highest rates in the radio industry at present.

194. The DG has also noted that during the course of investigation it was contended by the opposite party that one of the reasons for charging higher price from radio operators or charging fixed or minimum charges is to compensate the loss on account of decrease in sales of music in physical format. It was argued that repeated airplay by radio has adversely affected the physical sale. However, this contention has not been backed by any evidence and during the investigation Shri Neeraj Kalyan from the opposite party was asked to clarify whether they request the radio operators to not repeat the same song on their channel and he confirmed that it was not so. The DG also found that after the release of music, FM radio is used as a platform to promote music.

195. The DG also found that the opposite party has not reduced its rate despite the non-renewal of licenses by some of the operators such as Radio

City, Big FM, Radio Mantra. The DG has further observed that the opposite party has also raised the issue of high acquisition cost and the decrease in sales of physical form to justify its conduct of charging prices above the benchmark or industry norms. Further, the opposite party has itself stated that the cost of music and royalty rates for FM channels cannot be correlated directly. Thus, it may be seen that the opposite party has not been able to justify the reason for charging higher price than the competitors in the market. It has conveniently chosen to stick to the prices determined by the First Order of the Copyright Board, as detailed earlier. Therefore, according to the DG, it is evident that the only reason for charging the excessive price is the dependence of consumers on the music of the opposite party and that the investigation has revealed that there is no reasonable relation between the prices charged by the opposite party and the economic value of the product. As per the DG, the prices charged by the opposite party are much higher than the industry norms or the prices charged by its competitors. The DG has thus concluded that the opposite party is charging excessive and unfair prices in violation of section 4(2)(a)(i) of the Act.

196. The Commission notes pricing abuses may come under the purview of competition law as abuse of dominance. Pricing abuses may be 'exclusionary' *i.e.* pricing strategies adopted by dominant firms to foreclose competitors. Such strategies include a wide variety of measures, such as predatory pricing, price squeezes, loyalty rebates. Pricing abuses may also be 'exploitative' *i.e.* which cover instances where a dominant firm is accused of exploiting its customers by setting excessive prices. This case deals with the issue of pricing abuse which is exploitative *i.e.* excessive prices charged by a dominant firm to its customers.

197. The prohibitions or the abusive conducts including both 'exclusionary' and 'exploitative' practices are set out in section 4(2) (a), (b), (c), (d) and (e) of the Act. Imposition of unfair price has been explicitly stated as an abusive act under section 4(2)(a)(ii) which states that there shall be an abuse of

dominant position, if an enterprise or a group directly or indirectly imposes unfair or discriminatory price in purchase or sale (including predatory price) of goods or services. Evidently, a dominant firm, under the Act, abuses its dominance if it charges 'unfair prices' to its customers, which may include both unfairly high or excessive price and unfairly low or predatory price. Thus, excessive price forms a subset of 'unfair price' in the Indian context.

198. The Commission notes that determining whether a price is excessive is an uncertain and difficult task. The opposite party has submitted that cost analysis for setting the license fee is not possible as the cost of a sound recording is reflected in the acquisition price paid as 'royalty' to the owners, whereas if the sound recording is developed in-house, the cost is categorized as 'recording expenses'. As against the said direct costs, the opposite party has various avenues for commercially exploiting the same and it is very difficult to apportion the cost of acquisition of sound recording to different revenue streams. Moreover, certain sound recording may be expensive to acquire but the music may turn out to be a flop, the reverse may also be true. Therefore, the value of a particular sound recording would depend upon its popularity and not its cost.

199. The Commission notes that in the absence of the cost data it will be difficult, neigh impossible, to term the price charged by the opposite party at 661 INR per needle hour as unfair being excessive solely on the basis that it is higher than the price charged by the competitors of the opposite party. In view of all factors discussed in the preceding paragraphs above, the Commission holds that a case of excessive pricing has not been made out against the opposite party.

MCC

200. The DG's investigation has revealed that the opposite party requires MCC to be paid by the informant irrespective of the actual number of needle

hours of the opposite party's music that is broadcast. The opposite party imposes an amount of INR 2,16, 667 per month per radio station (excluding Bangalore) as MCC for both sound recording and performance rights and therefore, the informant is bound to pay a total of INR 6,50,000 per month for three radio stations to the opposite party, irrespective of the actual quantity of the opposite party's music broadcast. The statement of Shri Neeraj Kalyan from the opposite party explaining the reasoning for imposing MCC is reproduced as under:

> *'.....As far as the issue of minimum guarantee in terms of playout of our music is concerned, it is not mandatory on anyone to accept this condition and there are instances wherein we have offered our licenses without minimum guarantee of music playout also. Minimum guarantee is sought from the FM stations based on our playouts in the immediately preceding year by the FM station and it acts as a mere assurance to us that the losses suffered by us by way of ever decreasing physical sales is somehow compensated for which FM stations are the main reasons for such decline because they have been belting out music of our albums and films so much during the whole day that the consumer do not feel the need to buy or consume such music in any other manner when the same is available free of cost. However, it has been noticed that FM stations have been playing our music invariably in excess of the minimum committed needle hours which in itself is proof that the same is not a deterrent, exploitative or anti-competitive in any manner. In addition to this we have also been offering the FM stations some complementary needle hours in exchange of the minimum committed needle hours playout which also helps the FM stations to bring down their cost of music and it is in our mutual benefit.....'*

201. The DG's investigation further revealed that except the opposite party, no other music company is imposing MCC, neither is PPL imposing MCC and furthermore, that since the opposite party has a position of strength in the relevant market the radio operators have no choice but to accept the conditions imposed by the opposite party. The agreements for granting licenses to the FM channels contain the provision for MCC. On perusal of some of the agreements, the DG found that the minimum committed needle hours for playoff of the songs of the opposite party imposed by it are as high as 50%. According to the DG, this reveals the modus operandi of the opposite party is to ensure its business share in the relevant market and that if half of the total songs played by the FM stations have been fixed by the opposite party, the other music companies will be left with only 50% of the total market share of the relevant market.

202. The opposite party has contended that when they impose a condition of minimum play out of more than 35% they also allow a complementary needle hour upto 20%. Therefore, they are not abusing but giving a royalty discount of extra free music for the benefit of the FM radio stations. According to the DG, the contention of the opposite party has no merit as they by virtue of their market power are imposing restraints on the FM stations by not allowing the music companies to play music as per their choice. It has been found during the course of investigation by the DG that while taking the broadcasting rights, the private FM radio stations have to accept MCC as it is an essential precondition before grant of broadcasting rights by the opposite party to the radio stations.

203. As per the DG, the investigation has further revealed that the condition of MCC is distorting the competition in the relevant market. On one hand it increases the cost of music for FM radio stations as they are forced to pay extra money even if they are not playing songs of the opposite party, on the other hand it also forces FM stations to play at least the minimum guaranteed needle hour even though there is no demand of such songs from the listeners.

The opposite party has argued that they decide MCC on the basis of the percentage of songs actually played by the FM stations. Therefore, they are not hindering the competition, as the FM stations will anyway play their song of the same needle hour. According to the DG, the contention of the opposite party is devoid of any merit because the investigation has indicated that the obvious purpose behind imposing the condition of MCC is to protect its dominance in the relevant market and to maximize its profit. In the music industry, nobody is sure about the popularity of a song unless it is released and played in the market. By way of ensuring the minimum play out, the opposite party also gets advantage in procurement of music from film producers. Thus, the opposite party due to its dominant position in the market also gains a position or strength and bargaining edge over its competitors while purchasing the rights of film music. According to the DG, the opposite party has not been able to put forth any explanation to justify that the conditions of MCC are imposed for any pro-competitive reason. It is evident that the terms and conditions are imposed only to maintain and abuse the dominance of the opposite party in the relevant market. Thus, the DG has concluded that the opposite party is imposing an unfair condition in violation of section 4(2)(a)(i) of the Act.

204. The Commission notes that the prohibitions or the abusive conduct including both 'exclusionary' and 'exploitative' practices set out in section 4(2) (a), (b), (c), (d) and (e) of the Act include the imposition of 'unfair' or 'discriminatory' condition in purchase or sale of goods or service. Therefore, imposition of unfair/ discriminatory trading condition has been explicitly stated as an abusive act under section 4(2)(a)(i) which provides that there shall be an abuse of dominant position, if an enterprise or a group 'directly or indirectly imposes unfair or discriminatory condition in purchase or sale goods or services'.

205. The opposite party has alleged that the condition of MCC is not exploitative as radio stations in any event broadcast the pre-determined

amount. According to the informant, this is a blatant attempt to mislead the Commission; for example in the year 2009-2010, the informant has, with the exception of the month of November (for all three radio stations) and in December for the Kolkata radio station and January for the Mumbai radio station, never broadcast the full MCC target.

206. The Commission notes that MCC, irrespective of whether it is 30% or 50%, is exploitative and exclusionary in nature. It is exploitative as it forces the customers to pay for music that it may not play. Exclusionary conduct is characterized by improper strengthening of market power by the dominant enterprise. In this case the imposition of MCC by the opposite party has an anti-competitive effect on the market as it forecloses other competitors from a substantial share of the market. Since the private radio station is contractually bound to pay the opposite party a minimum guarantee, they are likely to broadcast the amount of music that they have already paid for. Therefore, a certain amount of music playout on private FM radio stations is already fixed for the opposite party. This results in the opposite party's competitors not being able to compete for and being foreclosed from broadcasting their music on this prefixed playout of 30-50% reserved for the opposite party.

207. The opposite party has raised the contention that computation of MCC is based on the playout of the radio station for the previous year and therefore, rather than forcing broadcasters to buy content that they do not want, it reflects their actual demand. In view of the Commission the plea taken by the opposite party is devoid of any merit as demand of content of opposite party by a radio station last year does not mean similar or identical demand in the next year also. Besides, the playout number is manipulated by opposite party in its favour through incentive scheme.

208. Similarly the argument taken by the opposite party that charging of MCC is justified as the revenue from the physical sales dipped significantly due to continuous belting of music by the FM radio stations has no substance

and self defeating as by its own account the opposite party was giving complementary needle hours of play along with the minimum committed needle hours.

209. The opposite party has urged that the DG has erred in failing to consider the efficiency explanations for MCC. The Commission notes that the opposite party cannot justify MCC on the grounds that MCC reduces the uncertainty that content owners face, particularly since it is the only player in the market that is charging MCC.

210. Based on above discussion the Commission concludes that it is unacceptable for a dominant enterprise to impose such unfair/ discriminatory conditions in licensing of their content and the Commission holds that the imposition of MCC on private FM radio stations is an abuse by the opposite party under section 4(2)(a)(i) of the Act.

Performance license fees

211. According to the DG, it has been submitted by the informant and other radio operators that the opposite party is charging license fees for both sound recordings and underlying works whereas various High Courts have held that no license fee is required to be paid for underlying works. The opposite party on the other hand has claimed that as per the provisions of the Copyright Act when a sound recording is broadcast from an FM radio station, two separate royalties, one for communicating the sound recording to the public and one towards performance of the underlying works is payable. The opposite party is relying on the decision of the Madras High Court in *Mutooth Finance* v. *Indian Performing Rights Society & Ors.* to justify its stand. Radio operators on the other hand have contended that the Division Bench of the Delhi High Court in *IPRS* v. *Aditya Pandey & CRI Events* has taken into consideration the above case and held that music providers are not entitled to a performance license fee for the broadcast of music by radio stations.

212. The DG examined a number of music companies and radio operators. Radio operators have submitted to the DG that they have stopped paying performance license fees to IPRS for the broadcast of their music; the opposite party on the other hand continues to impose the payment of performance license fees for broadcast of its repertoire. PPL and YRF who were asked about the performance licensee fee. According to the replies received, it was revealed that there is a there is a separate copyright society, IPRS, which is responsible for collecting the performance license fees on behalf of its members for underlying works, and thus PPL has no role in the matter of performance license fee. YRF (who is not a member of IPRS and therefore, collects performance license fees directly) on the other hand stated that they do charge performance royalties as the same is provided for under statute. According to the informant YRF is not insisting on immediate payment of performance license fees and on examination of the agreement between the informant and YRF, the DG found that there is clause in the agreement which states that if the final decision of the Supreme Court is pronounced in favour of the music companies, the performance royalty shall be paid by the informant within 30 days. Thus according to the DG, it may be seen that at present none of the music companies except the opposite party are able to impose the condition of performance license fee on radio operators and in view of the various High Court decisions are awaiting the final decision of the Supreme Court. In view of the above, according to the DG, the allegation of the informant regarding violation of provisions of section 4(2)(a)(i) has been found to be correct on account performance license fees imposed by the opposite party on the radio operators.

213. According to the opposite party, the DG has not appreciated that the terms of the agreements entered into between the opposite party and the radio operators contain a clause in the agreements that if in any Court/Copyright Board proceedings to which both licensor and the licensee are parties stipulates a ‘future rate’ that is different from the ‘current rate’ at which the

license fee is payable, whether in any interim or final order, then the rate payable shall be modified to equal the 'future rate' so stipulated by the Court/ Copyright Board order. The agreement, as per the opposite party, therefore, clearly has a mutually agreed clause that in proceedings, where both the opposite party and the informant (or any other radio operators) are parties to the proceedings, any order passed by the Court/ Copyright Board must be implemented. The said clause 4.2 of the License Agreement dated October 12, 2006 between the opposite party and the informant is as follows:

> '*4.2 The Licensee in consideration of the grant of the license as mentioned above under Clause 2.2, during the term of this Agreement agrees to pay to the Licensor a Performance License Fee at the end of each month starting from the Commencement date for the designated radio station at a rate per needle hour of broadcast…..For the removal of doubts it is clarified that the performance license fee paid in terms of this clause is separate and in addition to License fee payable under clause 4.1.*
>
> *Provided further that if any Court/ Copyright Board in proceedings to which both Licensor and the Licensee are parties, stipulates a 'rate' that is different from the 'License fee rate' at which the Public Performance License Fee is payable hereunder, whether in any interim order or final order, then the rate payable hereunder shall be modified to equal the 'future rate' so stipulated by the Court/ Copyright Board…'*

214. The Commission notes that the final determination of whether a performance license fee is chargeable or not for underlying literary and musical works is pending before the Supreme Court. Given that at present there is lack of clarity on the subject as the matter is pending before the

Supreme Court, and the Supreme Court will determine whether owners of underlying works are entitled to a performance license fee for broadcast of music by radio stations or not, the Commission does not deem it appropriate to deal with this issue on merits.

ORDER

215. In view of the above discussion, the Commission holds that the opposite party is in contravention of the provisions of section 4(2)(a)(i) of the Act by imposing unfair condition of MCC on private FM radio stations.

216. In view of the findings recorded by the Commission, it is ordered as under:

(i) The opposite party is directed to cease and desist from formulating and imposing the unfair condition of MCC in its agreements with private FM radio stations in India;

(ii) The opposite party is further directed to suitably modify the unfair condition of MCC imposed on private FM stations in India in its existing agreements within 3 months of the date of receipt of this order.

217. In terms of the provisions contained in section 27(b) of the Act, the Commission *inter alia* may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

218. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty as can be noticed from the

phraseology employed in the provision noted above. The primary objectives behind imposition of penalties are: to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them. To quantify the penalty, the Commission needs to prepare an inventory of aggravating and mitigating circumstances/ factors. After weighing the aggravating and mitigating factors, the Commission has to reach an appropriate finding on the quantum of penalty. In relation to the imposition of penalty under section 27 of the Act, the legislative intent seems to provide strong deterrence to the firms from indulging into practices which are detrimental to the competitive process in the market resulting not only harm to the consumes but also retard economic development of the country.

.

219. The Commission has bestowed its thoughtful consideration on the issue of quantum of penalty. The Commission has examined the financial statements submitted by the opposite party of the years 2008-09, 2009-10 and 2010-11 and the same may be noted below:

Name	**Turnover for 2008-09 (in Crores)**	**Turnover for 2009-10 (in Crores)**	**Turnover for 2010-11 (in Crores)**	**Average Turnover for Three Years (in Crores)**
SCIL	36.74	36.29	33.22	35.41

220. Furthermore, the Commission has also taken note of the aggravating factor emanating from the finding recorded by the DG that the opposite party imposed an amount of INR 2,16, 667 per month per radio station (excluding Bangalore) as MCC for both sound recording and performance rights and therefore, the informant is bound to pay a total of INR 6,50,000 per month for

three radio stations to the opposite party, irrespective of the actual quantity of the opposite party's music broadcast.

221. Considering the totality and peculiarity of facts and circumstances of the present case, the Commission decides to impose penalty on the opposite party at the rate of 8% of its average turnover of the last three years of the company amounting to Rs. 2,83,28,000 (Two Crore Eighty Three Lakhs Twenty Eight Thousand).

222. The Commission further directs the opposite party to deposit the penalty amount within 60 days of receipt of this order.

223. The opposite party is further directed to file an undertaking in terms of the directions contained in para 216 (i) within a period of 30 days from the date of receipt of this order.

224. It is ordered accordingly.

225. In terms of the order passed by the Hon'ble High Court of Delhi in Writ Petition No. 2037 of 2013, it is ordered that the operation of the present order shall remain stayed for a period of one week from the receipt thereof by the opposite party to enable it to approach the appropriate forum for grant of relief, if any.

226. The Secretary is directed to inform the parties accordingly.

(Ashok Chawla)
Chairperson

(M. L. Tayal)
Member

(S. L. Bunker)
Member

New Delhi
Date: 01/10/2014