

## CRITICAL ANALYSIS OF INDUSTRY-INVENTED TITLE OF RIGHTS UNDER COPYRIGHT LAW

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### *Abstract*

*Copyright is used in the singular, but it stands for multiple rights. Copyright is a bundle of rights - an accurate statement. Section 14, which defines copyright in the Copyright Act, 1957 ('The Act'), splits these rights based on singular works and work groupings. A literary work author's right to adaptation is a copyright. The same author has the right to translation, which is also a copyright.*

*We do not see the use of Mechanical Right or Synchronisation Right in Section 14. In my interaction with students of intellectual property, it is mostly the case that my reference to these rights draws a blank. These titles are very common in industry usage. Distribution Right, in comparison, is known to almost all, but it is interesting to note that there is no such title either under Section 14.*

*The titles of these rights are confusing. They don't tell us exactly what they encompass. As long as these confusions do not have an effect of defeating the purpose of copyright, it poses no real concern. This research paper asks the question whether such titles can, in fact, defeat the purpose of copyright. If yes, how would it impact the author vis-à-vis the right-holder? Could it be beneficial for the Act to interpret these titles? In answering these questions, this research undertakes a doctrinal route by analysing relevant copyright theory, legislative history, analysis by courts in India and usage by an important industry player - copyright societies.*

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## • INTRODUCTION

The Copyright Act, 1957 ('The Act') offers a range of rights to authors of works. The genius of authors lies in their creative potential in generating works which are beneficial for the growth of society. Salman Rushdie is a bright example. The monetary value offered by copyright is through Section 14 of the Act. Interestingly, this provision is titled 'Meaning of Copyright'. The absence of any interpretation of copyright under Section 2, i.e. the interpretation clause, makes it clear that 'copyright' is contained only within Section 14. The copyright holder would control acts involving his work, such as acts of reproduction and adaptation.

The language of Section 14 is purely economic in nature. It is concerned with prevention of economic activities connected to the work, unless it is authorized by the copyright-holder. Section 17 of The Act enunciates a universal copyright norm that under ordinary circumstances, the author is the first owner of the work. Change in these circumstances, such as a work made under the contract of employment, renders first ownership to the employer.

Where the author is the first owner, they have incredible opportunities to economically benefit from their works. These opportunities are struck at the bud by a ruthless industry wherein harsh agreements are the norm. Ilaiyaraaja is one of the most vociferous activists, battling for his rightful claim to revenue.<sup>1</sup> He has been a victim of harsh agreements.<sup>2</sup> As a senior composer in the Indian industry, his battles have much meaning for the younger generation of composers.

While some musical work and literary work authors have taken on this battle individually, others have been waging it collectively. Javed Akhtar has fought and won. As the driver of the 2012 Amendment to The Act, he delivered on a just course of action for his community from the Parliament itself.<sup>3</sup>

The concern raised in this paper is that while copyright is a treasure chest waiting to be opened by the author, the industry has complicated grabbing the treasure, thanks to some titles it has invented or not let go of. These right-titles such as mechanical rights and synchronisation rights are very common in industry usage. The fact that these right-titles are not contained within The

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<sup>1</sup> Sylvian Patrick Jesudoss, "Why Ilaiyaraaja Is a Misunderstood Activist" *Film Companion*, June 2024, available at <https://www.filmcompanion.in/features/indepth-stories/why-ilaiyaraaja-is-a-misunderstood-activist-manjummel-boys-coolie-lokesh-kanagaraj-rajinikanth-tamil-songs> (last visited on Dec 7, 2024).

<sup>2</sup> *Ibid.*

<sup>3</sup> Prashant Reddy, "The Background Score To The Copyright (Amendment) Act", 2012, 5 *NUJS Law Review* 470–472 (2012).

Act, begs the questions, what do they mean and what possible effect are they having on stakeholders using them.

### **1. Methodology**

This research work is doctrinal in nature. It will look at relevant copyright theory, application by courts in India, historical evolution and application by players such as copyright societies. Mechanical, synchronization and performing rights are in use in various jurisdiction like USA and UK.

### **2. Limitation of Research**

A comparative study is not undertaken in this paper. The connection between the copyright statutes in these countries and these rights requires its own study.

## **• FAMILIAR TITLES OF RIGHTS IN INDIAN ACADEMIC DISCOURSE**

In this first segment, this paper looks at some rights that are commonly used in Indian copyright academic discourse – Distribution Right and Performing Right. Reproduction Right has not been chosen for this segment as it is squarely covered under Section 14(a)(i) of the Act. An attempt is made to descriptively decode the meaning of these titles within the framework of Section 14. Where discrepancies occur, a possible way of interpretation is constructed.

### **1. Distribution Right**

What is a literary work author's distribution right? Literally, it means the author can control the spread of his work. The initial spread, that is. Exhaustion ensures that copies in circulation are out of his control. This is what Section 14 says about the distribution right, too. But, there is no such 'title' under Section 14. Distribution would simply mean the spread of one's work.

Spread of one's work could mean issuance of copies of the work to the public.<sup>4</sup> And it could also mean communication of work to the public.<sup>5</sup> Unlike reproduction rights,<sup>6</sup> distribution right is an umbrella right. While this usage might seem innocuous in copyright application, in terms of copyright transmission, it could pose serious problems.

Assignment of the distribution right by an author is open to interpretation, wherein the author could say he meant spread of physical copies, whereas publisher could include spread of digital copies as well. Once the agreement comes into place, any such ambiguity would affect the

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<sup>4</sup> Copyright Act of 1957 (14 of 1957), S. 14(a)(ii).

<sup>5</sup> *Id.*, Sec. 14(a)(iii).

<sup>6</sup> *Id.*, Sec. 14(a)(i).

author adversely. Unlike the resource-rich publisher, the author would hesitate in filing a lawsuit.

## 2. Performing right

What are a composer's performing rights? Where a singer wishes to use an author's composition in his concert, a performing authorisation would be needed.<sup>7</sup> Section 14 would give us no other alternative.

The meaning of Performing Right under the Articles of Association of the Indian Performing Rights Society ('IPRS') is as under:<sup>8</sup>

(xxv)	"Performing Right" means the right to perform and/or communication to the public of any Musical Works and/or Literary Works or parts thereof and would mean and include the right of performing in public, communicating to the public, broadcasting, telecasting, streaming, webcasting, netcasting and the like, and causing to be transmitted to subscribers to a diffusion services in all parts of the world, by any means and in any manner whatsoever by sound recording or cinematograph film, or by any other mode or medium, of exploitation, all Musical Works or parts thereof and such words or part thereof as are associated therewith including (without prejudice to the generality of the expression "musical work" or "literary work"), the vocal and instrumental music in cinematograph films, the words and/or the music of monologues having musical introduction, and/or accompaniment, and the musical accompaniment in non-musical plays, dramatico-musical works including operas, operettas, musical plays, revues or pantomimes and Ballets, videos, plays, serials, documentaries, dramas, commentaries, recitations, audio books etc. accompanied by music and the right of authorizing any of such acts.
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Communication of work to the public is a part and parcel of this performing right. In the original, i.e. unamended Copyright Act, performance meant communication of work to the public. An amendment in the year 1983 introduced this phrase for the first time.

This ended up serving as an important precursor to the introduction of performers' rights in 1992. India's performers had long been denied rights akin to copyright under the Act. India had not signed the Rome Convention.<sup>9</sup> It was the imminent coming of the TRIPS agreement that pushed the need for an amendment.

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<sup>7</sup> *Id.*, Sec. 14(a)(iii).

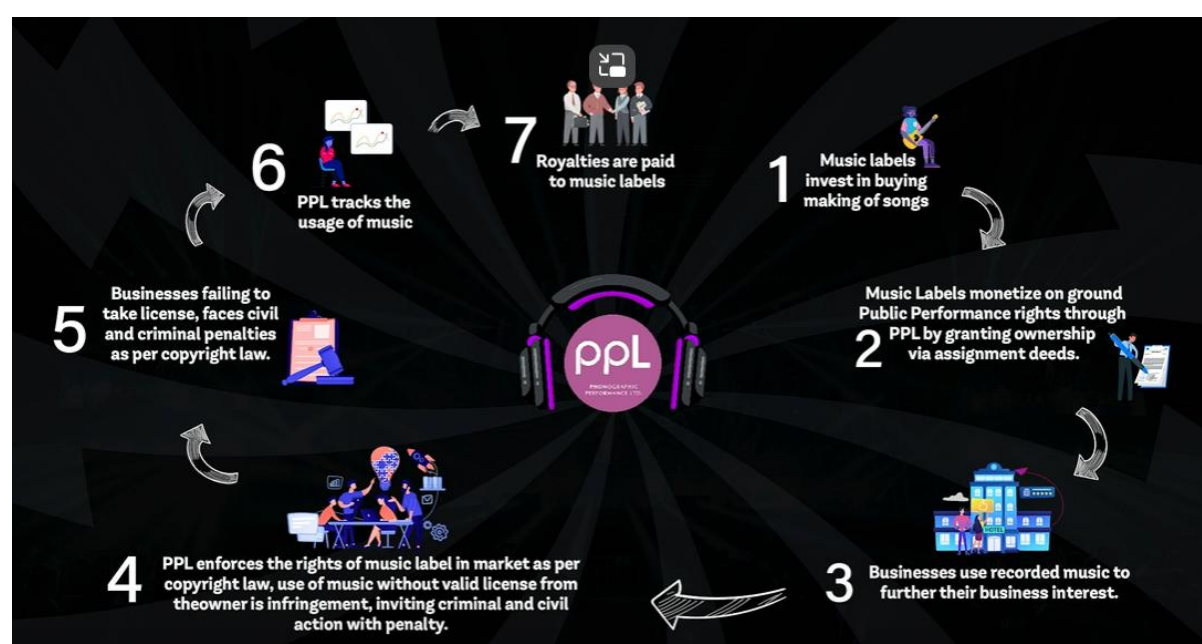
<sup>8</sup> Articles of Association of The Indian Performing Rights Society Limited, 4 (2018), *available at* <https://www.iprs.org/wp-content/uploads/2019/05/IPRS-ARTICLES-OF-ASSOCIATION-AMENDED-AS-ON-03.08.2018.pdf> (last visited on Dec 7, 2024).

<sup>9</sup> Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

With the introduction of performer's rights, The Act could not provide an interpretation which had a binary meaning. Thus, what was once a title synonymous with communication of work to public became completely associated to performances.

It is important to note at this stage that IPRS is a company that predates any of these amendments mentioned above. For a company that's been around since 1969,<sup>10</sup> This interpretation should have been amended, keeping it in line with the law.

Phonographic Performance Limited ('PPL') is an even older copyright society. Where IPRS concerns the business of transacting copyright for composers and lyricists, PPL concerns sound recording producers. The following is a flowchart that depicts PPL's activity:<sup>11</sup>



As can be observed, PPL does not concern itself with performance. It deals with the communication of work to the public. It is surprising, thus, when PPL interprets Performing Right in the following manner:<sup>12</sup>

**Performing right** means the right of communication to public or Public performance of sound recordings records in public in all parts of the world.

<sup>10</sup> About-IPRS, <https://iprs.org/about-iprs/> (last visited on Dec 7, 2024).

<sup>11</sup> About-PPL, <https://www.pplindia.org/about> (last visited on Dec 7, 2024).

<sup>12</sup> Articles of Association of Phonographic Performance Limited, available at <https://spicyip.com/docs/PPL-AoA.pdf> (last visited on Dec 7, 2024).

Two of the oldest institutions in the music industry are perpetuating a meaning in direct variance with The Act. This would no doubt reflect in copyright agreements. For the uninitiated, this would be a surprise.

### • TITLES IN INDIAN INDUSTRY DISCOURSE

In this segment, this paper looks at some right-titles that are used in Indian music industry discourse – Mechanical Right and Synchronisation Right. An interpretation of these rights is explored from sources available in the industry. These are then matched with available rights under Section 14.

Are you a law student who has never heard of Mechanical Rights? Don't worry. This information is not commonly known. The same goes for Synchronisation Rights. One look at Section 14 confirms why this is the case. There is no mention of any such right.

There are other rights found within the Act, other than copyright, that is, the resale royalty right,<sup>13</sup> moral right,<sup>14</sup> performer's right,<sup>15</sup> broadcaster's right<sup>16</sup> and the right to receive royalties<sup>17</sup>. No such thing as a mechanical right or a synchronisation right is mentioned anywhere.

Imagine a law student's surprise when he reads a news story about the largest royalty payout by PPL to IPRS – for synchronisation rights.<sup>18</sup> We must again look for answers from the industry.

This is how the IPRS Articles of Association interpret a mechanical right:<sup>19</sup>

(xvii)	"Mechanical Right" means and includes the right to reproduce a Literary Work and/or a Musical Work in any material form and/or in any media and/or electronic form by way of making Sound Recordings and/or Cinematograph Film of the Musical Works and/or Literary Works or parts thereof, the right to issue, lend or rent copies to the public not being copies already in circulation. For clarity, it does not include the "Synchronisation Right".
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<sup>13</sup> *Supra* note 4, S. 53A.

<sup>14</sup> *Supra* note 4, S. 57.

<sup>15</sup> *Supra* note 4, S. 38A.

<sup>16</sup> *Supra* note 4, S. 37.

<sup>17</sup> *Supra* note 4, S. 18 & 19.

<sup>18</sup> Bella Jaisinghani, "Music Composers, Lyricists Receive Rs 13 Crore in Largest Royalty Payout" *Times of India*, Apr. 24, 2018, available at <https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/music-composers-lyricists-receive-rs-13-crore-in-largest-royalty-payout/articleshow/63886673.cms> (last visited on Dec 7, 2024).

<sup>19</sup> Articles of Association of The Indian Performing Rights Society Limited, *Supra* note 8 at 3.

This Right seems to be nothing but a synonym for reproduction right. Interestingly, it is phrased in a manner in which no one *makes* a sound recording or a cinematograph film. Electronic reproduction of a musical work by way of a sound recording is impossible *per se*. It is the performance of the musical work which must be recorded. Similarly, reproduction of a musical work on a cinematograph film would mean a video shot of the graphical notations. As if this error wasn't enough, the interpretation continues to add the right to lend and rent copies as part of the mechanical right. It is crystal clear from Section 14 that no such copyright vests with authors of literary and musical works. Only one kind of literary work author has such a right – the computer programmer.<sup>20</sup> There is no way a composer can ever get a 'lending right' enforced against a sound recording producer, no matter what he calls it. Mechanical rights aren't interpreted within PPL's Articles of Association.

Having understood mechanical rights, let's move on to another interesting title – Synchronisation Right. This is how the IPRS Articles of Association interpret a synchronisation right:<sup>21</sup>

(xxx)	“Synchronisation Right” means the exclusive right to record and synchronise the Musical Work and/or Literary Work on the soundtrack of any Cinematograph Film and/or Audio-visual medium.
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Literally, this means that a copy of the musical work is placed in such a manner as to match the timing in a cinematograph film. The author of a literary work/musical work has the right to authorize the making of a sound recording.<sup>22</sup> Synchronisation right is a kind of *dual* 'making of a sound recording' right. Synchronisation onto a cinematograph film would mean making a copy of the original sound recording.

Such a problem would only arise with licenses, as a license to make a sound recording of a musical work would not include the right to make copies of it. If there is an assignment made in favour of the sound recording producer, then the producer can make copies at will.

A synchronisation right is not interpreted within PPL's Articles of Association. The Calcutta High Court in a matter stated:

<sup>20</sup> *Supra* note 4, S. 14(b)(ii).

<sup>21</sup> Articles of Association of The Indian Performing Rights Society Limited, *Supra* note 8 at 5.

<sup>22</sup> *Supra* note 4, S. 14(a)(iv).



*“The right to record the music as part of the soundtrack in a film is known as 'the synchronisation right', because it is performed in synchronisation with the film. This right is included in the right to reproduce the work in any material form.”<sup>23</sup>*

As I have attempted to explain, the understanding that synchronisation right is *included* in the right to reproduce the work is a result of right-conflation.

The erstwhile Intellectual Property Appellate Board, in a matter, had considered the right to reproduction and the mechanical right to mean one and the same thing.<sup>24</sup>

It is evident that both these right-titles were not intended by the legislature. In fact, in clubbing distinct ways of authorising copyright usage, these titles have the potential of prejudicing the interest of composers and lyricists. In the next segment, this paper looks to identify and expand on possible problems.

- **Issues Created by Title-Conflation**

Combining rights is never ever a good idea for the author. While the knowledge of IPR in India is on the rise, it is still very low. In my interactions with stunt artistes from Bollywood for instance, I had found almost a complete lack of knowledge.<sup>25</sup> The ecosystem of Copyright must facilitate easy access to information and uncomplicated enforcement. With the industry and the law practically operating parallel system of rights makes the life of such an author very difficult.

Between the composer, lyricist and the producer, it is the producer who is economically well-off. He is able to afford the best copyright law talent. The composer and lyricist should be backed by a system that enables access to quality copyright education and counselling. It makes no sense then for IPRS to continue the use of titles in variance with The Act.

The Act is a beneficial piece of legislation, intended to further the cause of public interest. Much has been written about the theoretical justifications of copyright, but it is important to note that at its heart, copyright law is looking to propel creativity such that more original works come into existence and are shared with the public. Be it the utilitarian theory or the labour

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<sup>23</sup> *Saregama Ltd. v. The New Digital Media and Ors.*, MANU/WB/1041/2017.

<sup>24</sup> *Music Broadcast Ltd. and Ors. v. Tips Industries Ltd. and Ors.*, MANU/IC/0068/2020.

<sup>25</sup> Rohan Cherian Thomas, "Living on the Edge: Recognition and Rewards for Stunts in Bollywood", 15 *Army Institute of Law Journal* (2022).



theory, or personality theory, or the social-planning theory, at their core, this is what they are promoting.<sup>26</sup>

A composer and a lyricist are authors whose incentive to create, theoretically, lies in the fact that the law can grant them avenues for rightful access to the market. For the legislators to have divided rights under Section 14 with such precision clearly indicates that combining them in any way was never their intention. In fact, in doing so, it can well be argued that inventing right-titles that combine rights would defeat the purpose of The Act.

Considering that IPRS is playing a leading role in perpetuating these titles, it is important to see what role copyright societies like IPRS must play generally. Additionally, it will also be seen in the next segment what IPRS can do in correcting this issue.

- **Role of Copyright Society**

The Indian copyright landscape is in an evolutionary phase. There are those collectives which are purely operating from a labour standpoint, such as the Movie Stunt Artists Association ('MSAA').<sup>27</sup> As I note in my study, the MSAA is doing a phenomenal job. In contrast, we have copyright societies which are not pure copyright societies. IPRS has been playing an activist role for its members.<sup>28</sup> This model of working is referred to as a hybrid model.<sup>29</sup>

A copyright society in India has the capacity to do much more than what it was created to do. Its primary duty, no doubt, is to conduct the business of licensing authors' works. But a copyright society is also the bridge to cultural changes.

During WIPO negotiations for audiovisual performer rights, the Indian delegation had noted that cultural relations in India prevent the grant of certain rights. For instance, the delegation noted that in the film industry, relations exist on the basis of trust.<sup>30</sup> There is a strong belief that the other person will not engage in cheating.

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<sup>26</sup> William Fisher, "Theories of Intellectual Property", in *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001).

<sup>27</sup> See *Supra* note 25, for a detailed understanding on the working of the MSAA.

<sup>28</sup> *Supra* note 3.

<sup>29</sup> WIPO Secretariat, "SCCR/17/3 Summary of the Outcome of National and Regional Seminars on Protection of Audiovisual Performances", 5 (Standing Committee on Copyright and Related Rights, October 17, 2008), available at: [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=142872](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=142872) (last visited on Dec. 8, 2024).

<sup>30</sup> Information Received from Members by The WIPO Committee of Experts on a Protocol Concerning Audiovisual Performances, 4 (1997), available at [https://www.wipo.int/edocs/mdocs/copyright/en/ap\\_ce\\_i/ap\\_ce\\_i\\_3.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/ap_ce_i/ap_ce_i_3.pdf) (last visited on Dec. 8, 2024).

Copyright Societies like IPRS can make the relationship between the producer and its members more professional. While maintaining mutual respect between parties, IPRS must ensure to offer what the law offers. For instance, Section 14(a)(iii) can be read to refer to two right-titles: A Performing Right and a Communication Right. This would be an accurate representation of what the law provides.

This would lead to a ripple effect. License deeds involving IPRS would become much more exacting.

- **Application of R3**

It is interesting to see whether an author has any claim to royalties through mechanical, performing and synchronisation rights. It is clear from the preceding discussion that if individual rights are broken down, then each such component can be commercially utilised by the author. The question that remains now is whether, after such transmission, the author has any mandatory royalty claim?

To answer this question, I am considering a sample agreement wherein a composer has agreed to assign his composition to a sound recording producer for a single remuneration. There is clarity within this agreement that the composer waives any claim to royalty from the producer's profits. For the uninitiated, record labels are infamous for trapping authors in an unjust agreement.

This problem has mushroomed to such an extent in India that an amendment was made in 2012 to the Act, just so that this abusive practice could be prevented with the force of law. The amended Sections 18 and 19 of The Act provide for a Right to Receive Royalty ('R3'), which is an unwaivable right. Not only does it cover authors of literary and musical works, but performers as well.<sup>31</sup>

With the help of R3, the practice of single remuneration might end up becoming a single equitable remuneration or be followed up with R3. The issue with single equitable remuneration is that the possibility of a mathematical precision in 'equity', even before the actual scale of revenue is known, is a fanciful thought. Thus, even with a possible single equitable remuneration, the subsequent application of R3 does not vanish.

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<sup>31</sup> See *The Indian Singers' Rights Association v. Chapter 25 Bar and Restaurant* MANU/DE/2038/2016 & *The Indian Singers' Rights Association v. Night Fever Club & Lounge* MANU/DE/2073/2016.

For Mechanical Rights, as and when copies are made, the numbers will add to the claim for R3. Since composers do not have the right to lend or rent, any amount promised in the agreement is simply a one-time payment. For Synchronisation Rights, as and when sound recording is made and revenue is generated, R3 claims will be initiated. Similarly, for Performing Rights, every time the composition is performed live or communicated to the public, there is a claim to R3. The issues with R3 itself are outside the scope of this paper.

- **Contractual Terminology**

Any effort of IPRS in the direction mentioned above can most certainly be overcome through an agreement. The contract in its definition clause can very well mention mechanical right, synchronisation right and performing right, just the way it was.

The achievement herein would be a tougher negotiation for record labels to conflate rights. Clarity on the distinctive nature of rights will bring in more informed composers and lyricists. Altogether, a more vigilant IPRS.

In leading this movement, they could motivate other authors in different parts of the country who are not members of any copyright society to better negotiate the transmission of their rights.

## **CONCLUSION**

The romantic notion of copyright places the author at the centre of Copyright discourse. This creator generates an original work. Without them, societies would be deprived of a means of cultural growth. The 2012 Amendment to the Act marks a watershed movement for copyright law evolution in India. By introducing R3, the Indian parliament recognised the need to focus on this author. Years of harassment at the hands of record labels had propelled lyricists and composers to fight for R3. This paper, though, was not offering a perspective on that battle.

Rather, the focus of this paper was on the harassment itself. While R3 is one solution to a wide issue, it is not the only solution available. This paper places the argument that industry practice has led to a conflation of rights into inventive right-titles. These right-titles like Mechanical Rights dilute the effect of Section 14 of the Act and, in doing so, defeat its purpose.

A possible way to sort this on an immediate basis would be to amend the IPRS Articles of Association. The practice of right-titles need not be done away with. As has been argued, right-

titles such as performing-right or communication-right can be used in a way that is concomitant with Section 14 rights.

While this approach would not reverse the confusion in deed documents, it could play a role in its gradual reversion. As long as producers call the shots in the music industry, the balance of power lies in their favour. Through complicated agreements and a pliant composer/lyricist, copyright could simply be turned into an easy hurdle. But if copyright societies were to be more vigilant and educate members as well as non-members in the best ways to harness the true potential of Section 14, it would lead to economic upliftment of both composers as well as lyricists. After all, not everyone is Javed Akhtar. Those struggling are the ones who really need the optimum protection of the Act.