

Copyright Piracy in Case of Musical Work – A Critical Analysis

A. Nirmal Singh Heera., M.A., M.L., N. Prabhavathi., M.A., M.L.,
Assistant Professors, School of Law, SAstra University, Thanjavur, Tamilnadu

Abstract: *The Copyright Act has travelled for a long way from the British period to the modern period. The first copyright act was passed, by the Governor General of India, in the year 1847. The origin of copyright law had a nexus with the invention of the printing machine by the Gutenberg in the 15th century. In Europe, the printing was invented and widely established during the period of 15th and 16th century. Because of this invention, there was a glowing and wide spread increase in printing and publication of books, which inter alia, led into the duplication of work done by the other authors without any prior sanction from the concerned authors. This practice caused great hardship to the author/s of the work. In this article, the authors are going to analysis the copyright piracy in case of musical work.*

Key Words: *Copyright – Musical Work – Authorship*

I. Introduction

The copyright Act 1957, in India, came into force on 12th January, 1958 superseding the copy right Act, 1911 which was existed in England was made applicable to India since India was an integral part of the British regime. After the independence of India, the 1957 enactment (Copyright Act, 1957) has undergone several changes during the period of 1983, 1984, 1992, 1994, 1999 and 2000 and the latest amendment made in the year 2012.

Objectives of the Study:

- To know the meaning of the term “copyright”
- To know what is the meaning of “musical work”
- To know when the musical work becomes complete
- To know the meaning of “piracy”
- To know the “role of performer” and “performer’s rights”.

II. Meaning of Copyright

Copyright is a right to stop others from exploiting the work without the consent or assent of the owner of the copyright. The object of the Act is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others. Copyright is a statutory right given by the copyright Act, 1957, to the authors of a work that fall within the domain of *Original Literary, Dramatic, Musical or Artistic work, Cinematographic film and Sound recording*. Copyright is purely a creation of the statute under the 1957 Act. According to section 14 of the Copyright Act, 1956, copyright means “*the exclusive right to do or authorise the doing of any of the acts mentioned herein below, in respect of a work or any substantial part thereof.*”

(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).

The above mentioned seven acts or rights *para materia* are applicable to the case of musical work also. The above referred rights are exclusive rights and the copyright owner/author (s) alone has the right to enjoy to the exclusion of all others. However this right is subjected to the limitation mentioned in section 52 of the Act, 1957. The object of this section 52 is to strike a balance between the interest of the society and the need to rewarding the creator of the work.

III. Meaning of Musical Work

According to Section 2 (p) of the copyright Act, 1957, “Musical work” means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.

The bare reading of the above section shows that the musical work means (i) a work consisting of music; (ii) Musical works includes any graphical notation of such work

But, the “musical work” does not include the following:

- (i) any words or any action intended to be sung
- (ii) any words or any action intended to be spoken
- (iii) any words or any action intended to be performed with the music.

“Music” means the art of making sound in a rhythmically organized, harmonious form, either sung or produced with instruments, and usually communicating some idea or emotion¹.

According to the Free Dictionary², “music” means (1) the art of arranging sounds in time so as to produce a continuous, unified, and evocative composition, as through melody, harmony, rhythm, and timbre.

(2) Vocal or instrumental sounds possessing a degree of melody, harmony, or rhythm.

“Graphic notation³” is the representation of music through the use of visual symbols outside the realm of traditional music notation. Graphic notation is often used in combination with traditional music notation. Composers often rely on graphic notation in experimental music, where standard musical notation can be ineffective.

Author of a Work:

The “author” of a work has been defined under section 2 (d). According to this section, “author” means,-

- (i)
- (ii) in relation to a musical work, the composer;
- (iii)
- (iv)
- (v) in relation to a cinematograph film⁴ or sound recording the producer; and
- (vi) in relation to [any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;]⁵

“Sound recording” means, according to section 2(xx)⁶ a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced.

Which one, the music lovers loves? Whether the song or music? What is the difference between the song and the music?

Whether instrumental sounds possessing a degree of melody, harmony, or rhythm alone constitute music? When the music becomes complete?

“Song” means a short poem or other set of words to music or meant to be sung. When the set of words are incorporated into the music, it is being loved by the music lover and not the mere instrumental sounds. This is the trend right from the beginning and only in the club or in the bar the pre recorded backing tracks (music) are used so as to enable the people to sing the song with lyrics. This type is called as “karaoke⁷”. In our current scenario, the music lovers love the music coupled with the set of words and not the music itself. When words written by lyrists are sung by the singer, the music composed by the musician becomes complete, in a large scale. In such a case, saying that the composer of the music alone is the author of the music, is right?

When the musical works incorporated into the cinema or cinematographic film, who will be the author of the musical work?

According to Section 2 (f) of the Copyright Act, 1957, “cinematographic film” means Any work of **visual recording** [on any medium produced through a process from which a moving image may be produced by any means⁸] and includes a **sound recording** accompanying such visual recording and “cinematograph” shall be construed as including any work produced by any process analogous to cinematography including video films.

Visual recording⁹ means the recording in any medium, by any method including the storing of it by any electronic means, of moving images or of the representation thereof, from which they can be perceived,

¹ Champers – 21st Century Dictionary, Revised Ed, 2004, Pub: Allied Champers (India) Ltd.

² <http://www.thefreedictionary.com/music>. Accessed on 25 March 2017.

³ https://en.wikipedia.org/wiki/Graphic_notation. Accessed on 23 March 2017.

⁴ Inserted by way of 1994 Amendment.

⁵ Ibid.

⁶ Copyright Act, 1957.

⁷ Karaoke means a form of entertainment in which recording of the music but not the words of popular songs are played.

⁸ The words in bracket omitted by Act 27 of 2012, (w.e.f.21.06.2012).

⁹ Section 2 (xxa) of the Copyright Act, 1957.

reproduced or communicated by any method. Sound recording¹⁰ means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. "Sound" means, it is a vibration that travel through the air or another medium and can be heard when they reach a person's or animal's ear. Sound is produced by continuous and regular vibrations, as opposed to noise.

Author of a cinematographic film:

According to section 2 (d) (vii), "author" in relation to a cinematograph film¹¹ or sound recording is the producer. With respect to the film, the copyright is vested with the producer and in the film, the song(s), sung by the singer(s), written by the lyrics, composed by the musician is incorporated and with respect to song, it is accepted by the producer only when the above conditions are fulfilled. The mere sounds of music instrumental are not accepted as such not only by the producer but also by the audience/people. Further, the film producer pays some remuneration or commission for the music composed by the musician. Therefore, as soon as a song(s) incorporated into the film, automatically, the producer of the film becomes the owner of the songs and no rights, in the absence of any agreement to the contrary, is vested in the composer.

In *Ilaiyaraja Vs. B. Narsimhasn, Agi Music Pvt. Ltd. and Ors*¹², it has been contended that, in the light of Section 2(d)(v) of the Copyright Act, the claim of the plaintiff that he is the sole and absolute owner of the right in respect of the musical works, sound recording, contained in the films as well as the independent artistic composer, is nullified.

Sound recording and the "musical work's rights are vested in different persons. Sound recording means recording of sounds, whereas "musical work" consists of music. In common parlance, the tunes, musical notes etc., belong to the composer/music director, whereas the recordings belong to the producers. The plaintiff does not sell any audio Cassettes/compact discs/DVDs., etc., of songs of the movies which would be sound recordings. In fact, *the plaintiff has also been paid remuneration by the producers of the movies for composing music for the films, which shows that the plaintiff as an author of musical work has composed music only based on the contract.* Further, it has been asserted that in all the films, sound recording includes the songs with words, for which the producer is the author. The plaintiff, who cannot be the owner of the sound recording. Copyright over the schedule film songs or sound tracks only vests with the producer and not to the music director. With due respect we, the author of this paper acknowledge the views expressed by the defendant's counsel in this case. Further, according to this authors, the composer should be considered only as a "performer" forming part of the film and should not be considered as an independent artistic composer unless or otherwise his songs are incorporated into the film to which the producer is the only author/owner. Further, to claim sole authorship with respect to music, the music should not become as a song. If it comes as a song, then the lyrics, music and sounds of words should be of the composer. For example, in certain films, maestro *Isai Gnani Ilaiyaraja* composes the music with his own lyrics and sings the song. In such cases, one person, that is to say, maestro *Isai Gnani Ilaiyaraja* performs the role of three persons. Even in this case, to claim sole authorship, the songs performed by one person taking the role of three persons should not be incorporated into the film. If there is any agreement to the contrary, then, he claim the sole authorship irrespective of whether his songs has been incorporated into the film or not.

Meaning of performer:

According to section 2 (qq) of the Copyright Act, 1957, the term "performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.

Who is a musician?

"Musician" is a person who plays a musical instrument especially as a profession or is musically talented. According to the Cambridge Dictionary¹³, the term musician has been defined as "someone who is skilled in playing music, usually as job". Musician is a composer ... or performer of music; especially: instrumentalist¹⁴.

Performer's rights: Musician vis – a - vis Singer with respect to song(s):

According to Section 2(qq), the term "performer" includes "musician and singer". The performer's rights have been dealt with under Sections 38, 38-A, and 38-B of the Copyright Act, 1957. Section 38 and 38-A and 38-B inserted by way of 1994 and 2012 amendment respectively. According to Section 38, Where any performer

¹⁰ See Section 2 (xx) of the Copyright Act, 1957.

¹¹ Inserted by way of 1994 Amendment.

¹² MANU/TN/0539/2015.

¹³ <http://dictionary.cambridge.org/dictionary/english/musician>.

¹⁴ <https://www.merriam-webster.com/dictionary/musician>.

appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance. The performer's right shall subsist until fifty years from the beginning of the calendar year next following the year in which the performance is made. Further, Section 38-B deals with exclusive right of the performer. Under sub section 2 of section 38-B, "**Once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film**": But under the Proviso clause, the *performer is entitled for royalties* in case of making of the performances **for commercial use**.

From the above analysis, it is very crystal clear that the musician or otherwise called as composer is not the sole author when his work incorporated in a cinematographic film and as such he is having the right to claim royalties where his performance is performed by a *third party* for a commercial use.

But, when the performance performed by two or more performer and if the one of the performer performs the performance without the consent of the other performer (like in the case of Ilayaraja and S.P. Balasubramainum), would it amounts to infringements of the copyright Act?

According to the authors, certainly, the answer to the question will be in negative. Because, under Section 38-A performer's right is an exclusive right, though the opening part of Section 38-A, starts with "without prejudice to the rights conferred on author". Therefore, under Section 38-A, The performer has the following rights. *That is to say*, to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof,

(a) to make a sound recording or a visual recording of the performance, including-

(i) reproduction of it in any material form including the storing of it in any medium by electronic or any other means;

(ii) issuance of copies of it to the public not being copies already in circulation;

(iii) communication of it to the public;

(iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;

(b) to broadcast or communicate the performance to the public except where the performance is already broadcast.

Further, the above rights are subjected to Section 38-B of the Copyright Act, 1957. Which *inter alia* says that the performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right,-

(a) to claim **to be identified as the performer of his performance** and

(b) **to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance** that would be prejudicial to his reputation.

The mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation.

IV. Suggestions and Conclusion

In order to remove the doubt/controversy with respect to the author of musical work as defined in Section 2(d) (ii), we, the authors suggest the following:

1. The definition of "author" in relation to musical work should be amended suitably.
2. The provision of Section 17 in relation to first author with respect to musical work should be added or amended specifically since, the provision does not contain proviso clause with respect to musical work like that of any other work.
3. The word lyricists have to be added in section 2 (qq) of the Copyright Act so as to include lyricists as a performer.
4. Even in the case of producer who is the author of the cinematographic film, the definition of section 2 (d) (v) has to be suitably amended. Because the producer, in case of cinematographic film is simply investing the money and no intellectual work/labour has been contributed by the producer. Whether intellectual property is merely based on only investing money or intellectual work? This question needs to be analysed.

Because of lack of protection of intellectual property rights awareness among the people and duo to rapid growth of technological developments, some people are stealing the labour of other people. So as to stop such practices, it is the need of time to create awareness among the people. Then only the creators of the work will be interesting in creating the new work and side by side the nation will also grow. That why, we conclude that protection of intellectual property rights not only gains the individual but also the nation.

=====