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OLD SONGS ARE THE NEW TRENDS

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Abstract

Music is food for soul; a statement which will be agreed to by everyone who believe that music is a timeless creation created to touch the soul. While we age listening to songs which are old and which always remind us of younger happier times, we have now started coming across remakes or remixes of the same songs with faster and peppier beats to attract our attention but only as much as we relate the new remake to the older original version of the song. It is an established fact that the publisher and/or the label of the song owns the copyright of the song. However, this paper seeks to delve into the finer aspects of what is the legal standing of the authors of underlying works who contributed to create the song. This present essay introduces the readers to the concept of music and remixes followed by explaining and quoting legal provisions related to the same only to draw a parallel to what actually goes down in the music industry based on entirely doctrinal research method undertaken by the authors in a meticulous manner in hard and trying times of the pandemic. Another aspect of the research study would be discussing the recent case of unfair treatment meted out to the authors of underlying works of the famous hit number 'Masakali 2.0.' The researchers on the whole try to bring out the provisions specifically pertaining to music remixes and how they pay a major role in the nascent stages of planning to come up with a musical work.

Keywords: Remix, Copyright, Sound Recording, Music, Underlying Works.

INTRODUCTION

"*Every new idea is just a mashup or a remix of one or more previous ideas.*"[1] – Austin Kleon

As we progress further in the 21st Century, we see a staggering increase in the concept of recreating pieces of art whose existence has already been immensely acknowledged by the appreciative applauds offered by the people who consume art whole-heartedly only to create a façade of creating a new artwork out of it by barely remixing it. Owing to this, it is only foreseeable that it has also led to an augmented increase in the copyright infringement cases solely with respect to remixed art and therefore the subsequent curiosity towards literacy in copyright laws and know-hows.[2] Remakes in the form of remixes, mashups, etc have presented themselves on the "Top-Trending" and "Top-Grossing" charts so frequently that it has now

[1] Austin Kleon, *Steal Like An Artist* (1st edn, Workman Publishing House 2012) 9
[2] Veerendra Tulzapurkar, "Remix and Copyright Law" [2005] 10 JIPLP 106

become a mainstream mode of creation which basically showcases the characteristic pivot in the world of art at the turn of two centuries.[3]

Before delving into the intricacies of copyright with respect to remixes in music, let us get a brief background on how copyright actually works and is perceived. Copyright *prima facie* is quite easy to understand if the preliminary concept of "*idea-expression dichotomy*"[4] is understood. In principle, an intangible idea cannot be given a copyright while an apt expression of the same idea can be.[5] A basic illustration of the differentiation with respect to the idea-expression dichotomy could be the idea or the concept of directing a cinematograph film in a certain backdrop with a certain set of actors in some colour coded costumes. While the thought of it and the visual imagery of the same in the director's brain cannot be copyrighted, the actual shooting and the recording of the same setting with the actors in the costume in a cinematograph reel which can be viewed on screen by several people can be copyrighted.[6]

Basically, one has a copyright from the moment one creates something in the field of literature, music, artistic work, etc with the caveat that it embodies two essential aspects: originality of the work and that it is fixed in a tangible medium of expression because of the sole reason that the copyright laws protect expression and not idea.[7] Once something is created with the two basic elements which could make the work copyrightable, the owner of such work then has a subsequent exclusive right to develop it further, right of reproduction, right of publication, right to make translations, right to make adaptations, communication to the public, etc.[8]

Since we are now inching towards a digital era, the people *via* the internet have started majorly supporting the remix culture, where they actively engage with content by creating derivative works out of the original works. A very recent illustration of this could be the shorter cuts of already created songs used in lo-fi music or making changes to the beats or combining two

[3] Ashley Carmen, 'Spotify will let its podcast hosts include full songs in their shows' (*The Verge*, 14 October 2020) <https://www.theverge.com/2020/10/14/21514855/spotify-music-podcast-format-anchor-listen> accessed 10 September 2021
[4] KP Abhinav Sankar, 'The Idea – Expression Dichotomy: Indianizing an International Debate' [2008] 3 JICLT 129
[5] Upendra Baxi, 'Copyright Law and Justice in India, [1986] 28 JILI 497 <https://www.jstor.org/stable/43951048?refreqid=excelsior%3A58cad217db85820f266eb7ba8fc17f94> accessed on 12 September 2021
[6] ibid 4.
[7] PM Dhar, 'Copyright in Music: Evolution and Conflict of Rights' [1997] NCLJ 101
[8] Nidhi Tandon, 'Who Owns The Copyright On Remix Songs?' (Advaya Legal, 3 May 2020) < https://www.advayalegal.com/blog/who-owns-the-copyright-on-remix-songs/> accessed on 14 September 2021

songs as a mashup being repeatedly used on the new Instagram feature – "*Reels*" where such music aides the transition video culture propagated by the *Gen Z*.

With various examples of remixes given in the previous illustration, we can opine that remix can take up many forms, but the most popular one of the lot is the mere idea of sampling bits from other songs or creating music mashups.[9] A remix essentially is created by making use of an old song that has been produced with original lyrical work by incorporating altered, distorted and transposed audio and making some additions and subtractions to certain elements of the composition of the original song.[10]

Though the original song's duration would have been for a longer length of time, the artist who wishes to remix the song would pay more attention to the chorus of the song since that would attract more attention from the listeners once the remix is created. What the subsequent artist essentially plays on, is the 'recollection value' of the listeners in associating the new song to the old one. The artist looking to remix the song would look to attract the audience only by the attractive and not by the ordinary.[11]

The Indian Entertainment Industry popularly known as Bollywood has been tagged as one of the fastest growing industries over the last few years and has managed to have a robust economic value.[12] The Indian music industry with time has seen the surge in the production of remixes based on old hit numbers by the new generation artists like Badshah, Tanishk Bagchi, etc. We can consider the examples of the famous songs, *Dus Bahane*, *Saki Saki* and *Ankhiyon se Goli Maare* which were all hit tracks back in the 90s for their catchy tunes and the signature dance moves. These same songs were remixed and released once again by adding some new beats with a modern oomph though the rhythm and the idea behind picturisation of the song remained the same.

The question then arises about whether or not it is actually legally viable to make such a piece of art and exploit the original work of an artist. Earlier, these incidents did not come to notice

[9] Ritesh Khosla, 'Controversies and Legal Position On Remixing & Version Recordings' [2013] NCLJ 98
[10] Sanjana, 'Remix Music and its Interplay with Copyright Laws' (*IIPRD Blog*, 25 August 2021) < https://iiprd.wordpress.com/2021/08/24/remix-music-and-its-interplay-with-copyright-laws/ > accessed on 14 September 2021
[11] ibid 7
[12] Nishit Desai Associates, 'Indian Film Industry: Tackling Litigations' (2013) < http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Indian%20Film%20Industry.pdf > accessed 17 September 2021

since there was almost no literacy regarding copyright infringement cases. Now that such remixes are all over the internet and are causing an economic threat to the original composers, the fanaticism towards such work is increasing. We feel it is now the need of the hour to determine the legal position and legislations that protect the interests of the original composer as well as the author of the remixed work. This article at hand would essentially delve into the current legal position with respect to remixes in the Indian Music Industry with special reference to the copyright law framework. A brief comparison with the laws of the UK would also be included in order to view the idea of legality of remixes with a holistic standpoint.

CANONICAL ST AND POINT

The crux of the law revolving around copyright in India is to guard the work done by creators who create work which has some artistic value complemented with intrinsic value. In the event of the production and/or creation of an original thought of conceptualizing and developing a product, coupled with the use of intellect in the same process warrants the protection of the same from being plagiarized by someone who consumes the same product for the monetary gains of self without subsequent positive authorization from the owner of such product. In order to safeguard such rights, the Copyright Law rightfully protects and does not give the permission to an individual to gain profits out of the labour, skill and capital of another. Copyright in India is represented as a law which protects the creator's work in case of infringement. The Copyright Act, 1957 (hereinafter mentioned as "**Act**") includes protection for literary works like the work put in a magazine, newspapers, and other documented work. Artistic production which includes dance, theatre, screenplays are also protected under the same Act.

Since through the course of this paper we would be dealing with the legality of remix of songs, one of the relevant provisions to turn our attention towards would be **Section 2(p)** of the Act.[13] Under this section, "**musical work**" has been defined as *"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 music"*. It is thus sufficiently clear from this definition that the term musical work does not involve the lyrics for a sound which is fixed on any medium.

[13] The Copyright Act 1957, s 2(p)

Another section that comes into play is **Section 14** of the Act.[14] Under this section, "*copyright*" is defined as *"the exclusive right subject to the provisions of this Act, to do or authorize the doing any of the following in respect of a work or any substantial part thereof"*. The *"acts"* mentioned include dramatic, literary, musical work[15]; computer programme – its selling or for renting purposes[16]; artistic work – its storing and depiction[17]; cinematograph film – its copy or for renting purposes[18] and sound recording[19]. This proves that the word 'copyright' refers to a collection of rights which are exclusively conferred with the owner vide this section. Such rights can only be applied by the true owner of the copyright or by any individual who is permitted by the owner of the work. Such rights comprise the right of reproduction, adaptation, to make translations, publication, and communication to the public at large.

Section 14 (e) which lays down copyright of a sound recording says *"in the case of a sound recording, -* [20]

(i) to make any other sound recording embodying it [including storing of it any medium by electronic or other means];

(ii) to sell or give on commercial rental or offer for sale or for such rental, any copy of the sound recording;

(iii) to communicate the sound recording to the public."

This proviso thus lays down that a sound recording copyright includes the right to make any additional sound which exemplifies it, the right to sell or give on rent the copy of sound recording and the right to share it with the general public at large.

Section 51 of the Act deals with the concept of copyright infringement.[21] It lays down that copyrighted work will be considered to be infringed when an individual, without the license conferred by the lawful owner of the copyright or the Registrar of copyrights under the Act or in contravention of conditions imposed by a capable authority –

[14] The Copyright Act 1957, s 14
[15] The Copyright Act 1957, s 14 (a)
[16] The Copyright Act 1957, s 14 (b)
[17] The Copyright Act 1957, s 14 (c)
[18] The Copyright Act 1957, s 14 (d)
[19] The Copyright Act 1957, s 14 (e)
[20] The Copyright Act 1957, s 14(e)
[21] The Copyright Act 1957, s 51

i. does anything, the absolute right to do which is by this act granted upon the lawful owner of the copyright, or
ii. allows for profit any place which would be used for conveying the work to public and such conveying leads to a copyright infringement of the work, unless he was not conscious of and did not have any reasonable position for considering that such conveying would lead to a copyright infringement.

This type of a legal right is bestowed upon the original creator who is the owner of any literary, musical or any other artistic work. These may take the form of sound recordings, dramas, or paintings. From the section mentioned above, we understand that using work which is copyrighted without the permission of the owner is considered as infringement of copyright. The infringement of intellectual property arises when a person or group of persons concoct the owner's work without giving them the due credit for it.

Section 52 of the Act talks about instances that would lead to exceptions to infringement of copyright.[22] In particular, **Section 52 (1) (j)** of the Act[23] deals with exception to infringement of copyright of a sound recording if –

i. the recording of the work has been made with a valid license of permission from the owner of the original sound recording;
ii. the individual producing the recording has provided the original owner with a notice of intention to make the sound recording and has given copies of labels which the recording would be sold in. The individual must also pay in the specified manner to the owner of rights in royalties at a rate which is fixed by the Copyright Act.

This section comes with a caveat stating that the above can be an exception so as long as no alterations have been made without the permission of the owner of rights or which are not fairly required for adaptation of the work for the purpose of making the sound recording. It states that the recording must not be issued in any form of label that might confuse the public to with respect to its identity. It also states that the recording should not be made until the termination of two calendar years after the ending of the year in which the first recording of the work was

[22] The Copyright Act 1957, s 52
[23] The Copyright Act 1957, s 52(1)(j)

made. It lastly states that the individual making such a recording must permit the owner or his/her agent to examine all books of account and records which is relating to such a recording.

From the provisions mentioned above, it becomes sufficiently clear that other than the provisions of Section 52 (1) (j) of the Copyright Act, producing remixes would result to an infringement of the sound recording created by the owner. This section lays down that the making of a sound recording would not lead to infringement in case the new creator states his intention clearly to the original owner and has reimbursed the owner with the amount of royalty which is decided by the Copyright Board. The creator must take all the necessary precautions like to be mindful to not make alterations without the permission of the owner and that the recording must not be sold via a label which misleads the public at large.

Once the new creator has taken all precautions and fulfilled the conditions stated above, his act of making a remix of the recording would not lead to copyright infringement.

While we have understood the laws applicable to a remake of a song, it is important for us to delve into cases and have a look at how the Indian Judiciary has interpreted these laws.

In the case of *Gramophone Co v. Super Cassettes*[24], the plaintiffs made an audio tape which was called "*Ganapati aarti ashthavinayak geet"*. The defendants had sent a notice to the plaintiffs which stated that they intended to make a cassette comprising of a new sound recording which included the original work. They also sent a license fee of Rs. 2,230 for 5,000 cassettes. The plaintiffs returned the cheque clearly showing that they did not want the defendant to go ahead with its sound recording but the defendants went ahead and released their own sound recording anyway. Pursuant to this, the plaintiff filed a suit contending that the acts of the defendant led to infringement of their copyright. The defendants prayed the defence under section 52(1) (j) of the Act. After considering all relevant provisions the Delhi High Court held that the plaintiff did not permit the defendants to revise the sound recording and that defendants have not automatically become entitled to make a new sound recording under section 52(1) (j). The court held that the consent of the plaintiff was required to be obtained in order to comply with the section mentioned above. The learned judge held that the defendants had indeed infringed the copyright of the plaintiff.

[24] *Gramophone Co. v. Super Cassettes* [1999] 2 PTC 216

A contrary view was taken in the *Gramophone Co v. Mars Recording*[25] case by the Karnataka High Court. In this case, a case was filed for copyright infringement and an injunction was granted by the Trial Court. However, the Appeal against the order was dismissed by the High Court of Karnataka. It held that once the obligations of section 52(1) (j) were followed with by the defendants, they can become eligible to make a new recording which would not amount to infringement.

CONCRETE REALITY – DIFFERENCE ON THE GROUND

In order to record a remix or legally known as a derivative work, it is technically necessary to obtain authorization from the rights held by the artist or label who owns the master recording and who is the publisher of the song (usually a publishing company, or in some cases, the artist themselves). This makes it much easier for official remixes to be pulled off legally than unofficial remixes or "bootleg remixes."[26]

As long as you create an official remix, the likelihood of a legal problem is quite negligible (although it is always good if there is any sort of documentation to substantiate the originality of the production of music and/or the permission granted to make any further future changes with regards to the same). However, when official remixes become more complex, it is to decide who holds the copyright for the derivative work you create. When you record a remix, at least three different right-holding parties usually become a part of the long-standing transaction - the owner of the master recording, the publisher and the newest party to the transaction – the musician who attempts to make a remix of the existing song.[27]

Music when created comprises of many components such as lyrics, music composition, beats, rhythm and chorus to name a few. But when this same piece of music or song is recreated, as an 'adaption' of the musical work, usually an arrangement or transcription of these elements is undertaken.[28] While few of these elements are edited and changed as per the new artist's creativity, the other few elements are kept as it is to retain substantial similarity in order to let the audience connect with the recreated song with a recollection value of the original song.

[25] *Gramophone Co v. Mars Recording* [1999] SCC OnLine Kar 584
[26] ibid 12
[27] Maria A. Pallante, 'The Register's Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary' 113th [2013] 6
[28] ibid 12

There has been a long-standing debate on the fact whether a new copyright should be granted for such an adaptation or should the copyright holder of the original song enjoy the ownership of copyright of the recreated song.[29] One side of the debate holds the fact that the original song's copyright holder should retain the rights and be credited for the recreated song since what the new artist who recreates and/or remixes the song essentially brings to the table is barely a new creation. This is because this new artist is blindly banking on the popularity and the acclaim that the old song has garnered over the years coupled with the major elements of the old song being the same. Its almost like tweaking an old song to match the trend and vibe of the new generation. What essentially this side of the debate believes in, is the fact that such a derivation can be done as an accessory to the original song itself and there is no paramount need to declare this tweaked version of the original song as a new song with a separate copyright. While this is one side of the debate, the other side has legal professionals, scholars and musicians who are of the opinion that the alteration and the re-recording of the original song with the rearrangement of the elements of the song should be classified as a new work of art and the author or the new artist responsible for this art should deserve the protection of his work against public exploitation in the form of granting of a new copyright separate and distinct from the copyright held by the creator/owner/label/composer of the original old song.[30]

The latter side of the debate has been given more weightage in the present-day paradigm and the new artists who recreate the older songs get the copyright over their creations to safeguard their versions of the song from public exploitation. Now, in actual parlance this is the actual practice that is followed in the Indian music and film industry and the present research article sheds light upon why this approach is *prime facie* problematic for the owners of the copyright of the original song.[31] The most considerable argument capable of being formed was that the bigger labels and production companies take advantage of the lyricists, music composers and scriptwriters by not bestowing the rights that they deserve, upon them for the predefined work for some kind of consideration and mint extensive profits by using the same script, lyrics, music composition tactfully in various ways apart from what had been agreed to initially. This is exactly what happened in the recent controversy behind the release of the song 'Masakali 2.0'

[29] Jatindra Kumar Das, 'Law of Copyright' (first published in 2015, PHI Learning Private Ltd.) 88
[30] Sumyesh Srivastava, 'Raabta', 'Partner', 'Kaante': How Bollywood has dealt with plagiarism cases' (Scroll 28 March 2018) <https://scroll.in/reel/873364/raabta-partner-kaante-how-bollywood-has-dealt-with-plagiarism-cases> accessed 25 Septemer 2021
[31] ibid 29

about which the article now draws a parallel to in specific regards of how no approval was taken by T-Series from A.R. Rehman and Mohit Chauhan before going ahead and recreating the song.[32]

The Copyright Act states that the copyright over the sound recording of a song is necessarily vested in the producer of the musical work. Having stated this, there is no reference with respect to the rights of the authors of the underlying works made in the Act.[33] In an effort to safeguard the rights of the lyricists, composers, etc, a proviso to Section 18 of the Copyright Act was added in consonance with the Amendment of 2012 of the Act. The proviso reads as follows *"Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of the copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void."*[34] This proviso tries to act as an aid for the authors of the underlying works from getting monetarily exploited.

In the original song 'Masakali', although T-Series is the label that owns the song, its rights are limited to the extent of using the original song and communicate it to the public as is allowed under Section 14(e) of the Copyright Act.[35] Over and above this, they can also license the playing of the original song in events, concerts and restaurants to make money with the caveat that the authors of the underlying works have also expressly consented to the same and mandatorily share the royalty. Analogously, the label cannot create a new version of the old song unilaterally since the authors of the underlying works also have a stake and say in the matter.[36]

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[32] Charu Srivastava, 'No one can save us from Masakali 2.0 except law: A Copyright law perspective on Masakali 2.0' (*Times of India,* 11 April 2020) <https://timesofindia.indiatimes.com/readersblog/ip-law/no-one-can-save-us-from-masakali-2-0-except-law-a-copyright-law-perspective-on-masakali-2-0-2-11781/> accessed on 22 September 2021

[33] Akshat Agrawal, 'Song Remakes and Issues in Copyright Law' (*NMIMS Law Review Blog*, 22 October 2020) <https://lawreview.nmims.edu/song-remakes-and-issues-in-copyright-law-assignment-of-copyright/> accessed on 22 September 2021

[34] The Copyright Act 1957, s 18

[35] The Copyright Act 1957, s 14(e)

[36] Charu Srivastava, 'No one can save us from MASAKALI 2.0 except law: A Copyright law perspective on MASAKALI 2.0 (Times of India 11 April 2020) <https://timesofindia.indiatimes.com/readersblog/ip-law/no-one-can-save-us-from-masakali-2-0-except-law-a-copyright-law-perspective-on-masakali-2-0-2-11781/> accessed 25 September 2021

Additionally, anything which is contrary to the law cannot be put into an agreement and be subsequently signed. In such a circumstance, the agreement stands void. Since the second proviso to Section 18 has been added as mentioned earlier, not sharing royalties with the authors of underlying works can be deemed to be against the spirit of the Copyright Act.[37] It is necessary for the contracts to be read and interpreted in line with the intention of the legislature. However, in the present case of the release of 'Masakali 2.0', the stakes are higher since there is an involvement of various parties and stakeholders wherein several contracts must have been signed to create overlapping rights to different parties thus intensifying the situation. Therefore, it can be said that T-Series should not have unilaterally decided on and released the song 'Masakali 2.0' since the authors of the underlying works namely A.R Rehman and Mohit Chauhan also deserved a fair chance to be informed and a right to furnish their opinions subsequently giving or not giving consent for the said remake.[38]

What we essentially see missing in the real music and film industry is the awareness of the law that directly affects such important stakeholders and the blind greed for money that production houses possess for which they can go to any lengths even if it means infringing the rights of an artist.

CONCLUSION AND SUGGESTIONS

In today's world, art is everywhere. The creators or artists have been adapting and evolving with the growing pace of the society. The art which has its own process and course must be protected by its rightful owners.[39] When such protection is not provided for by the artist or the owner, it may lead to infringement of the said work. It is then that the sections of the Copyright Act come into use. Thus, every artist and creator must familiarize themselves with the legal provisions laid down by the Act, essentially sections 51 and 52.

Through the course of this paper, we have dealt with the legal scenario around song recordings and its remix in India. It can be said that section 52(1) (j) of the Act acts as a rulebook which must be obeyed before replicating a work of music or specifically a sound recording. Although

[37] Kiran George, 'The Ranga-Rangabati Copyright Row' (Spicy IP 16 July 2015) <https://spicyip.com/2015/07/the-ranga-rangabati-copyright-row.html> accessed 25 September 2021
[38] Anushree Rauta, 'Ankit Relan- Mashups, Cover Versions and all that Jazz under the Indian Copyright Law' (*IPRMentLaw*, 14 April 2018) < https://iprmentlaw.com/2018/04/14/guest-post-ankit-relan-mashups-cover-versions-and-all-that-jazz-under-the-indian-copyright-law/> accessed on 23 September 2021
[39] Sarah Hankins, "So Contagious: Hybridity and Subcultural Exchange in Hip-Hop's Use of Indian Samples" (2011) < https://doi.org/10.5406/blacmusiresej.31.2.0193.> accessed on 12 September 2021

this section is the only way to legally remix a song, it has been exceedingly criticized by the Indian music industry. This section permits an individual to use an original recording once only two years have elapsed of the public release by delivering a notice to owner. Even after doing so, the individual is bound to pay a royalty fee which is decided not by the owner but by the Copyright Board of the proceeds made post the first release.

In this sense it can be considered that the copyright of a sound recording which would be protected for 60 years is now being curtailed to mere 2 years after its release. This generates a loophole in where the creator of the remix may produce it with the excuse that they wish to guard ageless music by giving a chance to new talent. Even if the lawful owner is discontented with the new remix, the best alternative would be to file a legal notice and pursue a long legal battle against the new creator. This section in its essence attenuates a sixty-year-old law of protection that the owner was entitled to.

The limit of royalty which must be paid is also ambiguous as it has not been specified in the Act which in turn leads to low amounts paid to the original owner. Thus, there is a huge loss which is ached by the owner of the original music as there is a deterioration in the sale of their original music.

Thus, an imperative need to amend some important provisions of the Copyright Act in order to guard the legal rights of the copyright owners is seen. The first step can be taken by extending the time period of using a song to remix from 2 years to 5 years. This way, the original owner has ample time to make profits out of his own song or music.

The second step must be to establish a concrete rate for the quantity of royalty that must be paid to the owner which is not related to the number of copies of the remix song sold. This would add a lot of more clarity and foster better relations between the owner of the original recording and the creator of the remix without any scope ambiguity.