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Music Piracy, Legal Issues in Copyright of Music and Towards Combating Music Piracy

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ABSTRACT

Intellectual property has always been an expanding concept. Music has been acknowledged and protected under the copyright system from the 19th century. The protection of music as an intellectual property received attention in the wake of illegal publishing of musical works. As such both performers and owners of the music were denied the benefits of the work that were due to them. There are numerous ways in which music piracy can be countered. The legislative framework has failed to bring about a clear elucidation to the problem. These can, however be dealt with, by making certain modifications to the enforcement mechanism to fill the lacunae and there must also be an incorporation of policy changes to counter music piracy.

Keywords: *Copyright, Music, Piracy, Online Streaming, Licensing, Copyright Society.*

I. INTRODUCTION

The Copyright is concerned with the creative expression of authors, composers, artists and others who enrich the cultural and intellectual dimensions of human life. The whole purpose of the copyright system is to ensure that cultural and intellectual works are created and disseminated as plentifully and as widely as possible according to the existing principles which have been evolved over the last century. Copyright means the sole right to produce or reproduce whole the work or any substantial part thereof in any material whatsoever and the copyright in a work shall be deemed infringed by any person who does anything wherein the sole right to do so is conferred on the owner of the copyright.

Each country has a sui generis copyright legislation of its own although there are multilateral treaties in the international scenario.

II. ORIGINALITY OF COPYRIGHT AS REFLECTED IN SUI GENERIS LEGISLATIONS

The copyright system requires that the expression of the author, composer, artist and others should be original. The same is required of musical expressions also. In U.K., the question whether copyright subsists in a particular subject matter is governed by the Copyright Designs

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and Patents Act, 1988. The first stage is to inquiry is to identify whether the particular subject matter is capable of being a copyright work under the 1988 Act; the second stage is to consider whether the requirements laid down in the Act for subsistence of copyright in such subject matter are met. It is the second stage that is analysed throughout this work. Under Section 1(1)(a) of the Copyright Designs and Patents Act, 1988 it is a requirement for the subsistence of copyright in a literary, dramatic, musical and artistic work that the work should be original. This was the position under the equivalent provisions of the 1956[2] and 1911 Acts[3]. The United States Copyright Act 1976 also uses the expression 'original works of authorship'. In U.S. also, to be entitled to copyright, the work must be original, i.e., it must be the result of independent labour and not copying. However, the work need not be the first of its kind. In India under the Copyright Act of 1957, Section 13 lays down that: "*copyright shall subsist throughout India in the following classes of works, that is to say, original literary, dramatic, musical and artistic works, cinematographic films, and sound recordings".* The Indian Copyright Act thus, protects 'original' literary, dramatic, musical and artistic works. Here also, word 'original' does not mean that the work must be the expression of original and inventive thought. The Act only requires that the work should not be copied from another work and that the work should be solely originating from the author.

Thus, it is sufficient, under copyright laws of U.K., U.S.A. and India that the work of each author is new to him, i.e., the work is original with him, and not copied from the work of another, which is the relevant for any category of work to be granted copyright. Although the concept of newness or novelty is a prerequisite in the law of patents, it has no place in copyright law.

III. THE PROPERTY IN MUSIC

Copyright is a form of property. This is an important concept underlying the copyright system as it operates in market economy countries and because it is a form of property it can be dealt with in much the same way as other forms of property, and the law declares expressly that 'copyright is transmissible by assignment, by testamentary disposition or by operation of the law, as personal or movable property'.[4] Copyright is not a single indivisible right but in effect a bundle of rights, each of them.[5] Therefore, a composer has created a piece of music, and he has become the owner of, a piece of property which may, perhaps, be extremely valuable; and

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[2] Copyright Act 1956, Ss. 2(1) and (2) and 3(2) and 3

[3] Copyright Act 1911, S 1(1)

[4] Copyright and Music, Denis De Freitas Source: Journal of the Royal Musical Association, Vol. 114, No. 1 (1989), pp. 69-79

[5] Ibid

that it has attached to it a bundle of rights which may be enforced and commercially exploited in different ways, each of these rights being exploited jointly or individually.

The nature of property in music can be more clearly elucidated from the US copyright law which like any other copyright legislation, is derived from the Statute of Anne in 1710[6]. This is in turn, based on firstly, the utilitarian justifications which states about social benefit arising out of production and the labour theory of John Locke. The US Constitution throws light regarding acknowledging intellectual property right. Article I, Section 8, Clause 8 of the United States Constitution vests power with the Congress '*to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*'. The founders of the US Constitution believed that the spread of knowledge contributed to the public good, and government ought to encourage it. Thomas Jefferson stated in 1813, "*He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me*." Thus it was thought that the government should incentivize authors and inventors to create. Simultaneously it was also though that the rights to their works should also be limited, so that there would be free exchange of art and ideas. The first copyright term lasted a measly fourteen years, and only later did the Congress added new kinds of works- written music, photography, film- to the scope of copyright over the course of the nineteenth and early twentieth centuries. Seeing copyright as a monopoly, a sort of necessary evil, they were reluctant to expand its domain unless it was thought to be extremely necessary. Striking the appropriate balance between the monopoly grant to copyright owners while at the same time, serving the public interest has always been a troublesome task.

IV. Copyright protection available in music

Copyright is given only to original musical works. Additionally, there is also a fixation requirement that is relevant for granting copyright protection in music. Thus, it means that there is a protection only when it is written down, recorded or saved to a hard drive. Interestingly, playing a song live does not meet the 'fixation' requirement but only recording it. Thus, what the law requires is that the song must be fixed in some tangible form.

As regarding music, the copyright system protects both songs and recordings. Thus, there are two different kinds of music copyrights: firstly, sound recording which is a simply a work comprised of recorded sounds, for example, the recorded performance of a song that appears

[6] The stated goal of copyright in the Statute of Anne was "for the Encouragement of Learned Men to Compose and Write useful Books"

on a compact disc is a sound recording; secondly, musical work that is, the musical composition or the song. Hence, both the music and the lyrics to a song, or each of them separately, can constitute a copyrightable musical work.

Copyright protection is important as only the owner of the copyright has certain exclusive rights. These exclusive rights include the right to reproduce the work, the right to distribute copies of the work, the right to perform these works publicly, the right to make derivative works, the right to perform copyrighted sound recordings by means of a digital audio transmission and lastly, the right to display the work. Although this last right is rarely applicable to music, one example would be displaying the lyrics and musical notation to a song on a karaoke machine.

The duration of protection of copyright is also important, which would apply to music, will be the life of the composer plus 60 years.[7] When the said period has expired the work falls into the public domain and anyone may use the same freely.

Further, any substantially new arrangement or adaptation of an existing piece of music is entitled to copyright. What matters in relation to a musical work is its sound as appreciated by the human ear and thus, in the present context, what is important is the contribution made to the sound by the arranger or adapter. If A makes a piano score of music of B's opera or if he writes an arrangement of an existing melody, A has, in each case, produced an original music work. The work does not have to be inventive, in the sense of creating music which did not exist before.[8]

The principle in copyright law is that ideas are not protected by copyright while expressions are.[9] This so-called rule of the idea-expression dichotomy is not uncontroversial. However, despite its ambiguities it is a generally helpful rule for delineating and limiting the extent of the property protection copyright confers, particularly with regard to music. The elements or building blocks of music are what lawyers would call 'ideas' in copyright law: rhythm, melody, harmony counterpoint, form, methods of instrumentation in arrangements and their rules and principles. The problem usually arises in copyright infringement cases of works of literature because of non-literal copying of a pre-existing work. It appears that notions of storylines, historical facts, central themes as instances of non-protectable ideas are easier to grasp than non-protectable concepts of music.[10] This is also because with music the matter is more

[7] In India, while in UK and US the duration of copyright extends to the period of life of the author and an additional period of 70 years.
[8] COPINGER AND JAMES, Copyright, Thomson Sweet & Maxwell, Vol.1., South Asian Edition, 2008, London
[9] Article 9(2) TRIPS Agreement 1995
[10] Harman Pictures v. Osborne [1967] 1 WLR 723, Ravenscroft v. Herbert [1980] RPC 193; Baigent v. The

difficult: what is actually copied if the subject-matter of protection is supposed to be the sound, not the score?[11] If ideas, that is the building blocks of the craft of music, are taken-and that is entirely inevitable-then the result may sound similar to the claimants pre-existing works, and that points towards infringement. Whether there is sufficient similarity is usually ascertained on the basis of whether an ordinary reasonably experienced listener perceive it that way.[12] The test of ascertaining recognisably copied melodies can be deceptive; one major psychological problem is that once a melody is recognised, especially if it is a very familiar tune, the differences between the claimant's and defendant's works are soon perceived as immaterial, and the infringement is found potentially too readily.[13]

V. International conventions and how technology encouraged music piracy

Originality is not expressed to be requirement for protection under the Berne Convention. The concept behind the Convention is, however, to accord protection to authors in respect of their intellectual creations. This implies that the product so created is the result of the individual's own intellectual efforts, and therefore, in this sense is original to him. The degree of originality required for protection of works the subject of Berne varies widely amongst the countries adhering to Berne, as also does the approach to different types of works. On the other hand, the Convention that is of importance with respect to copyright in music is the Rome Convention.

In 1933, a group of international record companies met in Rome to found the International Federation of Phonogram Producers (DFPI). The aims of the organisation, as stated in Article 2 of its statutes, were: "*the defence in the international domain of the interests of the members by preserving their rights, statutory or otherwise, by the promotion of new legislation to extend such rights or to create them in those countries where they do not already exist and generally by safeguarding the present and future welfare of member by means or representation as a federated body in negotiations with and representations to governments and other interested and representative bodies*."

Creating an international organisation such as the IFPI was seen as a means of establishing specific audio copyright legislation where it did not exist, and at the same time harmonising

Random House Group [2007] EWCA Civ 247, [2007] FSR 579, CA (Da Vinci Code-Case)

[11] Francis Day & Hunter v. Bron [1963] 1 Ch 587 at 608; Sawkins v. Hyperion Records Ltd. [2005] EWCA Civ 565, para 53

[12] Francis Day & Hunter v. Bron [1963] 1 Ch 587 at 610, 622; Baxter v. MCA 812 F.2d 421

[13] Andreas Rahmatian, The Elements of Music Relevant for Copyright Protection, in Concepts of Music and Copyright: How Music Perceives Itself and How Copyright Perceives Music (ANDREAS RAHMATIAN ed.) Edward Elgar Publishing, UK, 2015

legislation so that piracy and parallel imports were illegal. In 1 961 the IFPI attempted to construct an international convention in order to protect the rights of artists and record producers directly. The result was the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broad casting Organisations.[14] It contained articles protecting the recording of a musical performance, its broadcast, distribution, rental and duplication. The specificity of the Convention dampened the level of enthusiasm shown for it and by 1970 only eleven countries had become signatories. Part of this reluctance was due to the fact that the Convention responded to cumulative broadcasting communications innovations over the previous three decades by attempting to establish property rights for artists and record producers in the domain of public performance.[15]

The poor membership response to the Rome Convention became increasingly perplexing to legitimate record companies over the 1960s. This was mainly due to audio technology innovations. In 1963 Philips launched its two-track Cassette and RCA launched the eight-track Cartridge. Both of these innovations greatly facilitated the activities of pirate record companies and for the first time opened up scope for widespread home duplication of recordings. The former activity was facilitated on four fronts. Firstly, the technology to produce audio tapes was much more accessible than vinylite. Therefore, a pirate producer could easily purchase blank cassettes which were readily available in both the wholesale and retail market. At the same time recording equipment, which is necessary to transform blank tapes to pre-recorded tapes, was also easily obtainable, being a standard purchase of recording studios and hi-fi enthusiasts. The second means through which tape innovation facilitated pirate production was the fact that unlike vinylite, the production of pre-recorded tapes did not necessitate high output levels in order to achieve low per unit costs. Tape production technology was more akin to constant returns to scale. Blank tapes could be purchased in small quantities and the associated recording and printing costs amounted to a small proportion of unit costs, and hence were not excessively high for small runs. Under the vinylite format, the pressing of discs from a master implied that only large output levels were economically justifiable. The net impact of this factor was to stimulate both the supply of and demand for enterprise in this activity. Demand was encouraged as the arrival of tape technology created scope for selling pirate tapes at low output levels. The supply of enterprise was encouraged as tape technology, being less capital intensive

[14] The Rome Convention came into force in 1964 to grant sound recordings copyright recognition in an international treaty. The minimum term of copyright protection allowed under the Rome Convention is 14 years from when the recording is 'fixed', but most countries have adopted a longer term.

[15] ANDREW E. BURKE, How Effective Are International Copyright Conventions in the Music Industry?, Journal of Cultural Economics, Vol. 20, No. 1 (1996), pp. 51-6

than vinylite, facilitated entry through relatively low initial capital costs. The third stimulus to pirate production was the fact that the portability of tape recorders allowed 'pirates' to produce more differentiated products than legitimate record producers. This arose because portable tape recorders could be transported to live conceits in order to tape the performance. The resulting recordings were usually of low quality, but enthusiasts for a particular artist were often willing to accept low sound quality in order to obtain recordings unavailable on legitimate audio software. These recordings of live performances are known in the industry as 'bootlegs' and their production is generally restricted to small scale pirate production. The fourth stimulus stems from the clandestine nature of pirate record production to the extent that output has often to be hidden or transported great distances (especially when the source of production and the destination of demand are two separate countries). With such product requirements, the tape cassette greatly facil itated the pirate's objectives, being a much smaller and more durable product than its vinylite counterpart.[16]

VI. Music piracy

Piracy of music retards the music industry economic since artists, music publishers and composers, and record labels are not granted the benefits due to them for their work. Thus, they are left uncompensated for their investments of time, effort and money. This would also create a false implication that music is a free commodity.

In the 1950s and 1960s, many guides to the technology of magnetic recording were published in the United States and Europe. Some explained the science for people who wanted to build their own equipment while others focused on the uses to which tape recorders could be put.[17] The technology could be used for taping sound from radio and television, making original recordings and backing up fragile disc records.[18] Tape users could also convert their recordings into disc form. Since tape recording was still a relatively new technology one could not expect that others would have compatible equipment to play a tape recording. Exchanging a record with friends often required putting the sounds on the widely accepted format of a phonographic disc.[19] This marked the beginning of music piracy in the US. To understand the rise of classical bootlegging in the 1950s requires understanding why people felt the need to record. Some copycats led to the documentary ethos of recording and looked at their work as a kind of craft.

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[16] ANDREW E. BURKE, How Effective Are International Copyright Conventions in the Music Industry?, Journal of Cultural Economics, Vol. 20, No. 1 (1996), pp. 51-6

[17] BEGUN, Magnetic Recording; and Michael Luxford Quartermaine, Magnetic Recording: Wire and Tape, London, 1952

[18] WALLACE S. SHARPS, Tape Recording for Pleasure, London, 1961

[19] ALEX SAYF CUMMINGS, Democracy of Sound: Music Piracy and the Remaking of American Copyright in the Twentieth Century, Oxford University Press, 2013

Like the hi-fidelity hobbyists who used many of the same products, these bootleggers aimed to capture an experience in the clearest way, though they may have emphasized the music itself more than some of the technology-obsessed audiophiles did. One opera pirate said that he and his partner bootlegged "as a labour of love. We work slowly and produce few albums. Quality is what we strive for and it is often hard to achieve with these old tapes. We do what we can to correct fluctuations of pitch and drops in volume, but we never doctor a sour note if the singer sang it that way. We want to document what really happened.[20]

The economic crunch of the late 1970s hit the music industry in the United States and Europe hard, ending a period of prodigious growth that had coincided with the coming of age of the postwar generation. Growth stalled in the late 1970s and early 1980s for a variety of reasons. One of them being the fact that consumers turned to tape recorders to share copies of albums.[21]

VII. SOLUTIONS FOR PREVENTING MUSIC PIRACY

There are numerous ways to counter the challenges faced by the music industry. Firstly, the existing lacunae in the legislations can be filled. Also, certain changes should be incorporated in the governmental policies.

1. **Modifying the enforcement of copyright:** Third parties or even the Copyright Society associated with music such as the Indian Performing Rights Society (IPRS) which is a society comprising of composers, musicians, authors and other owners should be encouraged to monitor piracy activities and report them to law enforcement agencies. The subscription based model for viewing music should be encouraged so that consumers are paying for what they view through the internet. The consumers should be made aware of whether the content they are watching is pirated such as the initiative of National Geographic wherein they educate young students about piracy and sensitize individuals about the impact of piracy on global economy. [22] The same can be adopted even in India also by the society.
2. **Can licensing be a solution? :** Licensing can be a solution to piracy. Here, society should be encouraged to grant licenses to other parties so that it can be better monitored. The current problem faced by the industry is that many consumers are accessing unlicensed music content. But licensing cannot be the ultimate solution because there

[20] Ibid

[21] ALEX SAYF CUMMINGS, Democracy of Sound: Music Piracy and the Remaking of American Copyright in the Twentieth Century, Oxford University Press, 2013

[22] WNS, Three Strategies for the Music Industry to Fight Piracy, https://www.wns.com/insights/articles/articledetail/308/three-strategies-for-the-music-industry-to-fight-piracy, Retrieved on 25-12-2019

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are always cases where the content is downloaded from other services and made public such as illegally downloading from services such as YouTube.

3. **Online streaming services:** The popularity of download services have been declining as streaming services such as Spotify has become popular. This is a better mechanism to deal with music piracy as it has reduced illegal downloads. Streaming services come within the right holder's exclusive right to communicate and make available to the public.

VIII. Conclusion

The primary objective of copyright is not only to reward the labour of authors but rather to protect expression while encouraging others to build freely upon the ideas and information conveyed in the expression. There are number of instances where the rights of copyright owners are infringed upon and music piracy is one among them. The enforcement of music piracy needs to be altered to deal with the current situation. On the other hand, the availability of new technology such as that of streaming services also helps in reducing the growing incidents of music piracy.

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