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# The Copyright Framework for Musical Works: An International and Comparative Legal Analysis

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## ABSTRACT

*"Legal action is one of the major effective methods for protection of the copyright, Copyright is a legal term that describes the right given to the creators of a broad range of literacy and artistic works. It is a protection system the covers published and unpublished works, whatever the form of expression provided such works are fixed in a tangible and material form copyright provides exclusive rights to the creators to use their works. International Community has made sincere efforts for the development of legal framework. The judiciary of Nepal in Particularly, the High Court of Nepal has been catalyst in promoting rule of law in the area of Copyright, despite limited legislative mechanism and enforcement. The author in this article tries to give overall picture of legal and judicial regime for the protection of copyright in musical work under Copyright Act, 2002.*

## I. INTRODUCTION

Music is known as an art a means of entertainment which is the production of combined efforts comprising musician, Lyricist and vocal performer it is defined as Art of arranging the sounds of voices or instruments or both in a pleasing sequence or combination.<sup>2</sup> Music is organized in time and consists of rhythm. Organizing Musical sound is part of composition. Music can be defined and known from different perspective. From artist point of view, it is known as an expression of original point of view, it occupies large music market involving making selling and distribution of sound recording and visual recording from legal point of view, it can be called as an intellectual work, where the right of creators or owner is protected by the copyright law.

The general meaning of 'Music' is sound is melodic or harmonic combination, whether produced by voice or instruments. In England, Section 3(1) of copyright, Design and Patent Act, (CDPA), 1988 defines musical exclusive of any words or action, intended to be sung

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<sup>2</sup> A.S. Hornby oxford Advanced Learner Dictionary of Current English, 6<sup>th</sup> Edition (2000), ed., Sally Wehmeir/er Oxford University Press, P. 837.

spoken or performed with the music.<sup>3</sup>

Although, there is no Requirement in the statutory definition of a Musical work under the copyright, Design and Patent Act (CDPA), 1988 that the Musical must be in writing or other notion. But it is essential for music to be the subject matter of copyright law has excluded words as action to be sung spoken or perform musical work. Musical work is recognized as original work a sequence of notes as sound is sufficient be protected as copyright work. A song, will therefore have two copyrights, one is the music and another in the words of song, the later being a literary work.<sup>4</sup> However, voice of singer is not recognized as "original work".

In India, the Copyright Act, 1957 section 2 (p) defines musical work as a work consisting of music and includes graphical notation but does not include and words or any action intended to be sung or spoken or performed with music.<sup>5</sup>

Therefore, it can be said that a sound made up to various Copyrighted works. It is protected by various works. It is protected by various means and ways. But it depends to large extend on the agreement reached between the parties of creators and producers.

## **II. ORIGIN AND CONCEPT OF COPYRIGHT**

Copyright is the right to copy or reproduce work in which copyright subsists. Copyrights means the exclusive right to be or authorize others to do certain acts in relation to:<sup>6</sup>

- Literary, dramatic, musical and artistic works
- Cinematograph film
- Sound recordings

The exclusive right for doing the respective acts extends not only to the whole of the work but to any substantial part thereof or the any translation or adaption thereof, where applicable.<sup>7</sup> It means, fundamentally and conceptually copyright law should not give rise to monopolies, and it is permissible for any person to produce a work which is similar to a pre-existing work as long as the latter work is not taken from the first.<sup>8</sup>

Copyright is a form of protection granted to the authors of original works of authorship, including literary, dramatic, musical, artistic and certain other works. Thus books, songs,

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<sup>3</sup> W.R. Cornish "Intellectual Property", Sweet & Maxwell 3<sup>rd</sup> edition (1996), p.337.

<sup>4</sup> D.Bain, "Intellectual Property", Pearson Education Ltd. (2002), p. 48.

<sup>5</sup> Indian Copyright Act, 1957 Section 2(p).

<sup>6</sup> P. Narayan, "Intellectual Property Law", 3<sup>rd</sup> edition (Kolkotta Eastern Law House, 2006) p. 251.

<sup>7</sup> Ibid.

<sup>8</sup> D. Bainbridge, "Intellectual Property" 5<sup>th</sup> edition (Delhi Pearson Education 2002), p. 27.

plays, movies, sculptures, painting and choreographic works are all protectable. Computer software is also protectable by copyright.<sup>9</sup> The owner of a copyright has the right to reproduce the work, prepare derivative work based on the original work (such as sequel to the original), distribute copies of the work, and to perform and display the work.<sup>10</sup> Anyone else who does any of these things (known as the acts restricted by copyright) without the permission of owners infringes copyright and may be subject to legal action taken by the owner for that infringement. Ownership of a copyright is alienable and it can be transferred to another, license may be granted by the owner to another, permitting him to do one or more specified act with the work in question.<sup>11</sup>

The concept of public interest against rights of copyright owner has also been recognized by the Universal Declaration of Human Rights (UDHR):

- a) Everyone has the right freely to participate in the cultural life on the community to enjoy the arts and share in scientific advancement and its benefits.
- b) Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.<sup>12</sup>

### **III. INTERNATIONAL LEGAL PERSPECTIVE**

Musical works are protected across the globe. In international copyright system, the musical work have special protection under the copyright and related right heading the international instruments set the framework to provide the protection to the copyright able subject matter to the member state. Here are the numerous conventions and treaties providing for the protection to the author as well as the owner of original musical works. In this study, the conventions and treating having substantive sale in regulation the copyright and related right on musical works are examined with respect right on musical works and limitation of protection. Major conventions, treaties & agreements are described briefly under below:

#### **A. Bern Convention, 1886**

The Bern Convention is the oldest multilateral copyright convention, when countries in the 19<sup>th</sup> century found necessary to create an international system for protection of author's Right, Such system was at the outset, built upon bilateral agreement. As those agreement were neither comprehensive nor particularly uniform, the need was soon felt to establish a

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<sup>9</sup> D.E. Bouchex, "Intellectual Property the Law of Trademarks, Copyright, Patent & Trade Secrets, 1<sup>st</sup> edition (New York: West Legal Studies, 2000) p. 6.

<sup>10</sup> Ibid.

<sup>11</sup> Bainbridge "Intellectual Property" 5<sup>th</sup> edition (Delhi: Pearson Education, 2002), p.5.

<sup>12</sup> UDHR, Article 27.

multilateral treaty on the subject matter. This led to the adoption of the convention.

It establishes a union for the protection of the rights of author in their literary and artistic works. It provides that the personal connection of the author with a union country (By nationality or habitual residence) or the first publication of a work in a union country.

The convention extends that protection to them to grant national treatment, this means that same way as their own, unless where specific exemptions are allowed. The contracting parties are also obliged to incorporate into their national laws certain rights granted in the Convention as a minimum level of protection. They are however free to offer more extensive protection if they so choose. The musical works are protected under the original literary and artistic work.<sup>13</sup>

### **B. Rome Convention, 1961**

Rome convention secures protection to the performance, phonogram of their producers and broadcast of the broadcasting organization.<sup>14</sup> The Convention prescribes the protection to the beneficiaries of other contracting state. Its aim is thus to provide for an international protection and not to protect the country's own performing artist, producers of phonograms and broadcasting organizations. Such protection should be as per with the protection granted to the nationals of that country when the protection is claimed without any discrimination.<sup>15</sup> However as mentioned in its Article 1, the protection granted under this convention does not prejudice the copyright on musical works as literary and artistic works.

### **C. Phonograms Convention**

It is Typical anti-piracy convention creating an efficient international legal instrument designed to combat piracy was the main objective of this convention. The phenomenon of record piracy, which had attained epic proportions by the end of the 1960s, due to technological developments (the emergence of high-quality analog recording technique and the audio cassette), which made it possible for multinational pirate enterprises to flood many of the world's markets for recording music with cheap, easily transported and easily concealed copies of protected phonogram. The restriction on making and importation of duplicates of the phonograms for the distribution to the public is the core elements of the convention.

### **D. WIPO Performance and phonograms Treaty (WPPT)**

The basic idea of adopting WPPT was to maintain protection of the right of performance and producers of phonograms effectively and uniformly in technological age. It has contributed

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<sup>13</sup> Bern Convention, Article 2.

<sup>14</sup> World Intellectual Property Organization (1996). General information.

<sup>15</sup> Rome Convention art 2

the substantive and distinct provisions for the protection of related rights in the field of musical works.

### **E. TRIPS Agreement**

Protection to Musical works is further stressed through the obligations under the TRIPS Agreement. TRIPS Agreement is a multinational negotiation between the members of WTO to provide adequate legal protection to the trade related intellectual property for them as well as the national of other states. It is partly self-contained and partly based on other conventions administered by WIPO, e.g.:- It has referred to article 1-21 of the Berne Convention to be a part of the TRIPS Agreement except the Article 6 bis 66. There is one important exception: The Agreement provides that no rights or obligations are created in respect of moral right. It also contains a provision stating the well-known principle that copyright protection extends to expressions, not to ideas, procedures, methods of operation or mathematical concepts.<sup>16</sup>

## **IV. NEPALESE LEGAL PERSPECTIVE**

The concept of copyright in Musical works under *Copyright Act, 2002* is little a bit different which the concept of copyright in musical works of Indian and British Copyright Law. The current *copyright Act, 2002* doesn't define the 'Musical Works'. But Musical nation with or without word's is included with in the list of 'work' which are copyright able according to section 2 of *Copyright Act, 2002*. It has also granted protection to audio visual work, drama, dramatic-music, dumb show and a work prepared to perform in such manner which are related to musical work. Similarly, the folksong is protected by the Section 3(2) of this Act. It indicates that in Nepalese prospective Musical Work can be protected by the copyright Act in tow forms:

- Musical Work without words.
- Musical work with words.

The musical work which is created without words, that is the sole creation of music composer her/she can make it with the help of music instrument players. However, when a "Music Work" is created with words in not the sole production of the musical composer, which is the result of combine efforts of music composer, lyric writer, and singer.

From Indian and British prospective Musical work Means 'a work consisting of musical and includes graphical notation but does not include any words or any action intended to be sung or spoken or performed '. So that in their perspective singer has no copyright in his/her song.

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<sup>16</sup> TRIPS Agreements Art 9

Section 9 of the Copyright Act, 2002 eliminates performers right in the work when it is authorized to be incorporated in audio-visual medium. But it does not apply in sound recording, singer is recognized as performer according to the section 2(1) of this Act, and Singer as a performer has been ensure with economic right in sound recording in section 11(2) in this way:

*"The performer shall get the remuneration as per the agreement, in cases where any, made between the performer and producer on the remuneration referred to in sub section (1), and half the amount received by the producer where no such agreement is made".*

Singer as performer his/her moral rights are also recognized and explained in section 9(3) by this Act in this way:"

Notwithstanding anything contained in subsection (2), the performer shall have the right to have his/her identity maintained as the performer of direct audio performance as well as of the performance incorporated in the sound recording and to make a claim for the same and where any person has so mutilated or distorted his/her performance by mutilating the meaning as to prejudice his/her reputation or goodwill to prevent such acts.

Now, regarding Authorship and Ownership of musical work, the author of a Musical work is the person who creates its ownership flows from authorship; the person who creates the work is normally the first owner of copyright in the work is normally the first owner of copyright in the work. Authorship and ownership are distinct concept in intellectual property Law. Author is the first owner of economic right and author is only one owner of economic right. But ownership is distinct concept in intellectual property law. Author is the first ownership is granted only one economic right because, owner may not be the author of copyrighted work.

Copyright Act, 2002 section 6(1) says, 'The author of work shall be the first owner of the economic right of that work' section 7 gives economic right of the owner as well as author, But Section 8 gives moral right only to the author.

According to the copyright Act 2002 the economic right and moral right are protected for life long and plus 50 years after the death of the author .If the work is created jointly the term of protection shall be 50 years from the death of surviving author. If the work is created in direction or under the initiative of other person or in case of work is created in direction or under the initiative of other person or in case of work is created on hire or if it is published with pseudonymous name, the economic right and more right shall be protected for 50 years from the date of publication for the 1st time. If a work is published after the death of author, the rights are protected from the date the work is first published. The major provisions of

Copyright Act, 2002 are given below. These are:

**a. Performers Rights under Copyright Act 2002**

According to copyright Act, 2002 'performer' means any 'actor, singer, musician, dancer and other person who performs a literary and artistic work or folk/ore expression to the general public through singing, delivery of music and dancing.<sup>17</sup>

Sec 11 of the copyright Act 2002 is very important for the performers 'economic right. It says "in cases where sound recording published for commercial purpose of reproduced copy of sound recording is used for broadcasting the producer shall get reasonable remuneration from the user.<sup>18</sup>

The performers shall get the remuneration as per the agreement .It also ensure the right of the performer to realized agreed amount from the producer and if there is no agreement performers shall have the right to share 50% amount from the producer.<sup>19</sup>

This right is last for 50 years from the date of fixation or publication according to sec 11(3) of this Act.<sup>20</sup> Moral Right is also ensured to the performers by this Act. According to the section 9(3) of his Act performer shall have the right to have his/her identity maintained as of the performer of direst audio performance as well as of the performance incorporated in the sound recording performer has the right to prevent mutilation, distortion or otherwise deform of his/her creation.

**b. Right to Sound Recording producer under Copyright Act 2002**

Sound Recording is defined as 'The act of recording of sound of any performance recorded in any manner and with any method whatsoever for the purpose of hearing, except the act of recording sound with images by the sec 2(e) of the copyright Act 2002.<sup>21</sup>

According to the section 10(1) of the copyright Act, 2002, the sound recording producer shall have the following right:

- To reproduce the sound recording, directly or indirectly, in any manner or in any form.
- To import copies of sound recording

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<sup>17</sup> Copyright Act 2002, Section 2(1).

<sup>18</sup> Copyright Act 2002, Section 11(1).

<sup>19</sup> Copyright Act 2002, Section 11(2).

<sup>20</sup> Copyright Act 2002, Section 11(3).

<sup>21</sup> Copyright Act 2002, Section 2(e).



- To make the sound recording easily available by way of sale or ownership transfer or otherwise of the original or copies of the sound recording.
- To rent or lease the sound recording publicly
- To make the sound recording capable of being heard with wire or wireless equipment from any specific place or from the place of one's own choice or the general public.

Sound recording producer shall enjoy the right to equitable remuneration jointly with the performers. The term of the right to receive reasonable remuneration shall be for 50 years from the years of publication of such sound recording or from the year of fixation of such sound recording."

**c. Right of Broadcasting Organizations under Copyright Act 2002**

According to Sec 2(1) of copyright Act 2002 Broadcasting means 'Communication or exhibition of a work for public information or broadcasting of audio or audio-visual work Through wireless equipment or satellite.' According to this act broadcasting shall have the right to carry out following Act;

- To re-broadcast the subject it has broadcast
- To communicate its broadcast as to make it easily available to the general public
- To make fixation of its own broadcast
- To reproduce the fixation of its broadcast.<sup>22</sup>

**d. Eligibility for protection under copyright Act, 2002**

There are three basic criteria for copyright protection determined by the copyright by the copyright Act 2002. These are:

- Criteria of place of publication
- Criteria of Nationals of the producer or author
- Criteria of places of the creation.

The important criteria for the protection of copyright on musical works is the publication, which has either to take place in Nepal or Any member of the WTO by the Nation or of such member of the WTO country."<sup>23</sup>

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<sup>22</sup> Copyright Act 2002, Section 10

<sup>23</sup> Copyright Act 2002, Section 13(1)

Similarly, the performer of Nepal and performer of any member state of WTO are granted protection for their performances irrespective of the place of performance. If the performer is non-national of any member country but the performance is performed in any member country of WTO such performance is protected under the Copyright Act, 2002.

According to the Section 13(3) of the Act, the protection is granted for the producer of the phonogram if she/he is the national of Nepal or any Member Country of the WTO produces the phonogram or it such phonogram is published therein, In case of the broadcasting organizations, which has the office or broadcasting station is situated in Nepal or Member country of the WTO.<sup>24</sup>

**e. Fair Use/Permitted Use under Copyright Act, 2002**

Fair Use is the doctrine that allows limited use of copyrighted material without requiring permission from the right holders, such as use for scholarship or review. The fair use of a such use of a<sup>25</sup> copyright work, including such use by reproduction or phonogram recording or any other means specified by law, for the purpose of criticism, comment, news reporting, teaching (Including multiple copies for classroom use), scholarship or research is not an infringement of copyright.

'Fair Use' is not defined in Copyright Act, 2002 but some situation is mentioned where no permission required for using others copyrighted works. It has been said that there is no fair dealing provision for all type of copyrighted work are permitted under the copyright Act, 2002:-

1. Reproduction for personal Use.
2. Teaching and learning
3. Reproduction by Library and Archives
4. Citation
5. For the information of the general public
6. Reproduction of computer program
7. Importation for personal purpose.
8. Public exhibition

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<sup>24</sup> Copyright Act 2002, Section 13(4)

<sup>25</sup> P. Narayan, 'Intellectual Property law,' 4th Edition Delhi page 344.

## V. NEPALESE JUDICIAL PERSPECTIVE

The judicial decisions of copyright and related rights on musical works, there are very few cases in this regard. The major stakeholder themselves are not found aware for their rights. Even after implementation of the copyright Act, 2002 very few cases have decided by the Judiciary. Some of the famous cases are as follows:

### **Music Nepal v. Master recording<sup>26</sup>**

Ratna Recording Corporation has fixed Narayan Gopal performances in phonograms .It was the governmental undertaking and was liquidated all assets including the said phonograms were handed over to radio Nepal. Music Nepal, a producer of phonograms, was licensed by the Radio Nepal to reproduce the cassettes with condition that music Nepal would pay some amounts to the trust which was in the name of Narayan Gopal, for which sold to the market and each such cassettes should indicated that those songs were the complements from Radio Nepal, music Nepal registered the copyright office and reproduce phonograms.

After some time, a tripartite agreement was concluded by the said trust, radio Nepal and master recording to reproduce the cassettes and no approval of Music Nepal, which had been publishing the cassettes and owned the copyright registration. Music Nepal filed a petition to stop the reproduction of phonograms.

Appellate court Patan has decided with recognizing the right of the producer of phonograms and all those cassettes were handed over to Radio Nepal making it the true right holder. The Judgment was based on the fact that Radio Nepal had the right to reproduce all those cassettes being authorize producer.

### **Ram Thapa v. open international and other.**

Ram Thapa has filed the injunction petition in appellate court Patan alleging the copyright 'Lekali ho choyoko dako' the song was recorded in Radio Nepal in 2038 B.S, as a folk song. The dispute was raised when this song has also been included in a cassettes album produce by Music Nepal, Which was remixed sung by Anil Singh without the consent of the plaintiff, the main claim of petitioner was ato issue and injunction against the opponents to stop the unauthorized production, distribution, and advertisement of the album, which infringed the copyright of the said work.

The appellate court Patan issued interim order against defendant immediately. And at the final

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<sup>26</sup> Music Nepal Pvt. Ltd. Vs Master Recording and other decided by the Appellate Court Patan in the case of Injunction

decision of the court injunction was granted against defendants. In the decision, the court said that, the work of remixing, singing and manufacturing the folk song protected under the section 4 of the copyright act, 2002.

### **HMG V. Surendra Manandhar<sup>27</sup>**

In this case. The defendant was accused to have imported unauthorized copies of the audio and audio-visual cassettes were found to have printed with the name of universal Music Company, USA and the music World India as the producers of phonograms. However it was found that there was no such consent from such companies to sell in Nepal. The District Court and Appellate Court decided the case in favors of the defendant.

It was mentioned in the decision that there was no supporting document establishing of right holders on cassettes. The aggrieved party lodged no claim. The decisions contain the issue that copyright Act 2002 is to safeguard the exclusive right of the particular individual or the assignee over the creations of his individual intellect, and to penalize if others use such creations illegally. The decision further says that instead of protection the public damages or other goods, The Act provides for the protection of individual talents. In this case, the judiciary failed to acknowledge the fact that the copyright doesn't merely represent the rights of an individual but also serve the societal need of consuming quality goods. Nepal membership to WTO obliges the Nepal to promote the rights of copyright holders of another state equally. If such kind of decision are made again in the future it may deteriorates the reputation of Nepalese judiciary.

## **VI. CONCLUSION**

Intellectual Property refers to the creations of the mind in the field of inventions, literary and artistic works, scientific works, symbols, names and images used in industry, commerce and communication areas. Intellectual property is divided mainly into two categories such an industrial property and copyright and Related Rights. Now a days new fields of intellectual property are also emerging that cover traditional knowledge genetic resources, geographical indication etc. Industrial property includes patent for invention, industrial design, integrated circuits, utility modes, trademarks etc.

Copyright is a legal term that describes the right given to the creators of a broad range of literary and artistic works. It is a protection system the covers published and unpublished works, whatever the form of expression provide such works as fixed in a tangible and material

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<sup>27</sup> HMG Vs Surendra Manander the case decided by Kathmandu District Court on May 17, 2004 & Subsequently by Appellate Court Patan on December 10, 2004

form. Copyright provides exclusive rights to the creators to use their works.

The existing Copyright Act, 2002 provides the exclusive rights to the creator's author on their creations. Copyright is the legal protection extended to the owner of the rights in an original work which they have created. Copyright includes moral and economic rights which are the exclusive rights protected by law. As per the Copyright Act, 2002, any thought, religion, process, concept principle court Judgement, administrative decision, methods of operation, folk song folktale, proverb and general data have not protected.

## **VII. RECOMMENDATIONS**

1. The right of the musical instruments should be recognized as performance.
2. The core characteristics of moral right-perpetuity, inalienability and impressibility are should be fully respected and preserved in Nepalese Copyright law.
3. The copyright should be amended to reflect the joining of Nepal to the Berne Convention. It should also be amended to give an equal right of protection to Nepalese authors as offered to the foreign right holders under the Berne convention.
4. To address the ambiguity and lacunas in the use and implementation of the permitted use in the Act, The provisions should clearly describe the "Small portion" so that there may not occur the problem for judicial interpretation.
5. Government should accelerate the copyright on musical work awareness campaign with the focus to educate the stakeholder including the authors and general public.

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