

STRIKING THE RIGHT CHORDS: THE INTELLECTUAL PROPERTY LANDSCAPE OF THE MUSIC INDUSTRY

Geetika Rajkumari*
&
Aaditya Bajpai**

Abstract

The Intellectual Property conundrum in the context of the industry of chords and notes is an enigmatic and multifaceted tapestry characterized by the subtle liaison of artistic endeavour and legal safeguards, thereby resulting into a profound symbiosis. When it comes to the protection of copyright, the musical works are undeniably one of the most important ones. Copyright has served as a key source of leverage for the creators of musical works. There have been long-standing scholarly discussions on the above-mentioned genre, and it has provided the discourse on the intricate web of connections between musical creativity, originality, and intellectual property. This paper is therefore, centered around the said web of intricacies, wherein the paper initially provides a brief introduction with regards to the application of the Intellectual Property domain in the musical industry, followed by an in-depth analysis of the concept of music sampling, elucidating upon the various legal considerations in the same concerning pre-existing recordings, borrowed melodies, pastiche, and it also examines the various judicial interpretations in the area. The next section deals with the statutory requirements under Copyright Law and the judicial interpretations with regards to “version recordings”. Continuing the said discourse, the paper further analyses the social media’s technological advancement, examining the copyright issues surrounding music covers inside various social media sites. The epilogue of the paper, dwells into the regulatory prospects surrounding music and intellectual property rights, highlighting the responsibilities of parties involved, available defenses, the de minimis principle, fair dealing, and other legal considerations.

Keywords: Intellectual Property, Law, Music, Copyright, Samples, Covers

* BA.LL.B. Student, Maharashtra National Law University, Nagpur.

** BA.LL.B. Student, Maharashtra National Law University, Nagpur.

1. *Chords, Music, Copyright* - An Introduction to Intellectual Property in the Music Industry

“*In case that happens, I shall stop*”,¹ the famous English Singer-Songwriter Ed Sheeran has been the topic of discussion in the current Copyright Law realm, wherein he was accused of copying key components from the extraordinary 70’s hit song by Marvin Gaye, named “Let’s Get It On”, for making his own infamous song titled “Thinking Out Loud”. The lawsuit was based on the allegation that Ed Sheeran had copied an “ascending four-chord sequence and its rhythm”.² Nevertheless, in May 2023, Ed Sheeran was found not liable for any copyright infringement.³ This is just one of the many instances wherein the crossover of Intellectual Property has happened in the Entertainment Industry. The entertainment industry comprises of various facets like Filmmaking, Songs, Music, Script Writing, and so on. In all these facets, one thing is essentially common, i.e., the exclusive right of the creator over its creation. The focus of this paper shall be on the Music Industry specifically. Hence, in order to safeguard such rights from any unauthorised use, the Intellectual Property law comes into picture. The ambit of IP laws primarily includes three major tools, i.e., Copyright, Trademark and Patent. However, in the music industry, copyright plays the majority role.

When it comes to copyright protection, musical compositions are unquestionably a crucial category. Copyright has been a source of significant leverage for musical creators for a long time. In the international regulatory realm, the recognition for the protection of the works of artists was given under the Berne Convention of 1886.⁴ Before the advent of sound recording, individuals could only reproduce music by either physically owning printed sheet music or by memorising and playing the music by

¹ Hollie Geraghty, “Ed Sheeran Warns He’ll Quit Music If Found Guilty in Copyright Trial”, *NME*, available at: <https://www.nme.com/news/music/ed-sheeran-warns-hell-quit-music-if-found-guilty-in-copyright-trial-3438272> (last visited on July 21, 2023).

² Ben Beaumont Thomas, “Ed Sheeran Testifies in Marvin Gaye Copyright Case: ‘Most Pop Songs Can Fit Over Most Pop Songs’”, *The Guardian*, available at: <https://www.theguardian.com/music/2023/apr/26/ed-sheeran-testifies-in-marvin-gaye-plagiarism-case-most-pop-songs-can-fit-over-most-pop-songs> (last visited on July 21, 2023).

³ Chris Willman, “Ed Sheeran Cleared by Jury of Copying Marvin Gaye’s ‘Let’s Get It On’, Says ‘I Will Never Allow Myself to be a Piggy Bank’”, *Variety*, available at: <https://variety.com/2023/music/news/ed-sheeran-acquitted-not-guilty-plagiarizing-marvin-gaye-song-jury-trial-court-1235603444/> (last visited on July 21, 2023).

⁴ Juan Sebastian Aguirre Navarrete, “Intellectual Property Rights in the Ecuadorian Music Industry: Digital Media” 8 *Revista de la Facultad de Jurisprudencia* 250 (2020).

memory. With the advent of recorded media, fortunately, came the opportunity to render recordings commercially accessible to a large market.

Notwithstanding music's intangible nature, the recording process resembles that of any other kind of manufacturing industry. Companies like Sony and Warner Music, amongst others, invest revenue to record music in studios and to make physical copies of the same in factories. The record labels also hold the "intangible legal right" to reproduce the creation, publish it, market it, or distribute it. This right so described here is called Copyright, and is a subject matter of Intellectual Property Law, which encompasses, performers' rights, digital rights, broadcasting rights, sampling and cover rights and a vast other majority of rights, as shall be discussed further in the paper.

The usual practice is for the record label to pay the artist for their labor, and then have the artist sign up the rights to the recording so that the label may market and sell the album. The legal right to recreate that specific song is much more valuable than the technology used to do so by record corporations.⁵ However, the modern generation has not stepped down, for as the technology burgeons, it presents an inimitable opportunity for the growth of distribution of unauthorised copies of such recordings. Not only this, digitally encoded audio files shared through CDs, USB drives, and the internet have made it much simpler to make duplicates. The vast sea of the musical industry has been corrupted with the presence of pirates, who either upload the music to websites for free download, or develop illicit CDs for illegal market distribution.⁶ The problem does not end here, for if not the pirates, then music creators also face a threat of content-stealing from their fellow artists, because there has been a huge history where various artists have been held tight in music copyright litigation. A major example of the same is the Taylor Swift's case wherein she was accused of having plagiarised her mega hit "Shake It Off" by copying lyrics from a song by a girl group named 3LW.⁷ Similarly, the world famous artist, Dua Lipa has had a rough path for her mega hit track called "Levitating", wherein she has faced two major copyright law suits against this song, within a week's gap.⁸

⁵ Danielle Fosler Lussier, *Music On The Move* 182, (University of Michigan Press 2020).

⁶ *Id.* at 183.

⁷ Ben Beaumont Thomas, "Taylor Swift Returns to US Court After Appeal Over Copyright Lawsuit", *The Guardian*, available at: <https://www.theguardian.com/music/2019/oct/29/taylor-swift-copyright-lawsuit-shake-it-off-players-gon-plat-3lw> (last visited on July 21, 2023).

⁸ Laura Snapes, "Dua Lipa Faces Second Copyright Lawsuit Over Hit Song Levitating", *The Guardian*, available at: <https://www.theguardian.com/music/2022/mar/07/dua-lipa-faces-second-copyright-lawsuit-over-hit-song-levitating> (last visited on July 21, 2023).

In order to safeguard the exclusive rights so earned by the artists and creators, various nations have laid strong IP foundations through enactment of various laws and regulations. In India, the Copyright Act is the one which deals with regulating issues regarding the copyright matters. In *Indian Performing Right Society Ltd. v. Eastern India Motion Pictures Assn.*⁹, highlighting the importance of safeguarding such rights, the Court stated that “A human’s innate creativity is on display in a wide variety of artistic mediums, but economic systems can sometimes be dysfunctional, leading to the exploitation of masters whose works are priceless. As a result of worldwide support for IP, local and national governments have enacted laws to safeguard creative works which, in India, is the Copyright Act of 1957.”

Hence, the research in this paper is centred around the IPR conundrum with regards to music industry, wherein initially the paper shall deal in length with the nuanced contours of Music Sampling in contrast with Intellectual Property Law, followed by a descriptive analysis of the legal intricacies of music covers under the IP regime. The epilogue of the paper shall cover the regulatory prospects surrounding music and IP, discussing in length the defenses available to parties, as well as the potential regulatory framework to be set up in India.

2. Sampling Alchemy - Exploring the Nuanced Contours of Music Sampling in IP Law

2.1. Borrowing a Melody

*“Old recordings are to the hip-hop producer what paint is to the painter - raw material to be manipulated into art.”*¹⁰

Sampling as an art owes its popularity to the hip-hop industry. Tracing back the history of sampling, and how hip-hop evolved to become a recognised form of music,¹¹ it signifies how sampling cannot simply be reduced to stealing others’ music or theft. Sampling also carries a cultural significance within the music industry for the purposes of paying tribute or homage. For instance, Ariana Grande paid homage to Brenda Russell by sampling ‘A Little Bit of Love’; J-Hope of BTS paid homage to Bianca Bonnie by

⁹ (1997) 2 SCC 820.

¹⁰ Joseph G. Schloss, *Making Beats: The Art of Sample-Based Hip-Hop* 23 (Wesleyan University Press, Connecticut, 2004).

¹¹ Bryan Bergman, “Into the Grey: The Unclear Laws of Digital Sampling”, *27 Hastings Communications & Entertainment Law Journal* 644 (2005).

sampling ‘Chicken Noodle Soup’; Puff Daddy and Faith Evans paid tribute to Notorious B.I.G. by sampling ‘Every Breath You Take’. In this way, sampling can also help revitalise the sampled songs in the memory of the public, thus preserving their legacy.¹²

Sampling is a form of music production that involves mixing and manipulation of a pre-existing sound recording to create a new sound recording.¹³ The sample can be reproduced exactly as it is, or there can be a change in “pitch, rhythm, speed, tone, timbre, or volume”,¹⁴ or it can be spliced and looped. In simple terms, as explained by the Bombay High Court,¹⁵ sampling involves taking of a short piece of music, which is then repeated and combined with other sounds in a new recording by using technologies such as a computer synthesiser.¹⁶

Once the framework for licensing was introduced, music producers were subjected to obtain clearances before sampling, which was basically an application to the copyright holder of the sampled sound recording seeking for permission.¹⁷ Courts across varying jurisdictions have dealt with the issue of copyright claims against sound recordings that have been created by way of sampling pre-existing records. Sampling was ruled to be copyright infringement in *Bridgeport Music, Inc. v. Dimension Films*,¹⁸ wherein the Court made the drastic statement “get a licence or do not sample”. However, such strict view to curb unauthorised sampling has to be followed by a proper analysis to determine what exactly constitutes an infringement in a sampled sound recording, and what factors are to be considered thereto. Otherwise, the whole music industry will be overturned and left in a turmoil, which will adversely affect the economic input and creative output¹⁹.

In India, the Copyright Act, 1957 does not have any express provision that deals with the issue of sampling. Under Section 14 of the Act, the copyright owners have been

¹² William Michael Schuster, “Fair Use, Girl Talk and Digital Sampling: An Empirical Study of Music Sampling’s Effect on the Market for Copyrighted Works”, 67 *Okla. Law Review* 445-446 (2015).

¹³ A. Dean Johnson, “Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits”, 21 *Florida State University Law Review* 139-140 (1993).

¹⁴ Rachal Carnachan, “Sampling and the Music Industry: A Discussion of the Implications of Copyright Law”, 8 *Auckland University Law Review* 1035 (1999).

¹⁵ *Ram Sampath v. Rajesh Roshan* 2008 SCC OnLine Bom 370.

¹⁶ *Jarvis v. A&M Records* 827 F. Supp. 282 (D.N.J. 1993).

¹⁷ Justin Morey, “Copyright Management and its Effect on the Sampling Practice of UK Dance Music Producers”, 3 *Journal of the International Association for the Study of Popular Music* 55 (2013).

¹⁸ 410 F.3d 792 (6th Cir. 2005).

¹⁹ Amanda Webber, “Digital Sampling and the Legal Implications of Its Use After Bridgeport”, 22 *Journal of Civil Rights and Economic Development* 375 (2007).

conferred with rights over their musical work, which is applicable to the whole work or even a portion of the work.²⁰ There have been numerous instances where Indian music has been sampled; such as the popular group ‘Black Eyed Peas’ famously sampling one of Lata Mangeshkar’s songs, titled “Choli Ke Peeche Kya Hai”. This was an instance where sampling was taken in a positive sense as it gives recognition to both the artists involved, however, sampling is not always so well-received. This is reflected in the dispute where Timbaland (Timothy Mosley) was sued for unlicensed use of a one-second loop from the song “Baghon Mein Bahar Hai” that is also sung by Lata Mangeshkar, wherein the plaintiff lost the suit.²¹

2.2. Substantial Part of a Sound Recording

The question of whether the incorporation of a fraction of a sound recording into a new one amounts to copyright infringement has been a long-standing issue. The plethora of cases on this matter boil down to the interpretation of what constitutes a ‘substantial part’ of a sound recording. In the case of *Pelham v. Hütter*,²² the Court of Justice of the European Union (CJEU) dealt with the same issue, wherein Pelham had looped a two-second snippet of Kraftwerk’s pre-existing musical composition into his own without any permission for doing so. The CJEU relied its decision on 3 determining factors²³ – (i) part of phonogram, even if very short, which forms the quantitative element, (ii) unmodified reproduction, and (iii) the test of ‘recognisability to the ear’. The law on copyright does not provide exact numbers or percentage to determine how much would exactly amount to ‘substantial portion’. However, in general, the more amount of work that has been copyrighted, the less chances there are of availing the defense of fair dealing. The Court considers the amount that has been used by the alleged infringer in comparison to the length of the original work in question.

The British Courts differ on the point of quantitative determination of substantial part, as held in the case of *Designers Guild v. Williams*,²⁴ that substantiality of a part is to be construed in its qualitative sense. The Courts should only be concerned with the copying of the overall essence – the heart or the main scoop – of the sound recording.

²⁰ Section 14, Copyright Act, 1957.

²¹ *Saregama India v. Timothy Mosley, et. al.*, 635 F. 3d 1284 (11th Cir. 2011).

²² C-476/17. Judgment of 29 July 2019, EU:C:2019:624.

²³ James Parish, “Sampling and Copyright – Did the CJEU Make the Right Noises?”, *The Cambridge Law Journal* 32-33 (2020).

²⁴ [2000] 1 W.L.R. 2426.

This view has also been followed by the Indian Courts, holding that the subsequent work had to have been “copied so substantially as to amount to negative fairness”.²⁵ Even use of small portion of work may be determined to have been excessive if such copied work infringes the main content of the work.²⁶ For instance, a short clip from a movie is usually accepted by the Courts, but if it so turns out that the said clip encompasses the most creative and essential element of the movie, then the Court may decide that there has been copyright infringement.

In the case of *Hawkes & Sons (London) v. Paramount Films Services Ltd.*,²⁷ the Court held that a twenty-second snippet of a four-minute sound recording was a substantial part. Here, the Court also determined that the onus upon the plaintiff is to show (i) rightful ownership over the copyrighted work, (ii) unauthorised copying, and (iii) substantial similarity.²⁸ Once the plaintiff establishes a prima facie case before the Court, the alleged infringer can then rely on defenses to prove his innocence against such claims. Thereafter, the Court will go into the question of substantiality, deciding upon the uniqueness of the sample alongside an arithmetic consideration of the proportion of sampling that has been done. “Despite the bias in favour of a qualitative assessment, it does not mean that a quantitative assessment is entirely irrelevant”.²⁹ Thus, the onus initially lies upon the plaintiff to establish a prima facie case of similarity, and then, the onus shifts upon the defendant to establish his defenses against such allegations.

2.3. Samples as Quotations in Sounds Recordings

Quotations are a valid exception to copyright infringement as part of the defense of fair dealing. They are usually understood in the context of literary works, however, there is no bar in interpreting quotations in the context of sound recordings. Samples have often been referred to as “sonic quote, audio quotation, and timbral quotation, etc.”³⁰

²⁵ *Blackwood and Sons Ltd. v. A.N. Parasuraman* AIR 1959 Mad 419, para 86.

²⁶ *Twentieth Century Fox Film Corp. v. Sohail Maklai Entertainment (P) Ltd.* 2010 SCC OnLine Bom 1577.

²⁷ (1934) 1 Ch. 593.

²⁸ Prashanth S. Shivadass and Rachand Pise, “Everything You Need to Know About Music Sampling: The Indian Perspective”, *SCC Blog*, available at: <https://www.sconline.com/blog/post/2021/09/14/everything-you-need-to-know-about-music-sampling/> (last visited on July 21, 2023).

²⁹ Adrian Rogowski, “Can a Song Be Copied with impunity: A Legal Perspective on Copyright Infringement Cases in Respect of Musical Works”, 28 *Stellenbosch Law Review* 218 (2017).

³⁰ Tanya Alpin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* 91 (Cambridge University Press 2020).

Equating quotations to samples would imply that samples can be accepted as an exception against copyright infringement in sound recordings in cases where no licence has been obtained by the sampler. It entails the recognition of the new sampled work being treated as an independent work that simply incorporates some quotations from a previous copyrighted work³¹.

The CJEU has ruled that samples can qualify as quotations, which would be a legitimate form of exception or limitation to copyright infringement. Quotation was defined as an extract from a previously existing work for the purposes of illustrating, comparing, or defending an opinion. This implies that there must be some form of ‘interaction or dialog’ between the former copyrighted work and the subsequent work that has been alleged of copyright infringement. On this point, Professor Drassinower mentioned that the Courts have to take into consideration the nature of the source material, and whether proper accreditation has been given to such source material by the sampler.³² The rationale underlying the advocacy for a liberal approach to the interpretation of quotations as exemplars stems from the concern that copyright ought not to be wielded as a tool of subjugation, contrary to its intended purpose as a stimulus for artistic and intellectual production.³³

Although not recognised in India, some countries (such as the U.K., Belgium and Germany) allow ‘pastiche’ as a defense against copyright infringement. In 2021, Germany introduced its new provision on pastiche to cover within its ambit - remix, meme, GIF, mashup, fan art, fan fiction, cover and sampling.³⁴ If quotations are intended to specifically be limited to literary works, then perhaps the inclusion of the defense of pastiche for sound recordings within the legal framework in India would be a possible

³¹ Tomasz Rychlicki and Adam Zielinski, “Is Sampling Always Copyright Infringement?”, *WIPO Magazine*, available at: https://www.wipo.int/wipo_magazine/en/2009/06/article_0007.html (last visited on July 21, 2023).

³² Abraham Drassinower, *What’s Wrong with Copying?* (Harvard University Press 2015).

³³ *Nova Productions Ltd. v. Mazooma Games Ltd.* [2007] EWCA Civ 219.

³⁴ Alan Hui and Frédéric Döhl, “Collateral Damage: Reuse in the Arts and the New Role of Quotation Provisions in Countries with Free Use Provisions After the ECJ’s *Pelham, Funke Medien and Spiegel Online Judgments*”, 52 *International Review of Intellectual Property and Competition Law* 857, 881 (2021).

solution. Allowing such avenues to legally recognise samples can enhance the marketability of the sampled work.³⁵

3. Unveiling the Notes: The Legal Intricacies of Music Covers Under IP Law

Knowledge reaches every ear, only if it is shared.³⁶ Creating anything in today's world, when criticism is lionised more than disdain, is, nonetheless, fraught with danger. However, newfound openness and tolerance have resulted from the knowledge sector's exposure to contrasting viewpoints and conflicting perspectives. There are people who reckon that cover versions are an obvious infringement of the Intellectual Property of the original artist, while on the flip side, others who are more accommodating claim that cover versions of a piece of musical art reflect a spectrum of expressions which should be propagated.

Basically, a cover version of an original song is to remake or revisit the original song, by an artist who is not the actual artist of the song. Lyricists write the lyrics (words) to a song, while composers make the music (underlying composition) to go along with those words, making what is ultimately an original song. After some time, the song is completed and released to the market. Over time, these melodies are revamped to create cover songs by being enhanced with modern recording standards and instrumentation. One of the biggest example of making song covers and commercialising on them is the famous Indian Band, named 'Sanam', which is in its 13th year of existence. They have enjoyed popularity because of their practice of taking up retro Bollywood songs, and making modern covers of the same.³⁷ Thus, this part shall deal with the statutory requirements under Indian Copyright Law and the judicial interpretations with regards to "version recordings".

³⁵ P. Brooks Fuller and Jesse Abdenour, "It's Bigger Than Hip-Hop: Sampling and the Emergence of the Market Enhancement Model in Fair Use Case Law", 96 *Journalism & Mass Communication Quarterly* 598, 611 (2019).

³⁶ "Copyright, Cover Versions and the Muddle", *Managing IP*, available at: <https://www.managingip.com/article/2a5brqcfb83rfpjtlhy4g/copyright-cover-versions-and-the-muddle> (last visited on July 23, 2023).

³⁷ Priyanka Sharma, "Never Felt Bad that Our Band was Known for Doing Covers: Sanam Puri", *The Indian Express* (Apr. 04, 2018), available at: <https://indianexpress.com/article/entertainment/music/sanam-puri-sanam-mennu-5123359/> (last visited on July 23, 2023).

3.1. The 31C Roadmap: Legality of Song Covers under Indian Copyright Act

A more detailed explanation as to what exactly refers to a cover version of a song was deliberated in *Star India Pvt. Ltd. v. Piyush Agrawal & Ors.*³⁸ wherein the Delhi High Court held that, “After the completion of first sound recordings and acquiring all the permits from the original owners, another artist may create a new sound recording to be produced based on the current musical work, and this second creation shall be considered as a version recording or a cover version.”

Prior to the 1994 amendment to the Copyright Act, Section 52 of the same dealt with the provision regarding song covers, and on a bare reading, the black text of the law under Section 52(1)(j)(i) stated that there was no mandate for the cover version to acquire permission of the copyright owner. However, post the 1994 amendment, the word “previously” in the Section was omitted because it’s pretty obvious that the consent of the copyright owner would only be required for the initial recording.³⁹ However, post the 2012 amendment, a new Section 31C was inserted which dealt with statutory licensing of the cover versions of songs.⁴⁰

Quite noticeably different from the current Section 52(1)(j), which is an exception to copyright, is the proposed Section 31C, which takes the form of a statutory license. In essence, it would serve as a defense in situations where copyright had been suspected to have been violated, but the alleged violation was covered by the pre-existing Section 52(1)(j).⁴¹ This new Section mandates anyone making a cover version to give notice to the original copyright holder and also provide, in advance, copies of all covers or labels with which the cover song recordings are to be sold, to safeguard the interest of the original owner. It is disallowed, as per this Section, to commercialise the cover versions in a way which can mislead the general audience about the true identity. It is also mandated that any cover version so made, shall be labelled as a cover as per the Act. The provision also provides for royalties to be paid to the original copyright holder, and

³⁸ 2013 (54) PTC 222 (Del).

³⁹ Nandita Saikia, “Cover Versions and the Proposed Amendments to the Copyright Law”, *available at*: <https://copyright.lawmatters.in/2010/06/cover-versions-and-proposed-amendments.html> (last visited on July 23, 2023).

⁴⁰ The Copyright Act, 1957, § 31C, No. 14, Acts of Parliament, 1957 (India).

⁴¹ Nandita Saikia, “The Bollywood Amendments: Film, Music and Indian Copyright Law (2010-2012)”, 36 (2020).

regarding filing of complaint with the Copyright Board for non-compliance of the provision by the cover artist.⁴²

There have been various judicial interpretations with respect to song covers, and hence, there has been a glaring debate in the same regards. For instance, in the *Gramophone Company of India v. Super Cassettes Industries*,⁴³ the Delhi High Court held that the mere fact that the plaintiffs refused to accept the royalties sent to them is enough to establish that they had no intention to allow the defendants to make a cover version of their work.

In a contrasting decision by the Karnataka High Court in the case of *Gramophone Company of India Ltd. v. Mars Recording Pvt. Ltd.*,⁴⁴ the Court held that if all conditions laid down under Section 52(1)(j) are obliged with, then there will be an absolute protection against any sort of copyright issue. This decision of the Karnataka High Court was even contested before the Supreme Court; however, the Supreme Court did not change the said stance, and upheld the ruling of the High Court.⁴⁵ Another major case on a similar line, developing the jurisprudence of “version recordings” further, was the case of *Super Cassette Industries Ltd. v. Bathla Cassettes Industries India P. Ltd.*,⁴⁶ wherein the Court dealt with the issue of Copyrightability of “version recordings” and not the original recordings. This case laid down the principle that version recordings shall not be eligible for copyright protection, because they themselves are an adaptation, and hence lack originality.

In accordance with the stipulation set forth in Section 31C of the Indian Copyright Act, it is incumbent upon individuals to obtain a licence from the original proprietors of the copyright in order to produce renditions of the original work. Referring to the case of *Saregama India Limited v. Sky B (Bangla) Private Limited*,⁴⁷ the primary issue before the Court was the complaint of the plaintiff whose copyright had been infringed by the defendants when the defendants performed and allowed performance of plaintiff’s songs at various instances without permission. The Calcutta High Court, in this case, referred to the provision under Section 31C and held that, since the defendants have

⁴² *Id.* at 37.

⁴³ 2010 SCC OnLine Del 4743.

⁴⁴ 1999 Supp. Arb LR 488.

⁴⁵ *Gramophone Company of India Ltd. v. Mars Recording P. Ltd. & Anr.*, (2002) 2 SCC 103.

⁴⁶ 2003 (27) PTC 280 Del.

⁴⁷ MANU/WB/0333/2020.

neither taken any consent of the plaintiffs nor obtained the necessary statutory licence under the Section, the plaintiffs pose a prima facie case of copyright infringement.

3.2. Cover Songs & Social Media

The primary question here is that whether song covers amount to copyright infringement or not, of which the views have been two-way, one sect supporting it while the other standing against it. This issue has been highly debated as there have been major advancements in technology around the globe. With the help of recent technological and informational advancements, many people have developed a wide range of entertaining applications, particularly for smartphones, and people have been actively participating in Social Media through the use of these applications, sharing content which majorly includes song covers.⁴⁸ YouTube, TikTok and Instagram have become a guiding light for the millions of karaoke covers and would-be pop stars of today. Performing a cover of a well-known song increases the video's exposure, giving up-and-coming artists a chance to show what they are made of. Therefore, this research will next concentrate on examining the copyright issues surrounding music covers inside various social media sites.⁴⁹

3.2.1. *The Big Red Button: Copyright Quandary of Song Covers on YouTube*

The communicative power so possessed by these social media platforms is evidently one of the biggest boons to have ever dawned on humanity. This is primarily because different people around the world are able to showcase their talent through these platforms to literally the entire world, with just a click of their hand. YouTube, being one of the biggest content platforms to ever exist is pre-dominantly a major tool used by both famous artists as well as the newbies to communicate their work to the entire globe. YouTube-based popularity may become a mainstream media reference and could open doors to lucrative opportunities like record deals and appearances on popular talent shows like NBC's 'The Voice'.⁵⁰

A majority of cases appear on YouTube wherein various cover artists post cover versions of songs or music and the same becomes the subject matter of copyright

⁴⁸ Bagus Rahmanda and Rinitami Njatrijani, "Juridical Analysis of Copyright Protection of Cover Songs Uploaded on the TikTok Application", 11 *Systematic Reviews in Pharmacy* 1871 (2020).

⁴⁹ *Supra* note 32.

⁵⁰ Costas Constandinies, *Adaptation In The Age Of Media Convergence* 111, (Amsterdam University Press 2019).

infringement. A big grey area in the same is when the cover artists believe that simply by mentioning the terms “fair use” or giving full credits to the original copyright holder, they would be saved from a copyright infringement strike. However, this isn’t the case. For uploading a valid and legal cover on YouTube, one requires a “synch license” from the original copyright holder, by paying the required amount of fee. Nevertheless, it’s not always the case that the said copyright holder shall grant “synch license”.⁵¹

Moreover, in order to avoid the issue of copyright cases, YouTube has put forth its own copyright rules. The two major tools in YouTube are (i) the Content-ID match system and (ii) the Manual Claiming Tool, through which YouTube has shielded itself from being personally liable for copyright infringement. The Content-ID match algorithm examines videos on YouTube and compares them to a repository of copyrighted works. If a video contains material that infringes on someone else’s copyright, the owner of that copyright has the option of having it removed or of “monetising” (or acquiring) the video themselves, in which case they would get all of the video’s advertising and sponsorship earnings.⁵² A creator’s account might be temporarily disabled or permanently deleted if it gets an excessive number of copyright accusations on their videos.

Although the cover songs so uploaded on YouTube exhibit a predominantly non-commercial nature, encompassing a wide range of musical renditions,⁵³ made mostly by fans, or musicians to let the world know about their talents, it still technically amounts to copyright infringement, because the copyright remains with the original artist. However, the major loss in such a practice is the resultant unfair competition between the original artist and the cover artist, because there have been many cases wherein these artists obtain more from their cover, as compared to what the original artists gets from the original song. The two ways to avoid copyright strike on YouTube is to firstly obtain the license from the original owner, and second is YouTube’s allowance of Fair Use.⁵⁴ The

⁵¹ Katherine K. Serniwka, “Canada: YouTube, Cover Songs and Copyright Infringement”, available at: <https://www.mondaq.com/canada/copyright/412236/youtube-cover-songs-and-copyright-infringement> (last visited on July 24, 2023).

⁵² Francesca Santoro, “Content Creators and Copyright Claims – How YouTube is Seeking to Expand the ‘Fair Use’ Doctrine”, *Journal of High Technology Law at Suffolk University Law School*, available at: <https://sites.suffolk.edu/jhtl/2020/01/22/content-creators-and-copyright-claims-how-youtube-is-seeking-to-expand-the-fair-use-doctrine/> (last visited on July 24, 2023).

⁵³ Andy Baio, “The Tangled Issue of Cover Song Copyright on YouTube”, available at: <https://www.wired.co.uk/article/cover-song-licensing-on-youtube> (last visited on July 24, 2023).

⁵⁴ Justin Amadeus and Cludio Hitipeuw, “Legal Analysis Regarding the Protection of the Original Work of Music Towards Music Cover That is Posted on YouTube”, 1(1) *Anthology – Inside Intellectual Property Rights* 222 (2023).

determination of fair use shall henceforth be predicated upon an examination of the defendants' objectives in employing the copyrighted material, the inherent characteristics and essence of the original work, the extent to which a portion of said work has been utilised, and the consequential impact of said utilisation upon the market.⁵⁵

Contrasting this to the songs being uploaded to the music streaming platforms such as Spotify, Apple Music, iTunes, and so on, there is another facet present when it comes to uploading of cover songs. Now, to make your recordings available on these platforms, one needs music distributors, such as Ditto Music, etc., which are basically intermediaries that enable you to distribute your music everywhere. While uploading a cover song through these distributors, they give you the option to select whether the song is your own or a cover, and once you click on the latter option, these distributors grant your cover the way to the platforms. This is how a "mechanical license" is procured. Mechanical licenses are the mandate when it comes to distributing cover songs on these music streaming platforms. The streaming platforms have the responsibility of ensuring that the original owners receive their rightful share of the royalties. In summary, it is permissible to release a cover song exclusively on streaming platforms without a mechanical licence in most territories, except for the United States, Canada, Mexico, Japan, India and Pakistan.⁵⁶

3.2.2. *A One Minute Show: The TikTok Copyright Stumper*

TikTok has gained world popularity within a very small time, for it being especially famous amongst the youth of the present generation. This has been pretty evident that as per the report released by Cloud Flare in 2021, TikTok took the first spot under the category of most popular domains, over Google and Facebook.⁵⁷ However, similar to YouTube, the issue of content copyright in TikTok is also very much prevalent. The two major responsibilities in terms of copyright which arises under TikTok are moral rights and economic rights of the original copyright holder.

If one mutilates anything that someone else created, then it is the violation of the creator's moral rights, which include the right to have one's creations treated with respect,

⁵⁵ *Folsom v. Marsh*, 9 F. Cas. 342.

⁵⁶ Nikhil Krishnamurthy, "The Statutory Mechanical License in India Whose Version [of the Law] is Correct?", 1 *Manupatra Intellectual Property Reports* 122 (2007).

⁵⁷ João Tomé and Sofia Cartida, "In 2021 the Internet Went for TikTok, Space and Beyond", available at: <https://blog.cloudflare.com/popular-domains-year-in-review-2021/> (last visited on July 24, 2023).

and the right to have one's creations preserved in their original form. Cuts and alterations made in the TikTok app's music composition process violate the moral rights of the song's copyright owners and may also infringe on the copyright holder's Economic Rights.⁵⁸ In the application of such songs on the TikTok app, there exists a clear violation of the economic rights of the original copyright holder, because then the mutilated part, as mentioned before, could be used by other users for commercialising purposes. TikTok's copyright policy, on similar lines of YouTube, also remove the content and ban the account if any case of copyright infringement is found on the app.⁵⁹

4. Thou Shalt Not Steal: The Defenses and Regulatory Conundrum in Musical IP

4.1. The 1st Defense: Fair Use

In the U.S., the first case that was heard by the Court of law in relation to the concept of 'fair use' was *Folsom v. Marsh*.⁶⁰ Justice Story laid down the four factors for determining whether a work is to be covered under the ambit of fair use or not, which were later incorporated under the Copyright Act. The factors were: (a) The characteristics and intentions of the selections made, (b) The inherent qualities and essence of the original work, (c) The extent to which material has been appropriated, and (d) The extent to which the utilisation thereof may impede the commercial viability, reduce the gains, or supplant the objectives of the original work.⁶¹ This Fair Use doctrine that is prevalent in the U.S. is similar to the fair dealing doctrine prevalent in India, yet the two differ in scope and meaning. India follows a narrower scope of exceptions to infringement listed out under Section 52 of the Copyright Act, 1957. The point of difference is that fair dealing only considers such a dealing which is permitted as per the jurisdictional copyright laws that are applicable, regardless of where and for what purpose such dealing is being done. On the other hand, fair use has a wider ambit, and the U.S. Courts take into consideration the purpose for which the work is being used, and whether that serves the larger interest of the public or not.

⁵⁸ *Supra* note 48, at 1874.

⁵⁹ TikTok, available at: <https://www.tiktok.com/legal/page/global/copyright-policy/en> (last visited July 25, 2023).

⁶⁰ 9 F. Cas. 342.

⁶¹ *Ibid.*

Lord Dennings held, in the case of *Hubbard v. Vosper*,⁶² that it would not be practically possible to define clear boundaries as to what constitutes ‘fair dealing’. It would rather be a question of degree. The Courts must consider the number as well as the extent of extracts and quotations that have been incorporated in the subsequent work directly from the original work. Then, the Courts must consider the use that has been made out of such copying. Thereafter, the Courts must consider the proportions while also keeping in mind certain other considerations. As a general rule of thumb, “it is a matter of impression”.⁶³ Within the domain of sound recordings, the concept in question has undergone a transformation, now recognised as the ‘ordinary observer test’. This test seeks to ascertain whether an individual of average perception, unless actively seeking out discrepancies, would be inclined to disregard them and perceive the aesthetic allure as indistinguishable.⁶⁴

The concept of fair dealing is an exemption to the author’s exclusive right under copyright law, which permits some uses of copyrighted content without the consent of the right holders. In India, Section 52(a) of the Copyright Act provides fair dealing as an exception for certain works. The underlying rationale behind the aforementioned doctrine, as articulated by Delhi High Court, is to safeguard the cherished principle of freedom of expression as enshrined within Article 19(1) of the Constitution of India. This noble objective seeks to ensure the preservation and safeguarding of various intellectual pursuits, including but not limited to research, private study, criticism, review, and the reporting of contemporary events. By affording protection to these invaluable endeavours, the doctrine aims to foster an environment conducive to flourishing of knowledge and unfettered exchange of ideas.⁶⁵ This concept of fair dealing is still evolving and there have been recent issues that are yet to be determined by the Court which will shape the outlook of fair dealing as understood in India.

In the case of *Civic Chandran v. Ammini Amma*,⁶⁶ the Court held that parody would not be covered under the ambit of copyright infringement, given that the work has not been misappropriated or misused. Here, the Court also laid down three tests to help

⁶² (1972) 2 Q.B. 84.

⁶³ *Ibid.*

⁶⁴ Jeremy King, “Tiny, Tiny Copyright: An Examination of the Copyrightability of Sampler Instruments and Its Impact on Derivative Works”, 45 *Columbia Journal of Law & Arts* 112 (2021).

⁶⁵ *Wiley Eastern Ltd. v. Indian Institute of Management* MANU/DE/0694/1995.

⁶⁶ 1996 PTC 670 (Ker HC), pp. 675-677.

in determining whether a certain work would constitute an infringement of copyrighted work or not, i.e., (i) The quantum and value of the matter taken in relation to the comments or criticism; (ii) The purpose for which it is taken; and (iii) The likelihood of competition between the two works.⁶⁷ The laws specifically list out several purposes that are appropriate for consideration under fair dealing such as teaching, scholarship, criticism, commentaries, news reports. The acceptance of fair dealing as a defense depends upon the application of all these factors, and not just one factor as a standalone.⁶⁸ So, courts also tend to decide in favour of works that are “transformative”⁶⁹ rather than those that are simply a reproduction of the original work. It means that fair dealing can be used as a defense in case where the original copyrighted work has been transformed into something different by the inputs of the person that has allegedly copied the work.

Given the premise of fair dealing in India, as discussed above, copyrights over sound recording can also be subjected to the defense of fair dealing. Currently, the exhaustive list given under the Copyright Act does not include samples and covers within its ambit. It rather prescribes the option of obtaining licences. However, the notion of fair dealing is still expanding its scope with each judgment of the Court of law, which can be further supported by setting up proper agencies to investigate matters of copyright infringement.⁷⁰ The doctrine is pertinent to strike a balance between the private monopolistic interests of the copyright holder and the creative public interests of the society at large.⁷¹ This defense can be accepted by the Courts when there is a need to preserve and promote the creativity and innovation within the sections of the society that would normally not be in a position to have access to all these copyrighted works.⁷²

4.2. The 2nd Defense: De Minimis Use

The de minimis principle is one of the defenses that are popularly sought after by the samplers where a suit for infringement has been lodged against them. It finds its origins in the legal maxim *de minimis non curat lex*, which can be translated as “the law

⁶⁷ *Ibid.*

⁶⁸ Loren E. Mulraine, “A Global Perspective on Digital Sampling”, 52 *Akron Law Review* 718 (2019).

⁶⁹ *Ramaiah v. K. Lakshmaiah* 1989 (9) PTC 137.

⁷⁰ Marissa Brown, “Not So Fair Use: The Shortcomings of Current Copyright Law in Music Sampling”, 15(2) *Brooklyn Journal of Corporate, Financial & Commercial Law* 462-464 (2021).

⁷¹ Caroline Olivier, “A Musical Cue for Fashion: How Compulsory Licenses and Sampling Can Shape Fashion Design Copyright”, 19(2) *Northwestern Journal of Technology and Intellectual Property* 231 (2022).

⁷² Sam Claflin, “How to Get Away with Copyright Infringement: Music Sampling as Fair Use”, 26(1) *Boston University Journal of Science & Technology Law* 109 (2020).

does not occupy itself with matters of insignificance”. It was exemplified in the case of *Newton v. Diamond*,⁷³ wherein The Beastie Boys (sampler) looped a six-second snippet of Newton’s song. The Beastie Boys had not obtained a licence from Newton to sample the underlying composition of the original sound recording. Here, the Beastie Boys raised the defense of de minimis use of the work, claiming that the sampling was so trivial that it was not even actionable, which was upheld by the Court. The de minimis principle is related to the concept of substantial copying of copyrighted work, which is an essential element to establish copyright infringement. The Court formulated the *Fragmented Literal Similarity Test* which is based on a qualitative-quantitative analysis of both the sound recordings on a case-to-case basis.

The principle of de minimis use is usually also discerned by testing whether the average audience would be able to point out such misappropriation, without being told or having the knowledge of the sampling.⁷⁴ It can be applied to sound recordings, similar to any other form of copyright.⁷⁵ The sampling is so meagre and fragmentary that an average listener would not recognise that the sound recording has been sampled from another pre-existing recording. The onus is upon the sampler to show that the part that has been sampled is of a trivial nature so much so that it quantitatively and qualitatively falls below the threshold to be an actionable element.⁷⁶ So, “substantial similarity would not be found if only a small, common phrase is copied, unless the copied portion is especially unique or qualitatively important”.⁷⁷

It was further elucidated by the High Court of Delhi in the case of *India TV News Service (P) Ltd. v. Yashraj Films (P) Ltd.*,⁷⁸ that an analysis of de minimis use of copyrighted work is much easier and more convenient even for the judiciary in lieu of an analysis of fair dealing. It would be a waste of Court’s time to go into the question of fair dealing in case of trivial violations of copyright. So, de minimis also concurs with the notion of speedy and expeditious trial. The Court also noted the factors to be considered while applying the de minimis principle – (i) the size and type of the harm; (ii) the cost

⁷³ 147 F.3d 215 (2nd Cir. 1998).

⁷⁴ *Fisher v. Dees*, 794 F. 2D 432 (9th Cir. 1986).

⁷⁵ *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016). See also Adam Baldwin, “Music Sampling and the De Minimis Defense: A Copyright Law Standard”, 19 *UIC Review of Intellectual Property* 317 (2020).

⁷⁶ *Sandoval v. New Line Cinema Corp.* 147 F. 3d 215 (2nd Cir. 1998).

⁷⁷ *Jean v. Bug Music, Inc.* 2002 WL 287786 (S.D.N.Y. 2022).

⁷⁸ 2012 SCC OnLine Del 4298.

of adjudication; (iii) the purpose of the violated legal obligation; (iv) the effect on the legal rights of third parties; and (v) the intent of the wrongdoer.⁷⁹ In this case, the Court classified copying of sound recordings as either comprehensive non-literal similarity (covers) or fragmented literal similarity (samples).

4.3. Regulatory Framework for Samples and Covers

The need of the hour is to set up a regulatory framework for samples and covers in India. A combined framework is desired for both samples and covers as the two forms of sound recordings “share a structural and methodological similarity”.⁸⁰ A proper procedure has to be formulated for grant of licences and clearances, along with the payment of fees and compensation incidental thereto. It has to be ensured that the copyright holders are not given absolute and unlimited monopoly over their work. The legislators must consider the possibility of the copyright holders intentionally blocking off their potential competitors by disallowing them from sampling or covering their copyrighted work.⁸¹ This would also cause prejudice against the new artists in the industry.

Inference can be drawn from the framework for song covers in the U.S. under the Copyright Act of 1976,⁸² whereby the legislators have attempted to strike a balance between the interests of the copyright holders and the general public. It allows the recording of a cover of a pre-existing sound recording; however, it also mandates that a compulsory licence be obtained as per the provisions of Section 115 of the said Act. The procedures are such that one only has to pay the statutorily stipulated fees before covering a copyrighted sound recording. Once this compulsory licence has been granted after the payment of the fees, then an express permission on part of the copyright holder is no longer a necessity. It fulfils the goal of setting clear and predictable boundaries at reasonable costs.⁸³ Thus, the public is given the avenue to cover or sample songs, and at

⁷⁹ *Ibid.*

⁸⁰ Kenneth M. Achenbach, “Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Re-examination of Compulsory Licensing for Sample-Based Works”, 6(1) *North Carolina Journal of Law & Technology* 210 (2004).

⁸¹ Donald S. Passman, *All You Need to Know About the Music Business* 307 (Simon & Schuster, New York, 2019).

⁸² The Copyright Act of 1976, 17 U.S.C.S.

⁸³ Carlos Ruiz de la Torre, “Digital Music Sampling and Copyright Law”, 7(3) *Vanderbilt Journal of Entertainment & Technology Law* 403 (2020).

the same time, the copyright holder is also provided with compensation at a rate which is biennially revised.⁸⁴

However, compulsory licensing in itself would end up raising another cacophony of issues with respect to the fixation of fees and/or compensation. This would especially become a concern for the case of samples, because there arises the question of whether the fee for sampling or covering a small fragment and a large chunk of the sound recording would be valued at the same price. This would imply that there is a need to determine a maximum length for sampling,⁸⁵ as well as formulation of a multi-tiered structure of fees to be paid to the copyright holder.⁸⁶ Moreover, if the option is left open for the sampler and the copyright holder to come to some licence-compensation arrangement amongst themselves, then there can be fixation of arbitrary rates based on power play between the two parties.⁸⁷ The permission to sample or cover should not be left upon any discretionary factor. Thus, the determination to be made by the licensing authority is not whether the sample or cover can be done or not, but rather the exact cost that is required to be paid by the applicant to the copyright holder for that particular sample or cover, and the issuance of a licence upon the payment of such fees.⁸⁸

Further, it has statistically been determined that samples and covers help in increasing the sales of the sampled or covered song, acting as cost-free advertisement.⁸⁹ *“The discoveries of such a kind lend support to a judicial inference that the act of sampling and covering may be deemed as fair use, particularly when assessing the impact that a novel creation exerts on the market”*.⁹⁰ It reflects the need for a reassessment of the legal provisions on fair dealing in India with specific reference to samples and covers against claims of copyright infringement of sound recordings. The law on copyright in

⁸⁴ Randy S. Kravis, “Does a Song by any Other Name Still Sound as Sweet: Digital Sampling and its Copyright Implications”, 43(1) *American University Law Review* 243 (1993).

⁸⁵ Lucille M. Ponte, “The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform”, 43 *American Business Law Journal* 555 (2006).

⁸⁶ Robert M. Szymanski, “Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use”, 3 *UCLA Entertainment Law Review* 295 (1996).

⁸⁷ Sean M. Corrado, “Care for a Sample? De Minimis, Fair Use, Blockchain, and an Approach to an Affordable Music Sampling System for Independent Artists”, 29 *Fordham Intellectual Property Media & Entertainment Law Journal* 204 (2019).

⁸⁸ Whitney C. Broussard, “Current and Suggested Business Practices for the Licensing of Digital Samples”, 11 *Loyola of Los Angeles Entertainment Law Review* 479 (1991).

⁸⁹ Mike Schuster, David Mitchell, *et.al.*, “Sampling Increases Music Sales: An Empirical Copyright Study”, 56 *American Business Law Journal* 177 (2019).

⁹⁰ *Supra* note 85.

India already lays out a narrow scope of fair dealing, limited to the exhaustive list given thereunder. As a complete change of the legal copyright regime is not sought for, the way forward would be to amend the provisions as per the arising needs.

5. Conclusion

The Intellectual Property quandary in the setting of the music industry is a complex weave defined by the nuanced relationship between creative expression and legal protections, which ultimately results in an intricate complementarity. Among the many types of works that ought to be safeguarded by copyright, musical compositions stand out as particularly important, and the same can easily be interpreted from the discussion so laid down in the paper here.

The issue heightens when artists copy some pre-existing sound recording without authorisation or without giving any credit to the original artist. Such songs might come to the spotlight, as was the case in ‘Ice Ice Baby’ by Vanilla Ice copying the baseline of ‘Under Pressure’ by the group Queen; or it might go virtually unnoticed, as has been the case in ‘Pehli Nazar Mein’ by Atif Aslam copying the underlying musical composition of ‘Sarang Hae Yo’ by Kim Hyung Sup. Thus, these gaps within the music industry with respect to samples and covers can be accounted for by careful consideration of a system of compulsory licensing alongside a re-evaluation of the doctrine of fair use and the principle of de minimis use. Further analysis can be made to determine whether samples can be interpreted as quotations in sound recordings, and whether covers can be interpreted as adaptations of sound recordings.

A system for compulsory licensing should be formulated and implemented in India for both samples and covers, whereby artists would be required to pay some stipulated fee to the copyright holder and thereafter, they would be granted the clearance licence to either cover or sample the said pre-existing sound recording (even without an express consent from the owner himself). Although compulsory licensing seems to be an obvious solution to the issue of samples and covers with respect to copyright infringement, however, what should ideally be aimed for is perhaps a combination of a scheme for compulsory licensing as well as reinterpretation of the fair dealing provision existing in India. When it comes to providing copyright protection to the original artists of a cover song, then either preventive or repressive actions could be resorted to. Preventive measures include registration, contracts, etc. while repressive measures

include litigation. Compulsory licensing, being a preventive measure, in itself is indeed one step ahead, but it comes with its own set of drawbacks, which can accordingly be complemented by an amendment to the legal provision for fair dealing. Compulsory licensing should also not act as a beacon for further distress by not even defining the scope within which a song could be prompted from the commercial perspective. A liberal, not literal, interpretation is required to encompass unauthorised (but fair) dealing of sound recordings in the music industry. This is because although the aim is to protect the rights of the artist who originally created the song along with upholding the spirit of fair use, nevertheless, the fragile line between the two should not be crossed in order to regulate the commercialisation perspective as well.