

TRANSFORMATIVE APPROPRIATION IN THE CONTEXT OF COPYRIGHT LAW-AN ANALYSIS WITH SPECIAL REFERENCE TO MUSICAL WORKS

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TRANSFORMATIVE APPROPRIATION

By definition, transformative appropriation implies creator's engagement with and reaction to other creators work.¹ It can occur in various ways- cover versions that are also called version recordings, medleys, remixes and mash -ups.

Version Recording

A version recording is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. Version recording is thus neither copying nor reproduction of the original recording; the record so made does not fall within the definition of infringing copy.²

In Super Cassette Industries Ltd. v. Bathla Cassette Industries Pvt. Ltd.,³ the Delhi High Court observed that 'version recordings would really be such sound recordings where while being inspired by the original melody, a distinct interpretation, different both in presentation, rhythm, and orchestral arrangement emerges'.

Version recording is a result of the nature of copy culture, where copying from a single original does not cost much except for the cost of a computer CD writer and blank CDs or cassettes, thus making this business extremely competitive.⁴ The high return, on the small investments required, has made the entire industry of version recording, a highly lucrative business and at the same time a competitive one.⁵

Pertinently, Section 52(1)(j) prior to the amendment of 2012, permitted any song older than 2 years to be used for 'version recording' if a notice of intent was given to the copyright holders, composers and lyricists along with 5% royalty and an advance.

¹ Joanna Demers, 'Steal this Music: How intellectual Property Law affects Musical Creativity', 27 (University of Georgia Press, Georgia, 2006).

² *Gramophone Co. v. Super Cassettes Industries* (1996) PTC 252 (Del) at 254.

³ (2003) 27 PTC 280 (Del), p. 303.

⁴ Rajlaxmi v. Nesargi, "Copyright and Copy culture in Indian Music" 40(6), *Economic and Political Weekly*, 516-517 (2005).

⁵ *Mars recording v. Gramophone Co.* decided on Feb. 28, 2004, at VIII Addl. City Civil Judge (CCH 15) (Un reported).

The Delhi High Court in *Gramophone Company of India Ltd. v. Super Cassette Industries Ltd.*,⁶ analysed Section 52(1) (j) of the Copyright Act and held:

- i. Copyright is a statutory right (Section 16). Only those rights which the Copyright Act creates, to the extent it creates, and, subject to the limitations that the Act imposes, vest in the owner of the copyright in the work, whether it is primary work such as literary, dramatic or musical work, or a derivative work such as sound recording or cinematographic film.
- ii. The Court read various clauses of Sections 2 and 13 and came to a conclusion in favour of the authors of the primary work and held that copyright in the primary and original literary, dramatic and musical works as also a separate copyright in sound recording or cinematographic film made there from, coexist and the copyright in primary and original works continue to subsist for exploitation by the owner(s) thereof in future and these rights are not affected by the factum of the making of a cinematograph film or sound recordings, the copyright(s) of which may vest in different authors,
- iii. The Court went through the scheme of the Act with respect to grant of licenses and assignment. It found out that in case of compulsory licenses, an application had to be made to the Copyright Board, whereas, that was not the case in case of statutory licenses. Section 52 was an illustration of statutory license.
- iv. Section 52(1)(j) deals with exploitation of only those literary, dramatic or musical work which the author of the work has already voluntarily permitted to be made in sound recordings, and has thereby thrown his work in the public domain in the form of sound recording. The law grants him the right to exclusively make sound recordings and the rights which go with it [under Section 14(c)] until the expiration of two calendar years after the end of the year in which the recording was made. However, thereafter the right to make version recordings or further sound recordings becomes available to others as well, subject to the conditions of Section 52 and Rule 21 of the Copyright Rules being complied with. The Court reiterated the decision in *Microfibres Inc v. Girdhar & Co.*⁷ in as much as it held, "the legislative intent was to grant a higher protection to pure, original, artistic works such as paintings, sculpture etc., and lesser protection to design activity which is commercial in nature.

⁶ 2010 (44) PTC 541 (Del).

⁷ 2009 (40) PTC 512 (DB) (Del.)

- v. The Court declared the judgment of Delhi High Court in *Super Cassette Industries Ltd. v. Bhatla Cassette Industries*⁸ as per incuriam.
- vi. Once a version recording in compliance with Section 52(1)(j) has been made, it is as much a sound recording as any other sound recording. Therefore, the copyright holder in a version recording, which is a sound recording has all the usual rights under Section 14(e). There is no limitation contained in the Act which prohibits the exploitation of the version recording by sale/ hire of copies of version recording, as a version recording through mobile phones or internet.
- vii. The defendants cannot market their version recordings under labels and covers which deceive or confuse the unsuspecting customer with regard to the fact that they are recordings from the original sound track and not version recordings.

The amendment of 2012 has deleted section 52(1)(j). It has inserted section 31C which provides for grant of statutory licence for cover versions. The amendment has made production of cover version more difficult. Time period after which a cover version can be made has been increased from 2 years to 5 years. The statutory requirement is that all cover versions must state that they are cover versions. No alterations are allowed from the original song, and alteration is qualified as "alteration in the literary or musical work". So no imaginative covers in which the lyrics are changed or in which the music is reworked are allowed without the copyright owners' permission. Only note-for-note and word-for-word covers are allowed.

Alterations were previously allowed if they were "reasonably necessary for adaptation of the work" now they are only allowed if it is "technically necessary for the purpose of making of the sound recording". While earlier it was prohibited to mislead the public (i.e., pretend the cover was the original, or endorsed by the original artists), now cover versions are not allowed to "contain the name or depict in any way any performer of an earlier sound recording of the same work or cinematograph film in which such sound recording was incorporated". There is also a requirement that a cover version can be released only in the same medium as the original. So if the original is on a cassette, the cover cannot be released on a CD. Payment has to be made in advance, and for a minimum of 50,000 copies. This can be lowered by the Copyright Board having regard to unpopular dialects.

⁸ 2003 (22) PTC (Del.)

Remixes

A remix is a song that has been edited to sounds different from the original version. In India, the trend is that remixes borrow heavily from an existing piece of music (usually more than one). In such a scenario, the issue of copyright law becomes a concern. The most important question is whether a remixer is free to distribute his or her work, or whether the remix falls under the category of derivative work.

There are two obvious extremes with regard to derivative works. If the song is substantively dissimilar in form (for example, it might only borrow a motif which is modified, and be completely different in all other respects), then it may not necessarily be a derivative work (depending on how heavily modified the melody and chord progressions were). On the other hand, if the remixer only changes a few things (for example, the instrument and tempo), then it is clearly a derivative work and subject to the copyrights of the original work's copyright holder.

It is successfully argued that remixes can be covered under the term 'adaptation' which attracts its own copyright. 'Adaptation of a musical work' is protected under Section 14(a)(vi). Under Section 2(a)(iv) adaptation in relation to a musical work is 'any arrangement or transcription of the work'. Transcription means 'arrangement of a musical composition for some instrument or voice other than the original'. In most cases of remixes, the subsequent company borrows songs from the original music company on payment of royalty. The result is that the music composers who had assigned their rights in the original music company do not get any share from the sale of remix songs. This results in an unfair treatment of the original music composers. This anomaly has been done away with by the Copyright Amendment Act of 2012 which has inserted the following provisos to Section 18 of the Copyright Act:-

“Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilisation of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall, except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void:

Provided also that the author of the literary or musical work included in the sound recording but not forming part of any cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilisation of such work except to the legal heir of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void.

However this amendment leaves much to be desired. For example, it is not clear as to what is meant by equal rights. It is also vague with respect to royalties when ownership of the work is owned by different people.

Another lacuna in the amendment is that it is silent as to the affect of its application i.e., whether the amendment will have prospective application or apply retrospectively to assignment of copyright made before the amendment Act.

It is submitted that the amendment should apply prospectively as otherwise; it will unsettle settled legal relations opening floodgates of litigation.

Mash ups

Mashup artists work with existing songs.⁹ They extract the vocals from some songs and the instruments from others. The artists then combine the vocals and instruments from other songs with their own sounds, often created with computer software.¹⁰ This combination leads to the creation of new music.¹¹ This is not a new concept. The practice of assembling new songs from elements of previous work dates back to the beginning of recorded music and reaches beyond modern genres of pop and rap and into genres such as jazz and folk.¹²

Medleys

Medleys, are a musical selection wherein the music is one or two minutes long and is basically an arrangement of snippets of the original songs according to the arranger's choice.



⁹ See Lauren Knapp & Tim Peters, Talking About Girl Talk, PBS (Feb. 16, 2011), *available at*: <http://www.pbs.org/newshour/art/blog/2011/02/the-two-sides-of-girl-talk.html> (Visited on Jan.1,2018). (“Gillis . . . has been remixing popular songs from the 1960s to present day, isolating different beats, slowing them down, speeding them up and mixing them back together to create something new. Gillis is a mash-up artist, and his laptops are his primary tools.”); see also Morgan Spurlock, A Day in the Life: Girl Talk, HULU (Aug. 17,2011), *available at*:<http://www.hulu.com/watch/275374/a-day-in-the-life-girl-talk#s-p1-so-i> (Visited on Jan. 31, 2018).

¹⁰ Lauren Barbagallo, New York: Making Musical History with Mashups, UMASSAMHERST (Fall 2007), *available at*: http://www.umassmag.com/2007/Fall2007/alumni_news/almanac/brown.html. (Visited on Jan30,2018).

¹¹ Ibid.

¹² DJ Maquiavelo’s Mash Ups, DJ MAQUIAVELO, <http://www.djmaquiavelo.com/Mashups.html> (last visited Feb. 22, 2018); see Brett Gaylor, RiP!: A Remix Manifesto, NAT’L FILM BD. OF CAN. (2008), *available at*: <http://films.nfb.ca/rip-a-remix-manifesto/>. (Visited on Jan.1,2018).