# FAIR USE IN CONTEXT OF MASHUPS: COMPARATIVE ANALYSIS OF US, UK AND INDIA

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## ABSTRACT

This paper analyzes evolution of copyright act along with development of mashups industry. I have tried to compare the rights of mashup's artists with the right original artists in various countries like India, US and UK. I have focused on various exceptions that they can use in case of any infringement of rights of original artists. In the end, I have emphasized on the need of special laws to protect the interest of mashup artists

Framers or creator of copyright have tried to maintain a balance between monopolization and protection of an artist's right. Copyright plays a key role in encouraging people to explore the field of creativity. However, one needs to make sure that such protection do not create monopoly which restricts others from exploring any other ideas of creativity. Legislators and courts have evolved the principal of fair use to maintain the balance.

However, the concept of fair use has been applied differently in various countries. In US, the courts have laid down various tests to justify the use of protected piece that was within the ambit of fair use. Some of the tests are: nature of work, purpose of use, and many more. However, India and UK have an exhaustive list that lays down the scope of fair use. Courts have evolved some tests to determine scope of fair use in these countries, however, when compared with US, the scope is still restrictive.

Music has evolved with technology. There have been multiple innovations that have resulted in modern music. A very common practice of making mashups, which includes using and combining music or lyrics of different songs to create a new music, has evolved over time. This

style of music is very much similar to sampling. These practices have raised multiple questions regarding copyright infringement of the original artist.

Such infringement can be defended on two grounds. One of them is *de Minimis*, which means insignificant copying. In copyright, principal of de Minimis stands for minimal copying for which no infringement can be claimed. Second ground for such defense is fair use. If copying is within the ambit of fair use, then no infringement can be claimed.

In this paper, we have analyzed evolution of copyright act along with development of mashups. In the first part we have tried to introduce and define the concept of mashups highlighting differences between mashups and remix, along with the history of mashups. In the second part we have analyzed the scope of copyright and infringement of rights of original artist that happens through mashups. In the third part we have discussed the principal of de Minimis as defense of copyright infringement including the minimal limit of copying that would constitute infringement in various countries. In the fourth part we have discussed fair use and have compared distinction of the fair use principal in various countries like US, UK and India. Finally, we have concluded this paper by analyzing the impact of inefficient copyright laws on music industries and how it has restricted the creativity of various artists, which is against the spirit of copyright. The spirit of copyright entails to encourage creativity by providing some rights and protection to the artist that must not result in monopoly.

## EVOLUTION OF NEW MUSIC: MASHUPS

Mashup is considered as very much similar to sampling. It is an audio collage of bits and pieces of various other audio. It was the beginning of mashups era when Danger Mouse album, Grey, was released.[1] It was a mashup of various songs contained in the album, Black, of Jay Z. This sampling and arrangement is done in a manner to create a new song by manipulating all the fragments in a manner to create minimal resemblance to original songs.

Remix, on the other hand, means recreating the original music. It may have the elements of other songs but generally it focuses on the refashioning of original music.[2] It is different from mashup as it is not a collage or mixture of multiple original songs.[3] Mashups contains sound clips from more than one songs that could be extended to 167 songs or more, as used by Girl Talk in Night Ripper.[4]

The fist mashup that was commercially sold was Do It Again by Billie Jean, which was just a combination of two songs: one by Steely Dan and another by Michel Jackson.[5] However, mashups came into limelight very late almost around early 2000, i.e. 20 years from the release of Do It Again. Such delayed exposer was due to inexpensive procedure of making mashups and undeveloped market of mashups. Generally, such mashups were transferred on peer to peer basis, thus not attracting major attention. It was in 2004 when MTV came up with the *Ultimate Mashup that* mashups became a main stream industries.[6] It resulted in two things- one encouraging people by creating awareness of this music and making it popular. Second, it attracted the attention of recording companies who claimed compensation for infringement of their copyrights. By this time mashups have become very profitable business. For example,

[1] Elina Lae, Mashups - A Protected Form of Appropriation Art or a Blatant Copyright Infringement?, 12 Va. Sports & Ent. L.J. 31 2012-2013
[2] Alan Levine, Remix or Mashup? What's the Diff?, (https://storify.com/cogdog/remix-or-mashup-what-s-the-diff) (last seen on 9th April, 2017)
[3] Tok Thompson, Beatboxing, Mashups, and Cyborg Identity Folk Music for the Twenty-First Century, Western Folklore, Vol. 70, No. 2 (Spring 2011), pp. 171-193
[4] Elina Lae, Mashups - A Protected Form of Appropriation Art or a Blatant Copyright Infringement?, 12 Va. Sports & Ent. L.J. 31 2012-2013
[5] PETER S. MENELL, ADAPTING COPYRIGHT FOR THE MASHUP GENERATION, 164 U. Pa. L. Rev. 441 2015-2016
[6] *Id*.

tickets of Girls Talks ranged from $20 to $400.[7] The huge profits was one of the reason for copyright infringement cases that were filed against mashup artists.

## COPYRIGHT FOR ORIGINAL ARTISTS

To claim an infringement, artist first needs to prove their copyright. Following elements need to be proved by the artist to claim copyright in India-

1. Originality
2. Recorded on a tangible medium
3. Have some intelligible meaning.[8]

However, among all the elements originality is the most disputable element when existence of copyright is in question. The test to determine originality has evolved overtime. Once all these elements are fulfilled then only one can claim copyright infringement.

Initially the test of originality was sweat-brow test.[9] It was based on the labor that was consumed in making the music. If sufficient labor and hard work is proved, then the artist would have copyright for the work. However, there was an issue with the test. It did not take into account the amount of creativity. Overtime, modicum of creativity test[10] was introduced by US courts. This test required element of creativity in the work. As per the test there must be some moderate creativity that needs to be involved in making the music.

However, neither of these two tests, that evolved overtime by the US Supreme Court, were accepted by Indian courts. As per Indian law there has to be some creativity but it can be at a minimal level. This test was introduced in the case *CCH Canadian Ltd. v. Law Society of Upper Canada*[11] and was called test of intellectual skills and judgment. The court defined originality in following terms:

[7] Elina Lae, Mashups - A Protected Form of Appropriation Art or a Blatant Copyright Infringement?, 12 Va. Sports & Ent. L.J. 31 2012-2013
[8] Ayush Sharma, Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or LexFerenda?, Journal of Intellectual Property Rights, Vol 14, November 2009, pp 523-531.
[9] *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd*, [1964] 1 WLR 273
[10] *Feist Publication Inc. v. Rural Telephone Service*, 499 U.S. 340 (1991)
[11] [2004] 1 S.C.R. 339

*"An "original" work under the Copyright Act is one that originates from an author and is not copied from another work. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original". This conclusion is supported by the plain meaning of "original", the history of copyright law, recent jurisprudence, the purpose of the Copyright Act and the fact that this constitutes a workable yet fair standard."*[12]

The same was upheld in the *Eastern Book Company v. DB Modak*[13] case where SCC claimed copyright over Supreme Court's judgment and the summary made by them. Court said that judgments cannot be copyrighted as they are in public domain however, the creativity present in the summary is protected under copyright act.

An individual cannot claim infringement if he has not proved his originality. A mashup artist can use doctrine of public domain as his defense to prove that there was no originality in the work of original artist. It was observed in the case *Sawkins v. Hyperson*[14] that work of Michel was a public domain work. Thus, work of Sawkins, i.e. addition of tempo, bass and beats to Michel-Richard de Lalande work was not an infringement of original work. Moreover, in the present case court gave copyright protection to the work of Sawkins as the court ruled that skill, time and effort passed by the Sawkins was sufficient to make it a creative and original work, even if the work is made using the existing work of Lalade. House of Lords ruled against Hyperson making them liable for breach of copyright for using Swakins' work in their recording.

After analyzing the existence of copyright, it is important to understand various defense that one can use in an infringement case, as only limited music comes within scope of public domain. Mashups are very prone to infringement cases as they are mostly inspired by different existing music. Not all the music that is used to make mashups are within public domain. Thus, the defense of de Minimis and fair use comes into picture when the work used for mashup is not within public domain.

[12] *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339
[13] 2002 PTC 641
[14] [2005] 3 All ER 636

## TOO TRIVIAL: INSIGNIFICANT COPYING

Principal of de Minimis stands for insignificant copying. The principal has evolved from the notion that courts should not be bothered by trivial issue. However, the question remains the same: what is insignificant?

The US courts have taken a mixed approach to deal with this issue. In the case *Newton v. Diamond*[15] court came up with two tests: quantitatively significant and qualitatively significant, to determine whether copying was significant or not. As per quantitatively significant test if the copied part is very insignificant or minimal compare to the whole original object then there won't be any infringement. In the present case, Beastie Boys copied three notes of the opening melody that was six seconds long, from Newton's original composition Choir and used it over forty times in their music that was called "Pass the Mic". Court ruled that it was not substantial. Moreover, the three notes were not an important part of Newton's composition. Thus, as per qualitatively significant test, the three notes did not constitute an important part of plaintiff's composition as it appeared only once for three seconds. As plaintiff failed to prove either of the test, court ruled that there was no copyright infringement in the present case.

The above-mentioned case was regarding sampling of music and not mashups, however the method of making mashups is very similar to sampling. Thus, the principal of de Minimis was accepted as a defense for mashups.

However, in the case *Bridgeport Music, Inc. v. Dimension Films*[16], court ruled that sampling of two-second chord of someone else's original work would amount to infringement and principal of de Minimis cannot be used as a defense. In the present case, N.W.A. sampled two seconds of guitar chord of Funkadelic's song, Get Off Your Ass, and looped it around five times in their music after altering the pitch. There was no permission taken or royalties paid to Bridgeport. Court ruled that it was an infringement as there was no sufficient creativity or *mental, musicological, and technological gymnastics* that could be observed in the present sample.

[15] 388 F.3d 1189 (9th Cir. 2004)
[16] 410 F.3d 792 (6th Cir. 2005)

However, in many of the later judgments US courts have criticized the ruling of Bridgeport case and have applied de Minimis principal in a situation where coping in insignificant or minimal.[17]

In India, de Minimis principal is applied quite differently. The landmark judgment to understand applicability of de Minimis principal in India is *India TV v. Yashraj Films*[18]. In the present case court defined the principal as *"De minimis is translated as: (i) The law does not concern itself with trifles; (ii) The law does not regard trifles; and (iii) The law cares not for small things.*"[19]

The court ruled that validity of de Minimis could be justified by concept of fair use, significant similarities and by analyzing its impact in other laws. Firstly, if the copying does not affect the business of plaintiff and does not cause much harm to the plaintiff then it would come within the ambit of fair use. That is if it is causing insignificant harm then it is trivial issue. Secondly, it the quantity of copying is insignificant, i.e. there is no significant similarity among the original and copied work and there is sufficient creativity in new work. Thirdly, in other laws this principal has saved courts time by not raising trivial issues or insignificant complaints of damage.

Overall, court came to conclusion that principle of de Minimis needs to be applied in copyright cases as copyright is one of the most abused rights in India and people have filed frivolous cases even though there was insignificant damage, i.e. cost of filing and fighting the suits were more than the compensation amount.[20] They laid down following five test to determine insignificant copying-

*(i)* *"the size and type of the harm,*

*(ii)* *the cost of adjudication,*

*(iii)* *the purpose of the violated legal obligation,*

*(iv)* *the effect on the legal rights of third parties, and*

[17] *VMG Salsoul v. Ciccone*, 9th Circuit June 2, 2016 (http://law.justia.com/cases/federal/appellate-courts/ca9/13-57104/13-57104-2016-06-02.html) (last seen on 7th April, 2017)
[18] 2013 (53) PTC 586 (Del)
[19] *Id.*
[20] Amlan Mohanty, Is the Delhi High Court the Fairest of Them All? Fair Use & De Minimis Examined, De-Coding Indian Intellectual Property Law, (https://spicyip.com/2012/08/is-delhi-high-court-fairest-of-them-all.html) (last seen on 9th April, 2017)

*(v) the intent of the wrongdoer"*[21]

However, de Minimis is not applicable in all the cases. Courts have criticized this principal and have refused to grant relief to the mashup artist based on this defense. Thus, more reliable source is fair use. Even though it is more difficult to prove, once all the elements of fair use are proved then courts tend to grant relief. Thus, it is a choice between certainty and convenience.

## FAIR USE (FAIR DEALING)

The balancing element of copyright act is the exception of fair use. It helps to maintain a balance between creating monopoly and self-interest of the artist. However, the principle of fair use is implemented differently in different countries.

Starting the discussion with applicability of fair use exception in Indian Courts. In India, section 52 of Indian Copyright Act, 1952 stipulates the concept of fair dealing. It has an exhaustive list of exceptions. Fair dealing has not been defined in the act however, courts have referred to English authorities to define fair dealing. In the case of *Hubbard v. Vosper*[22], Lord Denning stated that fair dealing cannot have a strict definition but different elements like quantity of copying and the purpose of copying needs to be considered to know the degree of infringement and after considering all the relevant factors one should make a judgment based on impressions. In addition to taking inspiration from UK Courts, Indian courts have used three of the tests that were laid down by US courts, i.e., the amount and substantiality of the dealing, commercial nature of the dealing and effect on potential market[23].

As per section 52 (1) (a) (ii), purpose includes criticism or review and courts have interpreted the section as inflexible and certain.[24] Courts have been reluctant in granting relief through liberal interpretation of the clause.

[21] *India TV v. Yashraj Films*, 2013 (53) PTC 586 (Del)
[22] (1972) 1 All ER 1023
[23] *ESPN Star Sports v. Global Broadcast News Ltd. and ors*, 2008 (36) PTC 492 (Del)
[24] *Blackwood and Sons Ltd. and Others v. AN Parasurman and Ors,* AIR 1959 Mad 410

In US, the Courts have stated that there is implied consent of the owner for reasonable and customary use.[25] To define the extent of reasonable use, they have laid down the following four tests-

**(i) purpose and nature of the use**

The purpose for copying a copyrighted song could be criticism, comment, news reporting, teaching, scholarship, and research or any other listed legitimate purpose which could be justified by the illustrations listed under section 107 of US copyright Act. The reasonability of purpose should be justified from the perspective of a reasonable listener. If a reasonable listener would think that the purpose was a legitimate one without any *malafide* intention of breaching the owner's right then it is legitimate.[26] This test has two elements i.e., transformative and commerciality. Transformative stands for the alteration of the original nature of the work into a new expression or meaning.[27] Commerciality tests the impact of the copied work on the market of the original work.[28]

**(ii) nature of the copyrighted work**

This test depends upon the strength of copyright that the owner has. If the original work involves lot of creativity then it will have strong copyright i.e. strength of copyright is directly proportionate to the extent of creativity.[29]

(iii) **amount and substantiality of the portion used in relation to the copyrighted work**;

This test is similar to de Minimis. It tests the quantity of copying and the way it has been used in the derivative work. In the Alibene Music case[30] the court ruled that taking three lines from the original song to make the parody would not amount to infringement as they have not repeated the lines again and again.

(iv) **Effect of the use upon potential market for or on value of the copyrighted work**.

This test determines the effect of derivative work on the market of original work. If the derivative work reduces the profit of owner to a substantial extent, then it would

[25] *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985);
[26] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994)
[27] *Id.*
[28] *Sony Corp. of Am. v. Universal City Studios, Inc*., 464 U.S. 417 (1984)
[29] *Folsom v. Marsh, 9 F. Cas. 342, 348* (C.C.D. Mass. 1841).
[30] *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 93 (S.D.N.Y. 2003).

amount to infringement. In the Aliebene case[31] court ruled that copying of three lines would not substitute the original work.

However, in *Harper & Row Publishers, Inc. v. Nation Enters*.[32], court added a fifth test that is good faith test. In the case *Grand Upright Music v. Warner Bros,*[33] court ruled that defendants tried to take permission of plaintiff for making a sample of their song 'Alone Again (Naturally)', which symbolize their intention to infringe plaintiff's copyright. They made the samples even though they did not receive the permission. In the end, they were held liable for infringement as they had made the samples in bad faith.

If all the above-mentioned tests are proved, then the derivative work would not be considered as an infringement. Mashups in general qualify all these test however, no proper holding has been passed as there have been insignificant litigation regarding mashup music due to extraordinary litigation costs. However, as per the recent trend, US districts courts have been very liberal for mashup artists. There have been multiple instances where the courts have passed judgments in favor of this developing industry. [34] Compared to India, a mashup artist is more likely to win a case in US. Indian courts have tended to restrict the purpose of mashups as per section 52 (1) (a) (ii).

The future of mashups is very uncertain in US and India as the laws have not been codified. There are no fixed or certain regulation that been passed to regulate these activities. However, in UK the scenario is quite different. On 1st October 2014, a new exception was introduced in UK legislation i.e. UK Copyright, Designs and Patents Act, 1988 that allows re-use of original copyrightable material for parody, caricature or pastiche without permission of original authors.[35] The intention of the legislator was to give greater freedom to creative industries. However, the issue with this new amendment is that it gives discretionary power to judges to decide what is funny and doesn't legalize mashups that are not funny but creative for a different

[31] *Id.*
[32] 471 U.S. 539, 540 (1985)
[33] 780 F. Supp. 182 (S.D.N.Y. 1991)
[34] *Saregama India Ltd. v. Mosley*, 635 F.3d 1284 (11th Cir. 2011)
[35] 'Mash-ups' now protected under copyright law - but only if funny, (http://www.telegraph.co.uk/technology/news/11127749/Mash-ups-now-protected-under-copyright-law-but-only-if-funny.html) (last seen on 9th April, 2017)

reason like satire. Humor is different for every different person. Such discretionary power would create ambiguity in the long run.

For non-humorous mashups, the court will decide the infringement by mashups based on substantiality test, i.e. whether the new music created from copying gives a similar impression of the original music or not?[36] If it is similar then it would amount to infringement. Copying of 20 seconds of music from a four minutes long tune would amount to substantial copying, if it is the most famous part of the tune.[37] However, this substantiality test depends upon facts of each case and cannot be considered as a reliable exception for all mashups.

Thus, overall mashups have been recognized as music since a long time. However, till date there is no law that validates mashups. Neither are there any guidelines which could clarify the position of courts regarding creativity and hard work involved in mashups.

US court have been more liberal in granting the fair use exception to mashup artists as compared to UK courts. The test used by both the courts are similar, for example transformative test is similar to idea and expression dichotomy and the substantiality test plays a key role in both the Courts. However, UK courts are more stringent as they interpret the statues literally and do not easily grant exceptions. They depend upon legislature to grant exception to mashup artists, which somewhere restricts the scope of fair dealing as a defense.

India is an amalgamation of system in both the countries. We have legislature that makes and amend laws as per societal need and we have judiciary that is very active in interpreting the law in a manner to broaden its application. However, there has not been much development regarding rights of mashup artists in Indian jurisdiction. There has been no special exception in copyright legislation of India for mashups artist like the humorous exception in UK jurisdiction, nor has there been any judgment that recognizes mashups as new art. However, as observed in Yashraj Films case[38], Indian courts have granted relief to mashup artists based on substantial copying principal. They have taken a middle ground as they are not as liberal as US courts nor have they restricted the scope of fair dealing as UK courts. They tend to interpret fair dealing in a broad manner based on the purpose of legislation and inculcating few tests

[36] *Ladbroke v William Hill*, [1964] 1 W.L.R. 273
[37] *Hawkes & Sons (London) Ltd v Paramount Film Service Ltd*, [1934] Ch. 593.
[38] *India TV v. Yashraj Films*, 2013 (53) PTC 586 (Del)

from US jurisdiction. However, this middle ground has not been developed due to lack of infringement cases against mashup artists in India.

## CONCLUSION

Mashup artists are emerging and are not powerful enough to battle against well-established recording companies. They need legal protection or else the entire industry could disappear due to high royalties or penalties. It is a well-known fact that making mashups involves creativity. It is not mere copying. It includes creativity for setting up pitches, base, adding different music and synchronizing various songs.

Such a work does not hamper the market of the original work but in turn helps to escalate the popularity of the original song. Generally, it is very different from the original music. It completely alters the basic setting of the songs. Moreover, in mashups only small pieces of original songs are picked to make a synchronized master piece. Sometimes these small pieces are so insignificant that even the original artists are unable to recognize their work. It requires high level of creativity to make a mashup. It could hardly be considered as infringement.

Even in jazz music, composers have used the borrowing technique to create new music.[39] It is a very old cultural practice. It would be unfair to not support these emerging artists. Basic aim of copyright act is to promote creativity but providing unreasonable protection to original artists would defeat the purpose of the act. Thus, it is strongly recommended that government needs to make a clear exception for mashup artists to promote creativity and new music. Especially in India, where no law-making body, neither the legislature nor the courts (through the methodology of judicial activism) have passed any law for governing mashups. It seems like Indian courts are trying to take a middle ground by inculcating few US tests in UK fair dealing concept, however no progress has been made to safeguard the interest of mashup artists.

[39] MUSIC MASHUPS: TESTING THE LIMITS OF COPYRIGHT LAW AS REMIX CULTURE TAKES SOCIETY BY STORM, 39 Hofstra L. Rev. 405 2010-2011