DETERMINATION OF COPYRIGHT INFRINGEMENT IN MUSICAL WORKS

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Abstract

Infringement exists in different forms of IPR works. However this paper will discuss about the infringement in case of musical works. Music is associated with human beings since time immemorial. Right from live performance till downloading people create platforms to perceive music. But there exists certain acts which we should be aware of – the difference between legal and illegal authorization. Some ways of perceiving music may not be legal as it is believed to be. So we must know such acts which determine such acts. Day to day we hear about different incidents of copyright infringement in music but it is a bit difficult to understand the concept in detail. This paper discusses the various ways in which there can be copyright infringement in musical works. Different cases has been discussed and analyzed to know how this infringement is determined. Also incidents which do not lead to infringement but come under purview of fair use have also been cited to get a clearer concept- Indian including Bollywood cases as well as foreign cases. Provisions of the Copyright Act dealing with such issues are also mentioned and discussed. Awareness among people and strict enforcement of law is required to combat the problem.

Keywords: Music-Infringement-Copyright Law-Fair use-Cases.

Introduction:

In ancient days creative writers, musicians and artists wrote, composed or made their works for fame and reputation rather than to earn a living. The question of copyright never arose as the process was laborious and quite expensive. And slowly in the process there came a time when the rights of the authors needed to be protected and also knowledge needed to be disseminated. Then a balancing system which would serve both the needs was urged which led to the development of Copyright laws. The importance of Copyright was recognised only after the invention of the printing press in the 15th century which enables the reproduction of books in large numbers. The development of Copyright law in India being closely associated with the British Copyright Law. The first copyright law in England was the first Copyright Act in the world whose name was "Statute of Anne" and it was passed in 1709. This act provided that the author of any book already printed will have the sole right of printing such books for a term of

21 years and for a term of 12 years commencing from the date of publication. After the expiry of this term, the author will have another term of 14 years for the sole right of printing the books.

Since after the 1709 Act, various other acts were also passed to protect different classes copyrighted works. However, after the act of 1709, another Copyright act was also passed in 1814.But the Copyright Act 1842 repealed the two earlier acts of 1709 and 1814.After the Act of 1842, the Copyright Act was passed in1911 and 1956.After that a committee was appointed under the chairmanship of Whiteford to review the existing law on Copyright and designs. On the basis of this report, the Copyright, Designs and Patents Act was passed in 1988 in England. In India , the first Copyright Act was passed in 1914 which was nothing but a copy of the U.K Copyright Act 1911 with suitable modifications. The next Act was the Copyright Act 1957 which adopted many of the principles and provisions contained in the U.K Act of 1956.However the Copyright Act 1957 came into force on 21st Jan 1958.

Meaning of copyright:

'Copyright' is the term we use for the bundle of *exclusive rights* which the laws of most countries confer on *authors* to exploit the *works* which they create. The Oxford English Dictionary defines Copyright as the exclusive right given by law for a certain terms of year to an author, composer etc to print, publish and sell copies of his original work. Copyright gives exclusive rights to the owner to exploit the creation. And there are different durations of protection according to the nature of the work.

The general rule of copyright is that author is the first owner of the copyright. However, this rule is subject to exceptions in the case of employments work, and commissioned work and government work. Author is the person who put intellectual labour to create the copyright work. But in the case of sound recording and cinematograph film author is the producer is author. Works protected under the Copyright law includes literary works, musical works ,artistic works, cinematograph films, sound recordings and computer programmes.[1] Copyright also subsists in translations, abridgements or compilations (with the written consent of the owner). Separate copyright subsists in translated or abridged work. Section 37 of the Indian Copyright Act gives right known as "Broadcasting Reproducing Right" is given to every broadcasting organization in respect of its broadcasts for a period of 25 years .Actors, dances,

[1] As in Indian Copyright Act,1957

musicians, jugglers, acrobats are given Performer's rights, protection These rights are also available for a period of 25 years and guarantee rights such as reproduction of sound or visual recording of the performances and its broadcast or other communication to the public etc.[2]

In general, copyright subsists for a term of the lifetime of the authors plus 60 years in case of a literary, dramatic, musical or artistic work. In joint authorship, the term is till the death of the last author plus sixty years after it. In cinematograph films and sound recordings, term of copyright is for 60 years.

Requirements of Copyright:

For a work to be copyrightable, it should be an original work of the author. The work should be an independent creation and not a mere copy from some other work. Second requirement is fixation. The work needs to be fixed in some tangible medium. A work is protected under Copyright Law the moment it is fixed in some tangible medium. It may not be registered to the protection though registration is recommended to expand the protection. Copyright subsists only in the expression of a work and not in its ideas. Sec 40 of the Act[3] gives power to extend copyright to foreign works.

Infringement of Copyright:

The Copyright holder has the exclusive right to do any works in respect of those works .The copyright law prohibits any other person from accessing and doing the works of another without the permission of the owner. The concept of copyright infringement is detailed insec51 of the Act.[4]The plaintiff must prove himself as the owner of the work and that the defendant is

[2] Indian Copyright Act, 1957.
[3] Supra note 1 :Sec 40.
[4] Sec 51 of the Copyright Act 1957, provides when copyright is infringed. It says Copyright in a work shall be deemed to be infringed-

a)when any person ,without a licence granted by the owner of the copyright or the registrar of Copyrights under his Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this act-

i) does anything , the exclusive right to do which is by this act conferred upon the owner of the copyright , or

ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication constitutes an infringement of the copyright, or

b) when any person-

copying impermissible acts without his permission. This Infringement of copyright can either be contributory or vicarious.

Copyright Infringement in Musical Works:

First we have to know what a musical work is. The Oxford English Dictionary defines Musical work as sounds in melodic or harmonic combination whether produced by voice or instruments. Musical Works which consist of music, exclusive of any words or actions intended to be sung, spoken or performed with the music.[5]This extends copyright protection to a musical work which has not been reduced to any material form. So, in a song there will be two copyrights, one in the music and other in the words of the song as a literary work. The work must be reduced in writing or otherwise. A relatively small number of notes and chords are sufficient for copyright protection to claim ownership of the copyright.

Music must be original and should have fixation which may be in writing or otherwise. Who fixed the music work is immaterial. Because in modern times, pop music which is played straightly without having first been written down and sometimes it gets recorded by radio stations, restaurants or by some other person. Thus it is immaterial who fixes the music. Also an arrangement of an existing piece of musical work is also subject to copyright protection where copyright will also subsist in the prior work. In arranging a piece of work the creator should show that he has expended sufficient skill and labour in adapting that music. However, this arrangement shall only be done only with the permission of the copyright owner of the existing music otherwise it will constitute infringement.

Hyperion Records v Sawkins[6] is a case involving of 17th and 18th century baroque composer Michael Ricard De Lalande. The claimant, Dr.Lionel Sawkins, a famous musician and the leading authority on the music of Lalande. In relation to some Lalande's pieces he produced modern performing editions. In doing editions, Sawkins reproduced Lalande's as faithfully as

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i) makes for sale or hire , or sells or lets for hire , or by way of trade displays or offers for sale or hire, or

ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

iii) by way of trade exhibits in public, or

iv) imports into India any infringing copies of the work. However, he can import of copy of any work for his private and domestic use. Also, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an infringement.

[5] CDPA 1988: Sec1(1)(a),2(1)
[6] *Hyperion Records v Sawkins* [2005] RPC 32[2005] 1WLR 3281.

possible. To make the music playable, he made numerous corrections and additions to the notation, figured the bass line and recreated missing parts which required considerable skill and effort. The defendants recorded a performance of Lalande's music from the modern performing editions as original musical work as he expended considerable effort in producing the editions. The defendant denied that the performing editions were original or musical. The defendant argued that the performing editions did not amount to a new and substantive musical work in itself as it simply reproduced Lalande's music.

The court rejected this argument. It is irrevalent to the issue whether he created an original musical work or not. The question is whether or not it attracts copyright in music. The essence of this music is combining sounds for listening to. Music must be fixed in some material form. But the fixation in written score or on a record is not itself the music in which copyright subsists. The person's effort skill and time qualify a work for protection. The work of Dr.Sawkins has sufficient aural and musical significance to attract copyright protection. The Copyright Act 1957, says that Copyright shall subsist in an original musical work[7] and gives certain rights[8] in respect of that musical work.

Berne Convention:

Berne Convention is also known as The International Convention for the protection of Literary and Artistic Works (1886). It has recognised literary and artistic works and has also included musical compositions with or without words under it.[9]

It provides protection to translations, adaptations, arrangements of music and other alterations of a literary or artistic work as original works[10]. This protection is given to all countries. [11]

[7] Copyright Act 1957:Sec 13.

[8] i) To reproduce the work in any material form including the storing of it in any medium by electronic means.

ii)To issue copies of the work to the public not being copies already in circulation.

iii)To perform the work in public , or communicate it to the public.

iv)To make any cinematograph film or sound recording in respect of the work.

v)To make any translation of the work.

vi)To make any adaptation of the work.

viii)To do , in relation to a translation or an adaptation of the work of the specified acts.

[9] Berne convention,1971:Article 2(1)

[10] *Id*:.Article 2(3)

[11] *Id.*Article 2(6)Berne convention.

Berne Convention provides protection to the authors who are nationals of one of the countries whether their work is published or not. Protection is also provided to the authors who are not nationals of the countries of the union but the work first published in those nations[12] or if the habitual place of residence of the author is in one of those countries.[13]

Now regarding the rights of the author, he has the right in the following ways:

- **To publish the work:** It includes works published with the consent of the author. The performance of a musical work does not constitute publication.
- **To translate:** The authors have the exclusive right to translate any or whole of their work throughout their term of protection.[14]
- **To reproduce the rights:** The authors of any work have the right to reproduce his work fully or partially in any manner.[15]
- **The right of authorising**: The authors of musical works shall have the exclusive right of authorising the public performance of their works.

The Berne Convention limits the rights of recording of any musical work. Countries are open to provide their own conditions regarding musical works and the author has the right to authorize any other person to do sound recording of his musical work provided an agreement has been made to the context.

Determination of infringement:

According to Sec 2(m) of the Copyright Act, in relation to a literary , dramatic , musical or artistic work , infringing copy means " *a reproduction of thereof otherwise than in the form of a cinematograph film*".

As per Sec 51 of the Indian Copyright Act, any reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film will lead to infringement. And in case of musical works, infringement shall be determined both by the eyes and the ears. Any two works can be identical but they are independent creations it will not amount to infringement. In such

[12] *Id:*Article 3
[13]*Id*:Article 3(2)
[14] *Id*:Art 8
[15]*Id:* Art 9.

cases, determination of infringement will depend on the impression upon judges and the evidence of the experts will be given preference. When the defendant has not copied any substantial part of the work, it will not amount to infringement. The elements which constitute infringement in musical works are same as those of elements constituting infringement as per the Indian Copyright Act. Only adaptation differs. Here, in case of musical works, adaptation means any arrangement or transcription o the work. Some of the case laws as well as circumstances relating to issues of musical infringement are briefly discussed below to get a overall view of the concept.

- **Disco arrangement of an original work**: Copyright subsists in disco arrangement of an original song. The author of such arrangement is the owner of the copyright and is entitled to sue for infringement of copyright in his work even if it infringes the copyright in the original song. He is entitled to prevent others from infringing his work and claim damages subject to his obligation to account the original author of the song for his due share of any recovery.
- **Unconscious copying of musical work**-An unconscious recollection of a tune which was originally heard might later be reproduced without any attempt of being made consciously to copy the work originally heard.

In *Francis Day & Hunter v Bron*[16], the plaintiff claimed that the song , "*Why*" composed by Mr.de Angelis and published by the defendants infringed Copyright in their song "*In a Spanish Town*". The composer of "*Why"*" was called as witness who denied copying and said that he had never heard that song in his life. In cross-examination, however, he said that at a young age he might have heard it. But he adhered to the statement that he consciously never heard it. There is possibility of hearing that song because the song was extensively exploited in U.S. The judge, however, contended that there was no sufficient material to justify the inference that Mr de Angelis copied the plaintiff's work even subconsciously and the action was dismissed.

The court held that the facts which are forbidden in relation to musical Copyright are: reproduction, arrangement and transcription. And reproduction and arrangement can be done consciously. However in some cases, reproduction can possibly be the result of a subconscious process. And this reproduction should be of a substantial part. However, in this present case,

[16] *Francis Day & Hunter v Bron* [1963]Ch 587(C.A).

there was no reproduction whether consciously or unconsciously .Reproduction is achieved only when identity is achieved.

In *G.Ricordi & Co (London) v Clayton and Walter Ltd*[17],

It was held that to find that subconscious copying, two stages must be considered-

i) whether subconscious copying is a psychological possibility and if so,
ii) whether in a given case it is capable of amounting to an infringement of the plaintiff's copyright

It was also suggested that medical evidence may also be required to find subconscious copying.

In other American case, *Fred Fisher Inc v Dillingham*[18], the plaintiff succeeded on the ground of subconscious copying and the decision were based on finding of a higher degree of familiarity with the plaintiff's work .So , if subconscious copying is found there must be proof of de facto familiarity with the work alleged to be copied.

- **Parodies and burlesques-**

Any imitation of a work like mimicry or commentary of any work can be termed as parody. In determining whether a parody or burlesque is liable to infringement sometimes creates confusion in many cases. In considering it, a test has to be applied.It is whether the writer has bestowed such mental labour upon the material he had taken and had subject to such revision and alteration as to produce an original work.[19]

In *Irving Berlin v E.C Publications*[20],here Irving Berlin is a well known composer of songs and the defendants published 25 parodies of the song. The distinction between significance and substantiality was held in terms of both quality and quantity-of the material taken. The court recognised the importance and social value of parody and concluded that the parodist must be permitted sufficient latitude to cause his reader or viewer to recall or continue up the original work if the parody s to be successful. The claim of Copyright in relation to all 25 parodies was restricted and held that the parody and satire are deserving substantial freedom

[17] *G.Ricordi & Co (London) v Clayton and Walter Ltd* [1928-35]Mac C.C 91.
[18] *Fred Fisher Inc v Dillingham* [1924]298 Fed. 145.
[19] (1960)2 Q.B.60.
[20]*Irving Berlin v E.C Publications* [1964]329Fed. 2d 541

–both as entertainment and as a form of social and literary criticism. However, parody was neither the intent nor the effect of fulfilling the demand for original. So there cannot be held infringement.

Joy music Ltd v Sunday pictorial Newspaper Ltd[21].

In this case a newspaper published an article reporting activities of the Duke of Edinburg. ". The newspaper wrote a chorus "Rock- a- Philip, Rock- a- Philip, Rock- a- Philip, Rock" which was believed to be adaptation of a popular rock music "Rock –a-Billy, Rock –a-Billy, Rock –a-Billy, Rock". The verses of the chorus were, however, different .There was complaint of infringement. Held that the newspaper had not reproduce any substantial part though the origin was from the song "Rock-a-Billy".

In Austin v Columbia Gramaphone[22], Here it was held infringement of copyright in music is not a question of note for note comparison but of whether the substance of the original copyright is taken or not.

D'Alamne v Bossey [23],It was held that must be noted whether the substantial element taken is same with the original .In this case the denial of copyright was wholly irrevalent. Here sufficient degree of similarity can be shown and also it was proved that the composer of the second work had access to the first work. The degree of similarity is sufficient to show that there was infringement.

- **Performance in public:**

Performance in public of a musical work will constitute infringement. If the performance is domestic or quasi-domestic , it is not public. The question whether an entertainment is given in public or in private , depends , solely on the character of the audience.[24]

In *Jennings v Stephens*[25] , it was held that in considering the nature or the character of the audience the primary matter is to consider the relationship of the audience to the owner of the copyright , rather than the relationship of the audience to the performers.

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[21] *Joy music Ltd v Sunday pictorial Newspaper Ltd* [1960]2 Q.B.60.
[22] *Austin v Columbia Gramaphone* [1917-23]Mac Cor.Case398.
[23]*D'Alamne v Bossey* [1835]1Y&C Ex.288
[24] P.Narayanan, *Law of Copyright and Industrial designs* 237(Eastern Law House, 6th edn , 2007)
[25] *Jennings v Stephens* [1936]Ch.469.

In *Jewell-La Salle Realty Company v Buck*[26], the U.S Supreme Court acknowledged that the owner of a private radio receiving set, who n his home invites friends to hear a musical composition which is being broadcast would not liable to infringement, for, even if this deemed a performance , it is neither public nor profit. It was held that the acts of a hotel proprietor , in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel proprietor , in making available to his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constituted a performance of such composition is violative of he owner's rights.

- **Music played in a factory or restaurant:**

It has been held that programmes of music and gramophone records played at a factory using loudspeakers for the benefit of the workers[27] and playing of records over loud speaker more or less continuously in a record shop to increase the shop owner's profit[28] were performance in public. Similarly playing music through a loudspeaker in a private room adjoining a public restaurant in such a manner that the music was audible to the public in the restaurant was held performance in the public and constituted infringement of copyright.[29]

Turner v Performing Rights Society[30], here two companies performed music to their employees during working hours .The performing rights in works thus used was vested in the Performing Rights Society (P.R.S) which sought to require the companies to take a licence

for the performances .The companies claimed that the performances were not in public.

But the character of the audience was taken into regard with all the relevant facts and so held that the performance was in public. The counsel here pay regard to the relationship of the audience to the performer in the present case. The result would be that the employers of millions of work people would be giving to their work without paying the fruits of the brains, skills, imagination and taste of the author; if he author be the owner of the copyright or the property of his successors in title, without any remuneration to him or them would be getting the advantage of that work, taste and skill in obtaining increased or improved output.

[26] *Jewell-La Salle Realty Company v Buck* [1931] 283 US 191.
[27] [1943] Ch.167(C.A).
[28] [1979] F.S.R 233.
[29] *Performing Rights Society v Cameo*(1936)3 All ER 557.
[30] *Turner v Performing Rights Society* [1943] Ch.167(C.A).

In *Performing Rights Society Vs. Harlequin Record Shops*[31] , the defendants played records continuously in their shops in a known means of encouraging purchases .The plaintiff society, which owned the performing right aspect of the copyright musical works thus played claimed for infringement by performance in public. The defendant denied this and relied , in the alternative, on an implied licence from the composer or publisher to use the work in this way in order to promote sales of the record .

Considerations were held whether the performance is or not in public and whether the performance injures the composers or interferes with his proprietary rights. Also it should be considered that whether the performance is given to an audience from whom the composer is expected to receive a fee.

It was held that a performance given to an audience consisting of the person's present in a shop which the public at large are permitted and indeed encouraged to enter without the payment or invitation with a view to increase the shop owner's profit .So it can be described as a performance in public and by such unauthorised performances the record shops are infringing his rights.

- **Selling of Recording Items**:

In *CBS Songs v Amstrad*[32], here Amstrad manufactured a twin -deck tape recorder..Sales literature encouraged home taping but warned that 'the recording and play back of certain material may only be possible with permission. The British Photographic Industry (BPI) asserted that this constitutes infringement of copyright in pop song sound recording. BPI's submission are that Amstrad 'authorised' infringement and that Amstrad is a joint infringer together with any person who uses an Amstrad machine for the purpose of making an infringing reproduction of a recording in which copyright subsists. BPI's next contention is that Amstrad by their advertisement authorise the purchaser of an Amstrad model to copy records in which copyright subsists. It was held that Amstrad did not sanction , approve or countenance an infringing use of their model .Authorisation means a grant of or purported grant , which may be expressed or implied , of the rights to do the acts complained of .Amstrad conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy. Amstrad

[31] *Performing Rights Society v Harlequin Record Shops* [1979]F.S.R 233.
[32] *CBS Songs v Amstrad* [1988]R.P.C 567(H.L)

have no control over the use of heir models once they sold .Amstrad did not ask anyone to use an Amstrad model in a way which would amount to an infringement

In *Monckton v Pathe Freres Pathephone Ltd*[33] ,It was held that if the seller of a record authorises the use of the record such use will be a performance of the musical work .In such a case the performance of the musical work by the use of record was bound to be an infringing use if the record was sold for that purpose.

- **Tuning Radio in Public Place:**

Switching on the radio in a public place in a separate performance in public different from that given by the original performer.[34] A man in control of a wireless receiving set who tuner who in his set and picks up and makes audible a musical composition which is being broad cast performs that musical composition[35]. If a person by means of an installation , makes audible the performance in a private place to a larger number of persons than the domestic circle, that is an infringement of copyright in the programme by performing the work in public[36].

- **Chain of Causation**:

Where the plaintiff's are owners of a copyright in the tune as published , it is not enough for them to show that theirs is identical to the printed record of music, they will also have to show that in producing their printed record, the defendant had made direct or indirect use of the plaintiff's printed record of it. Upon the indirect basis, the plaintiffs had to show that the defendant had learned the tune from somebody.[37]

All the links of this chain of causation must proved for the plaintiff's to succeed.[38]

- **Version recording:**

In *Gramophone Co of India Ltd v Mars Recording Pvt Ltd*[39],the Supreme Court set aside the order of injunction granted by the trial court and affirmed by the High Court on the ground that

[33] *Monckton v Pathe Freres Pathephone Ltd* [1914]1K.B.395 at 403.
[34] *Performing rights society v Hammonds Bradford Brewery* [1934]Ch.121
[35] *Performing rights society v Gillete Industries* [1943]1 All ER 228.
[36] [2005]RPC 32[2005] 1WLR 3281.
[37] Supra note 24 at 239.
[38] *Lady Helen Roberton v Hary Lewis* [1976]RPC 169.
[39] *Gramophone Co of India Ltd v Mars Recording Pvt Ltd* 2001 PTC 681(SC).

there was no pleading in the plaint for considering the question in the suit. It was open to the parties ,to raise appropriate pleading by amendment or otherwise before the trial court.

In *Madhu v Ramesan and Ors*,[40]

The plaintiff/appellant composed two songs for a film. He filed the suit seeking an injunction against the defendants/respondent restraining then from releasing the cassettes and exhibiting the scenes in the film in which his songs appear. His allegation was that he alone has copyright for the songs, that the recording and sale of cassettes was in violation of his copyright, and that certain words in the songs were changed without his authorization. The defendants resisted the suit contending that the Plaintiff was engaged to compose lyrics for two songs for the film and he was paid for the same and that he has no copyright over the lyrics. The court declined to grant injunction. Appeal was made which was dismissed.

It was held that the Act recognizes a musical work only when the music is notationally written, printed or graphically reproduced. Special provisions exist in the Act in relation to cinematograph films. Section 13(4)[41] preserves the separate copyright in an work even when the film is made in respect of such work or substantial part thereof. This intellectual property does not cut down the copyright of the film when there is a film.

The author of the lyric who has given authorization to a film producer to make a cinematograph film of his composition by recording it on the sound track of a cinematograph film, cannot complain before the infringement of his copyright if the film producer causes the lyric or musical work recorded on the sound track of the film to be heard in public. The composer of a lyric retains the right of performing it in public for profit otherwise than as a part of the cinematograph film. The film producer thus gets a very valuable right as a result of the authorization of the author of a lyric in the manner indicated in the Act. A protectable copyright comes to vest in the cinematograph film on its completion.

Section 17 states that when a film producer commissions a lyricist for valuable consideration for the purpose of making his cinematograph film or composing the lyric there for, the film producer acquires the first copyright therein; and no copyright subsists in the author of the lyric unless there is a contract to the contrary between the composer of the lyric on the one hand and the producer of the film on the other. Similar is the situation if the author of the lyric is

[40] *Madhu v Ramesan and Ors* [1988]2 KLJ 566.

[41] Sec 13(4) :The copyright in a cinematograph film or a [sound recording] shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the [sound recording] is made.

employed under a contract of service or apprenticeship to compose the work. The rights of an author of a lyric can be defeated by the producer of a film in the manner laid down in the provisos to Section 17(b) and (c) of the Act.[42]

Indian Performing Right Society Ltd. v Aditya Pandey and Anr & Phonographic Performance Limited and Ors. v Cri Events Private Limited and Ors[43]

Here the Plaintiff claimed to be the owner of Public performance rights and music literary works in music by virtue of Assignment deed and sought permanent injunction against the Defendant alleging that the latter was guilty of copyright infringement .The issue was whether song writers copyright extends to excluding the communication to the public without authorization, of the musical works embodied in a sound recording, i.e Defendants were liable to secure a license from the plaintiffs.

It was held that Sound recording rights are not co-extensive, or with provisions of the Copyright Act in India .In the case of literary, artistic or dramatic works , the content of the copyright owner's right encompasses the right to perform and except the right, to perform the works by means of digital audio transmission, the sound recording copyright owner does not have other exclusive rights . If the copyright owner of a sound recording is different from the owner of the copyright in the film, a separate authorization from the lyricist or the composer would be necessary .Once a license is obtained from the owner or someone authorized to give it, in respect of a sound recording, for communicating it to the public, including by broadcasting, a separate authorization or license is not necessary from the copyright owner or author of the musical and/or literary works . Other "bundle of rights" which authors or owners of musical or literary works were entitled to enforce, remain undisturbed Hence ,it was held that defendants were not liable to secure a license from the plaintiffs and the application for temporary injunctions was disposed of.

In The *Gramophone Company of India Ltd. Vs. Super Cassette Industries Ltd* [44] ,

the plaintiff filed a suit seeking *ad interim* relief to restrain defendants from launching version recordings of musical works in which plaintiff owns copyright. The issue was

[42] Berne Convention.:Art 8

[43] *Indian Performing Right Society Ltd. v Aditya Pandey and Anr & Phonographic Performance Limited and Ors. v Cri Events Private Limited and Ors* 2011(47)PTC392(Del)

[44]*The Gramophone Company of India Ltd. v Super Cassette Industries Ltd* 2010(44)PTC541(Del)

whether plaintiff being the owner of the copyright in the original, literary, musical and dramatic works and action of defendant in making version recordings of said works without the consent of plaintiff constitutes copyright infringement.

It was held that Section 52(1)(j) deals with exploitation of various works. There is a right to make sound recordings under Section 14(e)[45] until the expiration of two calendar years. After two years, 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 is complied with. Hence the submission of the plaintiff was rejected.It was also held that the rights of the owner of copyright in version recordings includes the exclusive right to issue copies of the version recording (Section 14(e)(ii)) and there is no limitation under the Copyright Act. However, the making of copies of the version recording and its sale must comply with the requirements of Section 52(1)(j) and Rule 21 of the copyright Rules.

Super Cassettes Industries Ltd. v Hamar Television Network Pvt. Ltd. And Anr [46].

In this case the plaintiff, i.e., the Music Company sought an injunction against infringement of its copyright in musical works by Defendants on ground that Defendant-Television Networks were broadcasting its copyrighted works without due permission .The issue was whether Defendants are entitled to of "fair dealing" in the matter.

It was held that an infringement of copyrighted work would occur only when there is a substantial re-production of the original work .In ascertaining as to whether a substantial part of the work has been reproduced it cannot be dependent solely on the "bulk" or "length of the extract". And not only quantity but also the value is required to be looked at. If substantial and vital part of the works are reproduced the intention to appropriate on the part of the infringer the labour of others for his own profit having been made out, the court need not look to proof of any independent oblique motive. In the instant case, the court came to the conclusion that the extracts taken are substantial.

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[45] Sec14(e) in the case of a sound recording- (i) to make any other sound recording embodying it;

(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;

(iii) to communicate the sound recording to the public.

[46] *Super Cassettes Industries Ltd. v .Hamar Television Network Pvt. Ltd. And Anr* [2010] ILR 6Delhi230.

- **Importation**:

In *Gramophone Company of India Ltd v Birendra Bhadur Pandey* [47], the Supreme Court on an appeal preferred by the appellant, held that the word import in Sec 51 and Sec53 meant 'bringing into India from outside India' that was not limited to importation foe commerce only, but included importation for transit across the country. The court stated that the interpretation, far from being inconsistent with any principle of international law, is entirely in accordance with international conventions and treaties between India and Nepal.

- **Internet issues:**

The Napster case: In this case 'Napster', a website, allowed its visitors to exchange music files in MP3 format apart from virtual chatting. So, a case has been filed by The Recording Industry Association of America (RIAA) is currently representing the band Metallica claiming copyright infringement and piracy lawsuit against *Napster*. The current lawsuit that is still pending.

MGM Studios, Inc v Groskter Ltd[48]

Here , " Groskter" – a website was doing a peer to peer file sharing service .The case of infringement was filed by MGM Studios which is an entertainment company in the US. The court held *Groskter* for infringement as they provided for file downloading including music contents.

Capital Records Inc. et al v Thomas –Rasset [49]

The Recording Association of America sued Thomson-Rasset along with other 18,000 individuals for involving in a legal assault where the association aimed to discourage people from illegal downloading. *Viacom* has also filed lawsuit against YouTube and others for broadcasting copyrighted videos without permission. Court held YouTube has participated in infringing activities though not interacted with the infringers directly.

The Di Minimis Maxim in India:

[47] *Gramophone Company of India Ltd v Birendra Bhadur Pandey* AIR 1984 SCC 667,p 680.
[48] *MGM Studios,Inc v Groskter Ltd* 545 U.S. 913(2005).
[49] *Capital Records Inc. et al v Thomas –Rasset* USCA 8th Cir.(2012).

Though even using a minimum portion of a work leads to infringements that also include activities of our daily life. The concept of Di Minimis ensures that no person is dragged to court for petty offences. As in India cases remain pending for years and these will over burden the court..Court in applying this rule looks certain circumstances like the nature of the harm caused, the cost of the adjudication process, what is the intention of the defendant behind the wrong, the purpose of the act and ay effect on third parties which include legal rights.

Bollywood cases:

Ram Sampath v Rajesh Roshan & Ors[50]

In this case ram Sampath sued Rajesh Roshan for using the Thump jingle owned by Sony Ericsson Company. This jingle was used by Roshan in his movie "Krazzy4".The case was filed just before the release of the movie and the two came to a settlement of two crores as compensation.

Saregama India Ltd v Balaji Telefilms Ltd & Ors[51]

In this case , the petitioner filed for injunction in the release of the movie "Ooh La La Ooh La La" or any of its song .He claimed that the music was copied from the old Bollywood movie "Mawali". "Ooh La La Ooh La La" has similarity with *Mawali*'s song "Ui Amma Ui Amma" and Bappi Lehri composed it. Court found that there is similarity between the two tunes and hence the defendant was held for infringement.

The Concept of Fair Use:

Fair use is a defence against the charge of Copyright Infringement. Section 107 of the Act contained the acts that lead to fair use of a copyrighted work. Such acts include criticism, comment, news reporting, teaching, scholarship or research. Copyright infringement is statutorily defined in both India and the US. US law uses the term "fair use," while British and Indian law uses the term "fair dealing". Thus there exists a minor difference in terminology with regard to the concept of fair use in the US and India.

[50] *Ram Sampath v Rajesh Roshan & Ors* 2009(40)PTC 70 (Bom).
[51] *Saregama India Ltd v Balaji Telefilms Ltd & Ors*(2006)32 PTC 12.

Examples of fair use include any commentary on a work, search engines, criticism of a work, news reporting, research, teaching purpose, library archiving and scholarship. However, US law does not specify acts which would be considered fair use but talked about purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.

Fair Use in Musical works:

From all these concepts we can say that in case of musical works parody does not amount to infringement. And the reviewers who criticize a song may quote lyrics from it and this will not amount to infringement. Some of the **permissible uses** regarding Musical works are[52]

1. When there arises any urgent reason which requires imminent copying of the music and which would be replaced with a purchased copy.
2. When the work is used for academic purpose and the excerpt include less than 10 percent of the work. Also only one copy shall be provided per student.
3. Editing can be done to any printed copy which has been purchased but the fundamental character shall remain the same.
4. Any teacher or any student can retain any copy of music which he requires for rehearsal purpose.
5. Also educational institutions can make a single copy of any music recordings for the purpose of constructing aural exercise or examination.

While the prohibited acts are:

1. Where the mere intention of copying the work is only to replace or substitute the work.
2. The work is being copied in order to make performance except emergency copying as said above.

[52] *These guidelines were developed and approved in April 1976 by the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision.*

3. Copying is one as a substitute for purchasing the work except as in A(1)[53] and A(2)[54] .
4. Copying is done but copyright is not included in the printed copy.
5. Where copying of such work will be consumed in the process of workbook, exercise or tests.

Now below are some of the case laws having the issue of infringement in musical works but are regarded as fair use:

In *Sony Corporation of America v Universal City Studios, Inc*[55]

In this case , Universal alleged that the use of VCRs sold by the defendant violated the 1976 Copyright Act of U.S and that sale of VCR machines constituted contributory infringement. The Court focused on the factor of fair use doctrine 'the effect of the use on the potential market for the copyrighted work' .And the court held that the practice of using a VCR to record a program for later private viewing was a 'fair use' because it was non-commercial and there was little likelihood of harming the potential market for the copyrighted work.

In *Campbell v Acuff-Rose Music, Inc*[56] Here a music company named "Acuff –Rose" filed a suit against a rap group for creating a rap version of their musical work "Oh-Pretty Woman"It was held that the rappers used the song as a parody only which comes under the ambit of fair use and the group has added their creativity and the result is something totally new.

Shapiro , Bernstein & Co .,Inc v P.F. Collier & Son Co[57], was a case of infringement of copyrighted song "You can't stop me from loving You" which was one of the principal song from a musical comedy which was first produced n New York. The defendant used the plaintiff's song in his serial. He played some lines of the song and played in his serial as

[53] *Ibid.*

[54]A(2) For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.

[55] *Sony Corporation of America v Universal City Studios, Inc* 464 U.S,417 [1984].
[56] *Campbell v Acuff-Rose Music, Inc* 510 U.S 569[1994].
[57]*Shapiro , Bernstein & Co .,Inc v P.F. Collier & Son Co* D.C.S.D.N.Y.,20Cop.Bull 656 [1934].

quotations. Every people who heard the story did not fail to know that that the quotations have come from that popular song .Here the question was whether it was a fair use or infringement.

In a song there are two categories of copyrights – in the written form and in the music. The defendants did not use the music. They just described a situation or scene in which the plaintiff's song was sung. Some more or less disconnected quotations were taken for creating a background when the story was told.

It was held that as the defendant did not impair the value of the copyrighted work, so the defendant is using the work as a fair use.

Shapro, Berstein &Co v Miracle Record Co[58]

This is case for the copyright infringement in musical works where the plaintiff claimed that the defendant has infringed plaintiff's musical composition. The parties agree that the bases are similar , while the trebles of both the composition are different .So , infringement was claimed on the bass. The defendant argued that the bass is to simple to be copyrightable and is the result of mechanical skill. Also phonograph records are available for purchase in every city, town and hamlet. So it is a common law property in a particular rendition and ended with the sale of records. So held this use was not infringement.

In *Bloom & Hamlin Vs. Nixon et al.*[59] , an actress from the defendant's performance sang a copyrighted song from 'The wizard of Oz'. An announcement was done that the actress would imitate the singer of that song the way she had sung on 'The wizard of Oz'. The court held that this mimicry was a 'fair use' ,the repetition of a the chorus being but a mere vehicle for carrying the imitation along .Also it was held that it was not the representation of the copyrighted song. If somebody uses a substantial and material part of the work then only it will amount to infringement.

Common Misunderstandings about Fair use or Fair dealings:-

Fair use is commonly misunderstood because of its deliberate ambiguity .So, here some of the conception and facts regarding fair use are follows:

[58] *Shapro, Berstein &Co v Miracle Record Co* D.C.D.N.III.e.d.,91 F.Supp.473[1950].
[59] *Bloom & Hamlin v Nixon et al* 125 F .997.

1. Sometimes, a use which looks fair may not be so. Judges have their discretion in determining and interpreting the work whether it amounts to fair use or not.
2. There are no fixed guidelines in determining fair use. It varies from case to case.
3. Any unfair work amounts to infringement of copyright.
4. Only the works which are protected under copyright law are covered under fair use. All other works which are under public domain can be used in any way without violating the copyright law.
5. A lack of copyright notice does not necessarily means that the work is in public domain.
6. Sometimes, a copyright owner uses a disclaimer that his work cannot be used in any way .But it is not true. When copyright exists in a work, fair use too exists there. No disclaimer can prohibit any fair use of a work.
7. There can be fair use of a work even after copying the entire work. Fair use is not impossible in such cases.
8. Even sometimes commercial copying of a work may lead to fair use .Though hard to prove, it is not impossible.

Remedies:

Remedies against Copyright infringement are distributed in Civil, Criminal and Administrative damages.

- **Civil remedies** are provided in the form of injunction, delivery of infringing copies and providing damages for the conversion done, and accounts of profits.
- **Criminal remedies**[60] include imprisonment of the person who has infringed the work or fine or both seizure of infringing copies and delivering them to the owner of the copyright.
- **Administrative remedies** are banning the delivery and importation of infringing copies of the work.[61]

Other remedies:

Besides these remedies, Sec 55 of the act also recognises other remedies like Anton pillar orders, Mareva injunctions etc.

[60] Sec 63-66 of the Copyright Act,1957.
[61] Sec 53 of the Copyright Act , 1957.

- **The Anton pillar order** is only to be made n the most extreme circumstances for the form of order is drastic and its after effects are far reaching .
- It is at the extremely of the court's power and is frequently accompanied by **Mareva Injunction**[62].Which prevents a defendant from taking action, such as disposal of assets, designed to frustrate subsequent orders of the court in favour of the plaintiff.

Before making such orders, the court should be satisfied that the plaintiff has an extremely strong prima facie case, the plaintiff has suffered or likely to suffer very serious and irreparable damages and there must be clear evidence that the defendant has in his possession incriminating documents or things and that there is a real possibility that he may destroy such material.

Conclusion

Music is an indispensable part of our lives. It has been claimed that listening to music is beneficial for physical as well as mental health. Music is an anti depressant therapy. Also it helps to tone the human body as it is used widely in gymnasiums, dancing clubs and other fitness clubs as a background play. Hence music is beneficial to us in various ways. This music thus needs to have some protection so that the creators always feel the enthusiasm to create more and more music. And infringement in musical works is not a new concept. Hard works of the creators should be rewarded and false claimants should be strictly prohibited. Infringement cases are rising high though there is a strong law for it. Thus there needs to be strict and proper execution of the law. If enforcement authorities take strict steps in punishing copycats then the necessity for originality will be obvious. With stricter enforcement musicians will feel free to create music so that people can enjoy more and more soothing music in the future.

[62] *Mareva Compania Naviera v International Bulk Carriers SA*[1980]1 All ER 213.