



DIGITISATION AND THE MUSIC INDUSTRY: RETHINKING COPYRIGHT LAW FOR THE DIGITAL AGE*

ABSTRACT

The internet has changed the manner in which we interact with multimedia. One of the most transformative roles the internet has played has been in the music industry which has seen a radical change in the manner music is disseminated by copyright holders and individuals, as well as the manner in which content is accessed. This has resulted in a number of challenges to the law of copyright. The decentralised nature of the internet is such that it is extremely difficult to regulate this dissemination. The manner in which copyright law addresses this new regime has also often been criticised by academics as being archaic. However, what must be borne in mind is that the transmission of music over the internet is in fact in furtherance of the ultimate goal of copyright: that of the promoting the progress of art and science by providing incentives to authors, musicians, artists and others. The internet allows a previously unimaginable number of people to access music which would otherwise have been impossible. Time and space no longer defines the limits of one's musical experience. Resultantly, the need of the hour is that copyright law adapts to the phenomenon that is the internet. This article seeks to examine how this can be done, and how and why copyright law should evolve so as to ensure that its aims and objectives are achieved and maximum people can access the music, while not disincentivizing future generations of musicians. The ultimate argument the article espouses is that of promoting digitisation of music by providing greater access to musicians and promoting access to individuals.

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INTRODUCTION

Technological advances always pose a challenge to the existing copyright regime by facilitating the ability to reproduce and distribute works without prior permission of copyright holders – the circumstances surrounding radio, television, VCRs are all indicative of this fact. However none of these technologies come close to the revolutionary impact the internet has had on multimedia and the copyright regime. In particular, the internet has dramatically impacted the music industry. Digital downloads, online streaming and compression technologies have all changed the face of the music industry, making music far more accessible and significantly cheaper. One would imagine that this increased accessibility would have been encouraged by the music industry, as the internet possesses the potential to radically alter the way the music industry functions by significantly lowering costs and locating previously untapped markets. Instead, the internet has been criticised as promoting copyright infringement with no capacity for regulation or control. Resultantly digital copying and sharing has resulted in financially debilitating and fractious litigation and websites being blacked out. Massive campaigns have been promoted to stop what has been labelled “piracy” by the music industry, while individuals (“labelled pirates”) have also faced criminal charges.

However, this has not changed the fact that individuals still use the Internet to listen to their favourite songs and discover new ones. The decentralised nature of the internet is such that it is impossible to track individuals who access unauthorised content. The manner in which copyright law addresses the internet has also often been criticised as out-dated. However, what must be borne in mind is that the transmission of music over the internet is in fact in furtherance of the ultimate goal of copyright: that of providing access to the public while incentivising authors, musicians, artists and others to create works. The internet allows a previously unimaginable number of people to access music which would otherwise have been impossible. Time and space no longer define the limits of one’s musical experience. Through this paper I will seek to examine how copyright law can adapt to the digitisation of music, and justify the need to do so.

‘Intellectual property’ can be broadly classified into two branches viz ‘industrial property’ and ‘copyright’. The former protects inventions and the latter literary and artistic works. Copyright law protects only the form of expression of ideas - not the ideas itself. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colours and shapes. The legal protection under the copyright is to prevent unauthorized use of expression of ideas. The rationale of longer duration awarded to copyright is that once the idea is disclosed to the public, the creator will not be able to prevent third parties from using his ideas.

HISTORY OF COPYRIGHT LAW

Copyright was not invented until after the advent of the printing press and with wider public literacy its importance came to be increasingly recognised. Copyrights were recognized far back as the Roman civilization, where a creator of a manuscript was considered to have rights over his creation. However, the rights only existed as long as the owner was in possession as the rights were similar to rights over tangible property. The basic principle of copyright is based on the “eighth commandment”-“Thou shall not steel.”

Copyright law assumed significance with the invention of the printing press. The first Copyright Act was enacted in 1710 in England known as Statute of Anne. After the Statute of Anne, copyright law became less a tool of the state and more a tool of authors and publishers. Such a development reflected both an increasing respect for the rights of the authors as well as the growing economic opportunity of authors' creations. Thereafter, other countries around the world introduced similar statutes to protect copyright.

Traditionally as such copyright means the exclusive right to do or authorize others to do certain acts in relation to:

- Literary, dramatic musical and artistic works,
- Cinematography film and;
- Sound recording.

The nature of the acts varies according to the subject matter. Basically copyright is the right to reproduce the work in which copyright subsists. Thus any original published or unpublished literary work automatically acquires copyright and is protected by simply recording it in any tangible form.

COPYRIGHTS AND THE PRESENT SCENARIO

The most significant technological development of the 20th century was the invention of the digital technology and it has immensely influenced enriched and revolutionized the transmission and the quality of dissemination of information by converging the existing technologies such as sound recording, visual recording and printing. Thus the emergence of internet as a powerful and reliable platform for communication facilitated the creation of new works in the form of multimedia. These new opportunities in the internet enabled many to exploit the materials available in the digital form without the permission of the creators posing threat to this new

capital formed in the area of information creation. This created many new challenges for the existing legal norms particularly that of copyright inter-alia its protection and regulation on the internet.

An indication of the relative importance and complexity of the issues involved can be taken from a recent World Intellectual Property Organization (WIPO) estimate that on less than 90% of the total investment in the multimedia product was expended in dealing with intellectual property issues. In its 'Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society' the European Commission has estimated that: "The market for copyright goods and services ranges Community-wide from between 5% and 7% of the Gross National Product (GNP). This market is comprised of large variety of products and services, containing protected subject matter, ranging from traditional products, such as print products, films, phonograms, graphic or plastic works of art, electronic products (notably computer programs) to satellite and cable broadcasts".

Whilst, managing intellectual property rights is very complex and time consuming for those who wish to remain within the law, the ease with which digital information may be copied renders the owners copyright in literary, artistic and musical works vulnerable to the making and dissemination of unauthorized copies of a work in electronic format.

AN OVERVIEW OF MUSIC INDUSTRY IN INDIA

Having a pluralistic culture with people belonging to diverse religious and linguistic backgrounds, India has a unique demography. Music is an essential part of the Indian culture, and the country is known for having a rich heritage of folk and classical music. While the Copyright law in India which provides protection to literary, musical and artistic works has its origins in the British legislation, the law has evolved with changes in international scenario.

The market of music recordings in India is different from the West, as most of the music is produced for movies, and the sales are dominated by the film music. The recording industry in India has been dominated by a few players, and the modern times have seen an increase in the role of collecting societies which are authorized to collect royalties on behalf of the music companies.

Indian copyright law, which is based on the Berne Convention, includes certain provisions for compulsory licensing of copyrights in respect of certain works, which are withheld from the public. The authority for entertaining complaints on such matters has been given to the Copyright Board, a statutory body established under the Act. The purpose behind the provision is to prevent

the abuse of monopolies granted by copyrights, and to create a balance between individual rights and public interest. The Copyright Board has also been given the authority to adjudicate disputes relating to issue of compulsory licenses in copyrighted works.

After the liberalization of the economy, the FM radio sector was opened for operation by the private sector companies. A number of radio operators who got licenses to operate the stations approached certain music labels for licensing of copyrighted sound recordings, for the purpose of broadcast on radio. As the royalties demanded were not acceptable to the radio operators, they considered these as unreasonable and approached the copyright board for grant of compulsory licences in respect of those works, contending that demanding unreasonably high royalty rates amounted to withholding of the recordings from the public.

The Indian music industry is over a century old. The size of the industry is estimated to be about Rs.670 crores and is expected to touch Rs.777 crores by 2009. The turnover of the industry steadily declined from Rs 1,150 crore in 1990s to Rs 450 crore in 2005 , as rampant piracy has adversely affected the revenues. According to a study done by Ernst and Young, music is one of the worst hit sectors of the Indian entertainment industry, with 64 per cent of the market estimated to be pirated and the total loss to the industry being estimated at \$325 million. There are many peer to peer networks and websites that allow illegal download of digital music. Users are increasingly relying on P2P networks over individual websites.

The Indian music market is very different from other markets like USA or Asian markets, and the sales are highly dominated by film and devotional music. From the early 1900's, one company, namely, the Gramophone Company of India which was a subsidiary of the Gramophone Company Ltd., London, had a virtual monopoly over the record market. The GCI released its recordings under the HMV (His Master's Voice) label.

In 1961, the arrival of Polydor dented HMV's monopoly, but HMV still maintained hegemony with 60% of the market. In the late 1970s, audio cassettes and cassette players flooded the country, and became popular very quickly. These cassettes were cheap to reproduce and could be easily distributed, and this created the piracy industry in India, a significant part of which was owned and operated by a new record label, T-Series. The company quickly emerged as the biggest competitor to GCI, which even came close to winding up its operations. By the mid 1980s, T-Series had reportedly stopped the pirated recording business and 'shifted' completely to the legitimate businesses. Today, T-Series is the largest record label in India, which has more than 80% market share in the music industry.

There are a number of other record labels in the country, and 160 of these are members of Phonographic Performance Ltd. (PPL), is a Copyright Society which is entrusted with the task of administering the Broadcasting / Telecasting and Public Performance Rights on behalf of these companies. Another registered society, SIMCA (South Indian Music Companies Association), is an association of 86 music companies set up in 1996 to look after the common problems faced by the Industry in South India.

Thus, the music market in India has been dominated by a very few number of record labels. The collection of royalties for music recordings is entrusted to societies like PPL and SIMCA. There have been multiple allegations of abuse of dominant position on record labels and collecting societies. The disputes relating to royalties between broadcasters and music companies have been increasing; this is discussed in the following part.

LITIGATION BETWEEN FM STATIONS AND MUSIC LABELS IN INDIA

Certain private companies, who obtained licenses in 1999 for establishing FM Broadcasting Services, approached M/s. Phonographic Performance Ltd. (PPL), which holds copyright in sound recording for grant of licence. But the terms or rate demanded by PPL were not acceptable to these persons and therefore, they presented their complaints under Section 31 of the Act before the Copyright Board for grant of compulsory licence for broadcasting sound recording.

According to the complainants, PPL had refused to grant licence to the complainants on reasonable terms. The Defendant PPL raised an objection to the jurisdiction of the Copyright Board to entertain these complainants on the ground that the sound recordings had not been withheld from the public by the PPL as licence in relation to these sound recordings had been granted by the PPL to All India Radio.

The Copyright Board overruled the objection raised by the PPL to its jurisdiction to entertain the complaint. In so far as fixation of the amount of compensation was concerned, it held that it has power to fix the amount of compensation according to its own valued judgment and proceeded to fix the amount of compensation. Being aggrieved by the order, both the complainants and defendant filed an appeal before the Bombay High Court.

A number of similar complaints were filed by several radio operators under Section 31(1)(b) of the Copyright Act, 1957, before the Copyright Board praying for a compulsory license in relation to the "sound recordings" held by certain record labels. These orders subsequently went in appeal

to the High Courts and were finally taken up by the Supreme Court in Entertainment Network (India) Limited v Super Cassette Industries Limited.

In the case, the jurisdiction of the Copyright Board under Section 31 of the Copyright Act, 1957, to direct the owner of a copyright in any Indian work or a registered copyright society to issue compulsory licences to broadcast such works was questioned, where such work is available to the public through radio broadcast. While PPL argued that a compulsory license could issue only if the “work” had never been made available to the public earlier, the radio stations argued for an almost automatic Compulsory licence ground i.e. it was to be granted upon request and the only point for consideration was a determination of “reasonable royalty”. In an elaborate judgment, Justice Sinha held in favour of the latter interpretation.

A second issue was whether such a compulsory license can be issued to more than one complainant in the light of Section 31(2)? Here again, although a literal reading of the section made clear that there could only be one such applicant, the court held that, “Sub-section (2) of Section 31 would lead to an anomalous position if it is read literally. It would defeat the purport and object of the Act. It has, therefore, to be read down. Purposive construction therefore may be resorted to.” The case was referred back to the copyright board for determining "appropriate" royalties.

While the judgment faced some criticism, it came as a positive development for the FM radio industry. The decision also put the ball back in the Copyright Board’s court for deciding royalties, a decision on which would alleviate the need for any future negotiations between radio stations and the record labels or collecting societies.

The dispute between the Copyright Society PPL & radio stations was decided by the Copyright Board on the 25th of August, 2010, and the board ordered all music owners in the country to compulsorily licence all of their music to the radio station/applicants at a fixed 2% royalty. This was immediately challenged in a number of petitions and appeals.

CHALLENGE TO THE CONSTITUTIONALITY OF COPYRIGHT BOARD: THE ROAD AHEAD

Soon after the order fixing royalty rates was passed by the Copyright Board, T-Series and SIMCA filed appeals praying that the Order of the Copyright Board not be enforced against them since they were not made parties by the radio stations in the compulsory licensing applications filed before the Copyright Board. The Delhi High Court ruled that the Order of the Copyright Board could not be made applicable against T-series.

The Madras High court passed an interim stay on the order with respect to the SIMCA , only to later vacate this stay in a later order. It was held that since SIMCA is not a registered Copyright Society under the Copyright Act, it cannot represent a collective action on behalf of all of its members. The Madras High Court however refused to grant such a stay to PPL since PPL was unable to convince it of the need for such a stay.

PPL filed an appeal against the order in the Madras High Court under Section 72, which was admitted by the Madras High Court. A challenge to the appointment of the chairman of the copyright board was also filed in the Delhi High Court.

Later, SIMCA petitioned the Madras High Court challenging the constitutional validity of the copyright board itself. The petition, presently being heard by the Court bases its arguments on a judgment of a Constitutional Bench of the Supreme Court in the case Union of India v. R. Gandhi, which struck down key provisions pertaining to the creation of the National Company Law Tribunal (NCLT).

If the chairman's appointment is held illegal or irregular on some grounds, or if the challenge to the constitutional validity of the copyright board is upheld, this will not impact the earlier decision given by the board. It has been suggested that under the de facto doctrine and the doctrine of necessity, courts are likely to uphold the validity of the proceedings, notwithstanding any irregularity in the appointment of members adjudicating the dispute/proceedings.

With multiple appeals pending before the courts, the royalty dispute is yet to see a final outcome, and the judgment may have a far-reaching impact on the future of music industry in India.

As the music industry faces declining profits, the dispute between radio stations and music companies relating to royalties is yet to see a final outcome. With multiple appeals pending in this regard, there is a need for the legislature to ensure that the Copyright Board is constituted as per certain minimum legal standards, so that the questions on its integrity come to rest. This is essential as the dispute has continued for almost a decade now, and its conclusion will have impact on a large number of interests in the industry, as well as the general public.

The growth of such statutory tribunals in India has been sporadic, and devoid of a uniform pattern. The decisions given by these tribunals as well as their constitutional validity have been questioned in a number of cases. This has led to doubts being raised about the transparency in their working as well as fairness in the approach adopted by these tribunals. The method of

appointment of the members as well as the structure of the tribunals has been struck down by the Courts from time to time.

It must be accepted that the tribunals have come to stay, as the Supreme Court has pointed out that it is well within the power of the legislature to constitute such bodies and these are not per se violative of the doctrine of separation of powers. However, efforts must be made to regularise the procedures, compositions, and review/ appeal of decisions of tribunals. The qualifications for the membership for these tribunals must be laid down so as to ensure their independence from the executive.

There is also a dire need for the Indian music industry to reinvent itself and overhaul its operating model if it is to stay competitive in an ever-changing global scenario. As more and more means of digital distribution of music increase, finding alternative revenue streams for various delivery platforms is a must. The rapid growth of the telecom sector in India has helped the industry by providing ways of getting revenue apart from traditional sources like sales of physical CDs. Websites that offer streaming audio services and digital music downloads have recently gained popularity in the west, and similar business models have a great potential to save the dying art in India as well. However, an efficient mechanism to settle copyright disputes and to prevent abuse of monopolies by the record labels must be put in place, if we want this noble art to support the cultural and economic growth of the country.

THE LITIGATION SURROUNDING DIGITISED MUSIC

Indian jurisprudence has been rather silent on copyright vis-à-vis digitised music. Unsurprisingly most of the litigation has taken place in the United States which has seen considerable discourse in this field. Most cases in the United States have focussed on importing the doctrine of “fair use” into the digital context. The Indian equivalent of the same, the “fair dealing” doctrine in the Indian Copyright Act, 1957, under §52 is considerably narrower, as it is exhaustive. Therefore, the applicability and relevance of the litigation in the United States is somewhat suspect in the Indian context. However, the two doctrines have often been equated in the Indian context, and an examination of United States jurisprudence would certainly prove useful insights into the contours of this debate.

The legal discourse surrounding this debate started off with the landmark case of *A&M Records, Inc v. Napster Inc*. In this decision, the court observed that Napster, a peer-to-peer music sharing software, was essentially promoting unauthorised downloads of copyrighted music. The court then examined the software on the basis of the fair use doctrine, concluding that users of Napster

were downloading music for personal and recreational use. It then held that “Napster users get for free something [they] would ordinarily have to buy suggests that they reap economic advantages from Napster use.” This was clearly violative of the fair use doctrine. Napster also relied on a previous Supreme Court decision, *Sony Corp of America v. Universal City Studios Inc.* in which the Court had upheld the validity of home taping of copyrighted television programmes on grounds of fair use. However, the Court distinguished the Supreme Court decision stating that unlike VCRs where the users had to initially view the television broadcast for free (which would have been licensed under contract), Napster allowed users to download permanent copies of songs for free. Further, users could also make that song available to millions of other individuals, which the court concluded was an unauthorised distribution of the work. The outcome of the case was that peer-to-peer sharing networks such as Napster could not be considered fair use, because it disrupted the markets of musicians, thereby adversely impacting incentives.

A similar reasoning was employed by the courts in *UMG Recordings, Inc. v. MP3.COM, Inc*, *Universal City Studios, Inc v. Reimerdes* and *Metro-Goldwyn -Mayer Studios, Inc. v. Grokster, Ltd.* Rather disturbingly, the philosophy underlying these decisions seemed to be that copyright holders should have the exclusive right to exploit any and all markets for copies. These decisions all affirmed that consumer copying and distribution of music served no interest to society and prohibiting such copying was even sufficient to curtail the right to free speech. However, as I have explained above, such copying in fact plays a crucial role in helping individuals access music and creating incentives for musicians – facets of this debate which the court completely ignored or distorted in the above mentioned decisions.

Considering that the Indian doctrine of “fair dealing” is considerably narrower, allowing for only those uses listed under §52, it is unlikely that the result in Indian courts will be any different. However, this understanding of the debate is certainly contrary to the pronouncement of Judge Levet who justified “fair use” on grounds of constitutional policy, stating that “...The Copyright Act is intended to afford encouragement to the production of literary works, reward to the owner is a secondary consideration.” I shall now critique the existing copyright regime and show that current practice is in fact antithetical to the goal of copyright.

CONCLUSION

Digitisation of music offers tremendous scope for innovation. It can also ensure that musicians are financially compensated and can tap new markets, get their due credit and ensure a larger base of listeners. Likewise, it also allows consumers to access the music for lower costs from

around the world. While an internet connection is not something everyone can possess, at the very least, this new model based on digitisation ensures that access to the public is optimised. This will certainly incentivise musicians who will have greater control over their works and will be able to reap the financial benefits from the same.

Unlike the current regime which has often been described as “exploitative and manipulative,” digital sharing and copying can provide an equitable solution. If any website hikes up the cost of the album, the internet will simply respond with another website which allows individuals to access the content at a lower rate. The current copyright regime clearly does not provide musicians with enough incentives and also makes it difficult for the public to access the work. Digitisation renders these problems obsolete. It would also find support from innovators in the technology world who would also profit from creating portals and websites dedicated to the sale of music and merchandise. Digitisation of music represents the next quantum jump for the music industry and will hopefully propel music in a more productive and accessible direction.

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