

COPYRIGHT IN MUSIC : EVOLUTION & CONFLICT OF RIGHTS

*P.M. Dhar**

The main objective of the copyright law is to give authors an incentive to create and to promote their creative activity by giving full protection to their intellectual moral and economic interests. The moral rights are important for protection of moral interests of the authors. These essentially include the right to make public a work which has yet not been published; right to decide whether his true identity on the original work should be disclosed or it must appear as pseudonym; the right of protection of integrity of his work against distortion, mutilation or other modification against his will. Over and above these, the exploitation of a work prejudicial to the honour or reputation of author constitutes violation of his moral rights.

To sustain creativity along with moral rights, certain economic rights are also given to the creators of original work in the nature of exclusive rights to make profit by commercial exploitation of the work created by them. 'Adaptation'¹ of a work as the exclusive right of the creator of original work is included in the copyright law of India with a view to reward authors and allow them commercial exploitation of their work in related fields.

To do justice to any writing on copyright in music, its history and evolution must be traced first. The western commercial interests of today claim that Indian music is at best ORAL and cannot be written down in notation. As the copyright is available only in a work which is in writing² and has a definite form, they argue, that creators of Indian music can not enjoy the protection of any copyright laws. They conveniently forget the fact that the earliest form of music writing is found in the shape of rock inscription in Tamil Nadu.³ This inscription in clear form indicates the names for the sharps and flats of the notes in the octave. This inscription which has withstood the fury of nature for almost thirteen centuries strongly refutes the western allegation of impossibility of putting Indian music in written form.

The current concepts of copyright which depend mainly on west have been solely responsible for non-availability of complete copyright protection to Indian music. To understand this, it is important to know the socio-economic conditions under which authors worked and developed. Small communities being the norm in ancient India, creativity was at the root of community living.

Bards created songs for various festivals. This creation was more of a duty than a means of subsistence. The professional musician was born when this group of creators of music developed their skill and moved from one place to another and entirely depended on their music for their sustenance. They were patronized by kings and the temple trusts to write, sing and perform in their praise. Their life was easy and they were earning adequate amounts for their sustenance. This was a period of glory for the Indian music.

With the British coming as merchants and then taking over the administration in India, the musicians were reduced to abject poverty because the foreign rulers took over most of the kingdoms which supported these musicians. Since these people had come mostly as traders and their interests were commercial, the gramophone disc manufacturers also entered the country. This gave a new lease of life to local musicians for dissemination of their creations.

Though these gramophone companies were competing with each other, their approach to local talent was ruthless. For one time payment to these creators, these companies took away all the rights in the works of these musicians. Unfortunately, this practice of one time payment for all rights in one's creation, which has continued uninterrupted into 20th century is responsible for exploitation of all creative people.

The Indian Copyright Act, 1957 in clear term gives ownership of copyright in a musical work to the composer by making him the first owner of his work.⁴ The Act defines composer⁵ of a work as the person who actually composes a musical work. This means that the law recognizes the right of authorship only of a person responsible for planning, arranging and composing a work. The fact that he has utilised the materials procured by others is not relevant, if he has not copied it.

It seems that the Act gives sweeping rights to authors,⁶ but in fact adding proviso to these rights, the authors are greatly restrained in the exploitation of these rights by making the employer the *first owner of copyright* in a work if executed in the course of his employment or under 'contract of service'. A person is presumed to work in the course of his employment if he creates a work in the performance of a duty under his 'contract of service'.⁷ A person is under contract of service if he is employed by another to do work for him under his control, so that he can direct the time when the work is to be done, direct the means to be adopted to do the work and control the method in which the work is to be carried on.

The Indian Copyright Act, 1957 provides that copyright shall, subject to the provisions of this section and other provisions of the Act, subsist throughout India in the following classes of work, that is to say :

- (a) original literary, dramatic, musical and artistic works;
- (b) cinematograph films; and
- (c) records.⁸

The plain reading of this section implies that the protection is available to the literary, dramatic, artistic or musical works provided they are original. The word 'original' is not confined to a field which has not been explored hitherto by any other person, either in respect to ideas or material comprised therein.⁹ The copyright law is not concerned with originality of ideas but with the expression of thought in print or writing. The originality which is required relates to the expression of thought, but the Act does not require that the expression must be in an original or novel form, but only that the work must not be copied from another work and that it should originate from the author.

Thus to be entitled to copyright, the paramount element of *novelty* and *originality* must be present in the musical work.¹⁰ The protection of copyright can not be availed if these are only variations from or additions to an already existing musical work nor is this available if the old tunes are made use of by a person.¹¹ The musical piece to be original need not essentially be a new creation, an absolutely new arrangement of an old piece may be subject fit for protection under the copyright laws. In case where the musical work is more than a slavish copy with changes, the new composition must clearly show exercise of creative genius as distinguished from a mere application of mechanical skill.¹² Unfortunately, in the sphere of popular music the concept has been narrowed to include slight variation in rhythm or harmony of accent and tempo to give it the colour of originality.¹³

The Indian Copyright Act designates musical work as any combination of melody and harmony or either of them, printed reduced to writing or otherwise graphically produced or reproduced.¹⁴ Thus the plain reading of this section shows that the musical work in printed, written or graphic representation only are covered and does not afford protection to the work in its acoustic representation. Like literary or dramatic work, copyright to musical work does not depend on its merit. Mere collection of notes constituting composition is a good subject matter and can afford protection to such a composer. The question of infringement can arise only if to an average person the two melodies sound the same. The lack of musical merit has never been and can never be an impediment under copyright law.¹⁵

In India, the best medium for dissemination of music has been the Indian cinema, since music forms an essential and integral part of this medium of mass entertainment. The Indian Copyright Act makes the composer the author, consequently the owner of the copyright in his composition¹⁶ and the producer or owner of the film on its completion as its author or owner.¹⁷ According to

Indian Act, “the copyright in a cinematographic film or record 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 record is made”.¹⁸ This coupled with other provisions open up possibilities of multiple rights in the inputs that have gone into giving the film its final form by showering an exclusive right on the author of a musical work an exclusive right to perform the work in public.¹⁹ Unfortunately, the Act also showers the owner of the film with the right to cause the film to be seen and heard in public.²⁰

This right given to the composers for public performance cannot possibly be exploited by them since the film maker who has a conflicting right of public dissemination always binds them by ‘contract of service’ rather than ‘contract for service’.

This conflict of interest between Indian Performing Rights Society and the Exhibitors Association of India came before the Supreme Court of India in 1977.²¹ In 1969, the IPRS imposed fees for public performance of composers of musical works. Copyright Board having jurisdiction under section 35 of the Act held that the composers of music retained copyright in musical works which formed part of the sound track of the film if these works were written and the composers had not validly transferred these rights to the owners of the film.²² The High Court while reversing this decision of the Copyright Board held that the producer of the film becomes the first owner of copyright where there is valuable consideration. Composer can claim copyright only if the producer by agreement in writing and signed by him allows the composer to retain the copyright in music which forms part of the film. Thus, the High Court made it amply clear that the composers of music had no copyright in such musical works which could be validly assigned to the Performing Rights Society.

The Supreme Court in appeal took up two questions:

(a) Are existing and future rights of composers entitled to assignment under sections 18 and 19 of the Copyright Act, 1957?

(b) Can the same rights be defeated by a film producer with the help of section 17 of the Copyright Act, 1957.

The Supreme Court while reversing the ruling of the High Court on the question of composers’ rights of assignment held that the composers and lyricist have a right of assignment present and future by virtue of sections 18 and 19 of the Indian Copyright Act.²³ On the second question the court accepted the possibility of conflict of interests between the two. The court, in order to settle the dispute, invoked the principle of “harmonious and rational construction” and negated the idea of “mechanical construction”. The court observed:

According to proviso [b] to section 17, when a cinematograph film producer commissions a composer of music or a lyricist for reward or valuable consideration for purpose of making his cinematograph film or for composing music or lyrics i.e. the sounds for incorporation or absorption in the sound track associated with the film, he becomes the first owner of the copyright therein and no copyright subsists in the composer of the lyric or music so composed, unless there is a contract between the composer on the one hand, and the producer of the film on the other.

From the above, it is clear that the court held that the rights of the composers and lyricists can be defeated by the film producers by taking the help of section 17 of the Copyright Act. This ruling of the Supreme Court somehow overrides the views expressed in 1968 by Andhra Judge²⁴ who had held that an author engaged on a fixed remuneration is not the servant of the publisher and unless a contrary view is expressed in the contract, the copyright vests in the author.

The Andhra decision shows that to decide the question of copyright when section 17 of the Act is involved, the court must proceed with abundant caution before denying the rights to the authors. Unfortunately, the Supreme Court did not go in for close analysis which would have revealed many more conflicts.

It could have found that the Act clearly defines and allows multiple rights unaltered by assumed rights of the film producer. The scrutiny would have revealed the clear protection afforded by the Act to the combination of melody and harmony and not the material on which it is printed or graphically reduced. The Supreme Court's decision has, therefore, by not putting emphasis on terms of contract and findings on the basis of evidence, continued the uncertainty which allows the continued exploitation of composers and lyricists by owners of the copyright in films of which music is an essential part.

NOTES AND REFERENCES

- *- Reader, Law Centre-II, Faculty of Law, University of Delhi, Delhi.
1. Adaptation in respect of musical work under section 2(a) of the COPYRIGHT ACT means "any arrangement or transcription of the work".
 2. *R.G. Anand v. Delux Films*, AIR 1978 SC 1613.
 3. Kundumia Malai Rock Inscriptions dating from about seventh century.
 4. Section 17 of COPYRIGHT ACT, 1957.
 5. Section 2(d) of COPYRIGHT ACT, 1957.
 6. Section 17 of COPYRIGHT ACT, 1957.
 7. *A.R. Sabha v. Arvind Niketan*, (1979) ALJ 1220.
 8. Section 13 of COPYRIGHT ACT, 1957.

9. *Errabhadra Rao v. B.N. Sharma*, AIR 1960 A.P. 415.
10. *University of London Press v. University Tutorial Press Ltd.*, [1916] 2 Ch. 601; *Govindan v. Gopal Krishnan*, AIR 1955 Mad 391; *R.G. Anand v. Delux Films*, AIR 1978 SC 1613; *N.T. Ragunathan v. All India Radio*, AIR 1971 Bom 48.
11. *Nordon v. Oliver Dickson & Co.* (1936) US PQ 183.
12. *Cooper v. James*, 213 Fed 871.
13. *Arustein v. Edward Music Corporation* (1935) 27 US PQ 127.
14. *Hirsh v. Paramount Pictures Inc.* (1937) 32 US PQ 233. See also section 2 (p) of COPYRIGHT ACT, 1957.
15. *Hein v. Haris*, 175 Fed 875.
16. Section 2 (d) (ii) of COPYRIGHT ACT, 1957.
17. Section 2 (d) (v) of COPYRIGHT ACT, 1957.
18. Section 13 (iv) of COPYRIGHT ACT, 1957.
19. Section 14 (i) of COPYRIGHT ACT, 1957.
20. Section 14(1) (c) (ii) of COPYRIGHT ACT, 1957.
21. *Indian Performing Rights Society v. E.I.M.P. Association*, AIR 1977 SC 1443.
22. Section 18 of COPYRIGHT ACT, 1957.
23. *Indian Performing Rights Society v. E.I.M.P. Association*, *supra* n. 21.
24. *Dhankappan v. Vidyardambhan Press & Book Depot [P] Ltd.*, (1968) 2 Andh LT 71.