



A CRITICAL ANALYSIS OF DIGITAL SAMPLING OF MUSIC AND THE NEED FOR A CHANGE IN COPYRIGHT LAW IN INDIA

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Introduction

The Copyright Law conceives the notion of providing protection in case of any infringement. Copyright Law is the protection of a property and is a property right. The essential objective behind this is to promote and encourage novelty, innovation by providing economic incentive to the original owner. There are however, circumstances wherein the opposite party opts for the defence of Doctrine of Fair Use and the De Minimis Principle. The Doctrine of Fair Dealing, however, is embedded in Section 52 of the Indian Copyright Act, 1957 and it essentially permits reproduction of the copyrighted work in question only under certain circumstances. A few factors to be taken into consideration for fair dealing are; the amount and substantiality of the portion used regarding the copyrighted work which means there must be substantial infringement; Purpose, Character and Commercial nature of the fair dealing; effects on the potential market and the likelihood of competition. De Minimis Principle is where the reproduced work is extremely minimal and negligible in nature so far as it to be disregarded. This principle emphasizes that if

the reproduced work in question is trivial in nature, then it would not constitute as a copyright infringement.

There are various pertinent concepts in copyright law which are under constant deliberation and scrutiny. One such concept is the existence of digital sampling of music. Digital Sampling refers to the snippets of music that are borrowed and incorporated into another music in order to enhance the quality of the music. The concept of digital sampling allows the artists to sample pre-recorded songs which brings about the question of copyright infringement. The digital music technology is advanced and any sound which is part of the music or in general, could be captured in a digital code. Once captured the user possesses power to modify, reverse and fine tune the sound.¹ This ensures that there exists little difference between the digitised sample and the original sound thereby giving rise to ambiguity. This technology allows the artist to copy a part of the recorded sound and to combine it in order to create new work.

The existence of digital sampling could be traced back to the period between 1980's and 1990's² where a samples of a sound recording such as a drum beat, piano was incorporated with another sound recording. This enabled the musicians to digitise the samples with ease with the advent of technology. The digital sampling concept reduces the cost significantly in terms of hiring a drummer or any other artist and recording that portion of the music in order to incorporate the same into another music. A sample is essentially a base sound that is supplemented by the

¹ Mathews, *Max v. The Technology of Computer Music*, Cambridge, MA, M.I.T. Press, 1989

² Tyrone McKenna, *Where Digital Music Technology and Law Collide – Contemporary Issues of Digital*

Sampling, Appropriation and Copyright Law, Queens University, Belfast, JILT 2000 (1) found at - https://text.www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_1/mckenna/#fnb4



musician in order to acquire the desired sound.³ In the digital process, the sound is sliced into different samples, each being expressed as a number thereby rendering it music sampling.⁴

Sampling was rendered possible only through the emergence of digital sound technology in the 1960's and 1970's and this concept has developed to such an extent that any person who possesses a digital synthesizer could capture all or a part of the original recording of the copyright holder, alter its rhythm, pitch or tone. Hence, could incorporate the altered form in a subsequent recording. This could enable the artists to create new songs by merely fine tuning the previous recording of the original copyright holder by combining elements of the previous recording. It is a digital copy which could be reused musically and established as a base for a new song. It is the borrowing of a part of sound recording and the subsequent incorporations of that sound recording into a new recording.⁵ It is pertinent to note that a part of the song and the elements contained in the original music version such as tone sequences, guitar riffs, base lines and other individual notes could be sampled.

Sampling is the taking of small portion of sounds in a sound recording and using that portion in another recording. It presents questions as to whether the portion taken is sufficiently original and substantial to be protectable in itself and whether the portion, when reproduced in another recording, has been copied in a way that fulfils the

applicable criteria as far as infringement is concerned. Sampling Recordings are recordings effected by arranging, developing and extending a fragment of pre-existing recording to make a new presentation by computer processes or through digital means, where human or humans have contributed to the selection of the steps taken in the process of evolving the new pattern. In the famous case of *Newton v. Diamond*⁶, Schroeder CJ stated in the judgment that 'sampling entails the incorporation of short segments of prior sound recordings into new recordings.' It is pertinent to note that sampling is incorporated from a pre-existing recording. This is of primary importance as musical remixes and mashups would encounter legal implications when a whole or part of the music is incorporated into a different music.

Due to the improvement in digital technology in the 21st century, artists have opted to find creative ways to incorporate the sampling in their music and present it as new music recording. There always exists certain ambiguity as to whether there is a difference between the original music recording and the sampled music recording and if so, whether the sampled work would amount to infringement. The ambiguity exists because the original music holder's argument would be that due to the reproduction of the copyrighted work, it would constitute as a copyright infringement but on the other hand, a sampler could opt for the defense of fair use and argue that it was carried out for a creative purpose.

STATEMENT OF PROBLEM

³ Dupler, *Digital Sampling: Is It Theft?*, Billboard, Aug. 2, 1986, pp. 1

⁴ Franckling, *Digital Technology is Changing the Scope of Music*, UPI, June 6, 1986

⁵ Judith Greenberg Finell, *How a Musicologist Views Digital Sampling*

Issues, N.Y. LU., May 22, 1992, n.3.

⁶ 349 F 3d 591, 596 (9th Cir, 2003)



There is no legislation as such for the dealing of digital sampling of music in the Indian scenario. In furtherance of the Copyright Amendment in 2012, a provision of Section 31C of Copyright Act, 1957 deals with statutory license for cover versions of sound recordings but does not deal with digital sampling of music specifically. As a result, there exists a lacunae in the Copyright Act, 1957 regarding not including digital sampling of music in the legislation.

OBJECTIVES

- To undertake research in the area of digital sampling of music and point out the lacunae that exists in the Copyright Act, 1957 with respect to failure to incorporate digital sampling of music
- To compare the position with foreign nations such as United States, U.K and other significant countries that deal with digital sampling of music
- To attempt to portray the struggles that the artists face in obtaining permission from the owners of digital sampling for the incorporation of the same in their music.

IMPORTANCE OF THE STUDY

The advancements in this age of digital technology have been rapid especially in the music industry all over the world. There exists a mixture of creativity and fame in the music industry and due to the off-late increase in popularity of remixes and mashups, the question of copyright infringement comes into the picture. It is pertinent that the copyright of the original music holder is protected and at the same time, creativity and innovation is promoted in the field of music. The concept of digital sampling however, is a grey area and it is

pertinent to understand legal implications as well as economic implications of digital sampling. It is important to understand the concept of digital sampling not only from the owner's perspective but also from the sampler's perspective in order to ensure there is clarity regarding the copyright protection and the sampling of the said copyrighted work. Copyright Law is a vast legal field and digital sampling, only a subset under the same. However, this law attempts to ensure that the rights of the person is provided and no infringement takes place. Hence, a detailed analysis is required as to how the concept of digital sampling works and what its various implications are.

RESEARCH METHODOLOGY

The research methodology undertaken in this study is doctrinal method of research on the basis of literature reviews. An attempt is made to analyse the concept of digital sampling and its lacunae through various literature reviews, articles, books and other sources of research. This study will compare the legislations of other countries with the Copyright Act, 1957 with regard to digital sampling and attempt to throw light on the same.

RESEARCH QUESTIONS

1. Whether there is a need for separate legislation for Digital Sampling?
2. Whether the issues of Digital Sampling have been dealt with under the present international regime?
3. What are the struggles that the artists undergoes in dealing with Digital Sampling?



HISTORICAL AND CONCEPTUAL ANALYSIS OF DIGITAL SAMPLING

INDIAN PERSPECTIVE

The Copyright Act came into force in 1957 and the most significant amendment is the Copyright Amendment Act, 2012. The reason behind the introduction of this amendment is to bring the same under the purview of WIPO Copyright Treaty (1996) and WIPO Performances and Phonogram Treaty (WPPT). This would enable the protection of music and the film industry and to protect the interest and rights of the authors. Prior to the Copyright Act of 1957, the copyright law in the country was governed by the Copyright Act of 1914, which was a subset of British Copyright Act, 1911. The prevalent laws were borrowed from the U.K. Copyright Law⁷. Various countries provide various contexts to the concept of musical works.

In the Copyright Act of 1957, it is stated that there is copyright protection to various works which includes original literary, dramatic, artistic and musical works, cinematographic films, and sound recordings⁸. The Indian Copyright also grants exclusive rights to the copyright holder which authorises the original copyright holder to reproduce, distribute, perform and translate the work among the many rights⁹. It is important to

note that the author or the creator of the work is the first owner of copyright¹⁰.

DEFINITIONS

Musical work means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with music¹¹. The U.K. Copyright, Designs and Patents Act, 1988 defines musical work as a work consisting of music exclusive or any words or action intended to be sung, spoken or performed with music¹². The legislation in the U.S. defines musical work as including any accompanying words as among the words of authorship protected under the Act¹³.

The Berne Convention for the Protection of Literary and Artistic Works recognises musical work as a subject matter of copyright protection and deals with musical compositions with or without words¹⁴. Furthermore, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also provides for protection of musical works under the Copyright Law. Article 9 of the TRIPS directs the members of TRIPS to comply with the provisions of the Berne Convention¹⁵. Advanced Law Lexicon has also defined musical work as the combination of any melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced and further states that the term

⁷ <http://copyright.gov.in/>

⁸ Section 13(1) of the Copyright Act, 1957

⁹ Section 14 of the Copyright Act, 1957

¹⁰ Section 17 of the Copyright Act, 1957

¹¹ Section 2(p) of the Copyright Act, 1957

¹² Section 3(1) of the U.K. Copyright, Designs and Patents Act, 1988

¹³ Section 102(a)(2) of the U.S. Copyright Act, 1976

¹⁴ Section 3(1) of the Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971

¹⁵ http://www.wto.org/english/docs_e/legal_e/27-trips.pdf, Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994



'musical' pertains to music or the performance of music¹⁶.

ANALYSIS OF COPYRIGHT ACT, 1957

It is pertinent to note that the Indian Copyright Act, 1957 provides protection to the form and substance of the copyrighted work. This essentially means that the expression of the idea and not the mere idea is protected under the Copyright Act, 1957. In the leading judgment of *Eastern Book Company vs. D.B. Modak*¹⁷, it emphasised on the originality of the work and whether there exists substantial similarities between the original work and the infringed work. The idea expression dichotomy was enunciated in the said case stating that only the expression of the idea could be protected under Law of Copyright. The Indian Supreme Court, while doing so, followed the reasoning given in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*¹⁸. It was stated in this case that there must be reasonable skill and judgment drawing a middle ground between modicum of creativity and the sweat of brow doctrine.¹⁹ The Court further emphasised that skill is the use of one's knowledge, developed attitude and ability in producing the work and judgment is the use of one's capacity for ability to form an opinion or comparing different options in producing the work. It is stated that it must be more than a mere copy of the work.²⁰

The Copyright Act, 1957 states that copyright subsists in original literary, artistic, dramatic, musical works²¹. This indicates that the work that is created must be original in order to claim copyright. In the instant scenario, the musician must prove that the music is original and there exists substantial similarities between the original music and the digitally sampled music.

It is pertinent to note that in order for copyright to subsist in a musical work, it has to fulfil certain conditions such as it must be a musical work; secondly, there must be originality which means its originally created by the author and not copied with minimal changes and lastly, it must amount to works which are the compositions and the pieces of the music must be artistically set together. In the case of infringement, the Indian judiciary system uses a two-fold test to determine whether the rights of the copyright holder is affected. Firstly, the substantial similarity to be considered between the original and the infringing works and secondly, the challenged work must be a copy of the original work²².

The Indian scenario presents a bleak picture as copyright infringement in the form of unauthorized derivative work or reproduction of musical work is frequent²³. It is also understood that most popular Indian film songs are generally rip-offs from either Hollywood or from any other regional or literal work²⁴. The Indian judicial system is

¹⁶ Section 3(c) of the Musical (Summary Proceedings) UK Copyright Act, 1902; *Strouds judicial dictionary of words and phrases* (2000, p. 1653)

¹⁷ *Eastern Book Company v. D.B. Modak* AIR 2008 SC 809

¹⁸ (2004) 1 SCR 339

¹⁹ *Eastern Book Company*, supra note 18

²⁰ *Ibid*

²¹ S. 13 of the Copyright Act, 1957

²² K. M. Gopakumar & V. K. Unni, *Perspectives on Copyright: The 'Karishma' Controversy*, 38 ECON. & POL. WKLY. 2935 (2003)

²³ Atul Prakash, *So, Is it The Real Thing?*, TIMES OF INDIA, Apr. 30, 2005

²⁴ *Id*



silent on the concept of digital sampling of music and the Copyright Act, 1956 does not specifically account for music sampling and its legal implications. The public is generally unaware of the repercussions of such copyright infringement and the Indian Courts fail to enforce the copyright laws in an effective manner²⁵.

In the furtherance of promotion of copyright law in the country, The Copyright (Amendment) Bill was introduced in 2010 but it was subjected to heavy criticism especially by the producers²⁶. Due to backlash by many persons, producers in particular, there was the introduction of Copyright (Amendment) Act, 2012²⁷. It was stated in the amendment to Section 18 of the Copyright Act, 1957 that the author of the literary or musical work included in the cinematographic film or in the form of sound recording shall not assign or waive the right to receive royalty which must be shared on an equal basis with the assignee of the copyright, except to the legal heirs of the author. Also in the amendment, Section 31C (3) which deals with statutory license for cover version of sound recordings, it is stated that the person making such sound recording shall not make any alteration in the literary or musical work without the consent of the owner or which is not technically necessary for the purpose of the sound recording²⁸. Despite this amendment which provides equal rights to the lyricist and composer, the

Indian government provides the freedom to the entertainment industry to carry out their business in any manner as they please and hence, the profits rise but effectively hampers the government to monitor the regulations of the Intellectual Property Rights²⁹ especially in the music industry.

The trouble lies with courts' significant backlog of cases and, more importantly, with the lack of pertinence given to copyright and other intellectual property cases due to various civil, criminal and property related matters. Further, Indian film producers and music directors have taken advantage of Bollywood and other regional Indian film industry's relative anonymity for years by implementing the idea from foreign copyrighted works and copying it in their works. With the advent of globalization, the original copyright owners as well as the listeners of the unauthorized derivative works can make connections with the original and the copy and be able to distinguish the two³⁰.

According to the copyright law and the various judicial precedents laid down by the Indian Courts, for a work to be copyrightable, it must require two elements. Firstly, originality which means that the work must be original and must not be copied and secondly, the modicum of creativity where there must be a minimal degree of creativity so as to distinguish from other works.

²⁵ Anuradha Moulee & Chris Bevitt, *Slumdogs & Copycats*, SHELSTON IP, Apr. 1, 2009, available at <http://www.shelstonip.com/news-story.asp?m=3&y=2009&nsild=93>

²⁶ Avinash Celestine, *Lyricists, Composers Get a Boost in Royalty Battle*, ECON. TIMES, Nov. 26, 2010, <http://articles.economictimes.indiatimes.com/2010-11-26/news/27592919> 1 lyricists-royalties-composers

²⁷ <https://www.wipo.int/edocs/lexdocs/laws/p/4>

²⁸ Section 31C (3) of the Indian Copyright Act, 1957

²⁹ *Partners in Plagiarism*, Fin. Express (Aug. 10, 2007),

<http://www.financialexpress.com/news/partners-in-plagiarism/209513/>

³⁰ Harini Ganesh, *The Need for Originality: Music Infringement in India*, 11 J. Marshall Rev. Intell. Prop. L. [i] (2011)



In the event of substantial similarity, the Court in the case of *R.G. Anand v. Delux Films*³¹ laid down various principles in order to determine the violation of copyright. One of the principles is that an idea or a theme cannot give rise to a copyright claim but only a form and an expression of the same idea could be copyrighted.³² Another fundamental principle enunciated in this leading judgment is the fundamental similarities. This states that the infringement must be a substantial, fundamental in similarities and a material one in order to claim copyright violation.³³

Music is a unique genre of copyright with regard to the idea-expression dichotomy. This states that the idea-expression dichotomy holds that only elements of original expression, separate from the basic ideas underlying the expression, are entitled to copyright protection. The idea cannot be copyrighted but its expression in the form of literal work or a performance can be protected from copyright infringement.³⁴ The elements of musical works are not easily separated into those constituting original expression and those that are part of the basic, mechanical ideas.³⁵ Each musical work comprises of many elements. The sequencing of notes, chords, the harmony, melody, beat, tempo, composition, all work together to create a musical expression which is subjected to copyright protection.³⁶ Individually, each of these components constitutes an unoriginal, un-copyrightable idea. Removing the individual ideas would

annul the musical work as a whole, thereby rendering it not copyrightable³⁷.

The opinion of the public is another such principle that determines whether the copyright violation has taken place or not. There must be sufficient objective similarity between the two works for it to be constituted as copyright infringement³⁸. In the event of digital sampling, since there already exists a high degree of similarity, the only question for consideration must be whether the similarity is substantial and trivial and ideally, if an average listener of the music cannot recognise the appropriation in the sampled music, it would be considered that there is no infringement. The quality of the copied work and not the quantity would be taken into consideration which would determine the substantial infringement.

The Indian Courts follow the ordinary observer test which supplies a framework for assessing substantial similarity. Under this criteria, the defendant's work is considered substantially similar to the copyrighted work if a prudent person of reasonable attentiveness, would upon listening to both works would arrive at the conclusion that the defendant has violated the copyright of the plaintiff's protected work.³⁹

In the case of *Indian Performing Right Society Ltd. v. Eastern Indian Motion Pictures Assn.*⁴⁰, it was held that,

“The creative intelligence of a man is displayed in multiform ways of aesthetic

³¹ *R.G. Anand v. Delux Films* (1978) 4 SCC 118

³² *Id.*, at para 52

³³ *Id.*, at para 20

³⁴ Nehaluddin Ahmad; Saurabh Chaturvedi, *Originality Requirement and Copyright Regime of Music: A Comparative Overview of Indian Perspective*, 22 INFO. & COMM. TECH. L. 132 (2013).

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ Halsbury's Laws of England, (4th ed. 2006), Vol. 9(2), p. 316

³⁹ *Ibid*

⁴⁰ AIR 1977 SC 1443



*expression but it often happens that economic systems so operate that the priceless divinity which we call artistic or literary creativity in man is exploited and masters, whose works are invaluable, are victims of piffling payments.*⁴¹”

In another case of *Rupendra Kashyap v. Jivan Publishing House*⁴², the Court held that the word ‘original’ in Section 13 of the Copyright Act, 1957 does not imply originality of ideas but merely means that the work in question must not be copied from another work and the originality must arise out of the skill of the author. Original simply means that the work has independently been created by the author, and has not been copied from someone else's work.⁴³ In *Errabhrarao v. B.N. Sharma*⁴⁴, the Court stated that originality must exist in the expression of an idea and that the work created must not imitate another work but must be an original.⁴⁵ Emphasis is also given on skill, labour and judgment for proper utilisation of the raw materials or the ingredients required in the making of the product.⁴⁶ In a United States case of *Frederick Emerson v. Chas Davies*⁴⁷, there was a distinction made between an original composition of work and pirated version of the same. Firstly, creation of any new plan and compilation of material in furtherance of the same plan would entitle copyright protection to the author of the work; secondly, a work created using skill, labour and judgment would be entitled to copyright protection unless it is a direct copy of another

work and finally, in order to show copyright infringement, it must be shown that there is substantial copying done.⁴⁸

In the case of *Ram Sampath v. Rajesh Roshan*⁴⁹, the Court stated that in order to find out whether a copy of a portion of musical work into the latter musical work would amount to copyright infringement, few factors must be taken into consideration.⁵⁰ Firstly, the identification of similarities and differences between the two works. Secondly, to determine whether the latter musical work would meaningfully exist without the copied portion. The Court further emphasizes that the copied portion must be an essential part of the musical work. The music, irrespective of its length, would possess a ‘catch part’ to which a listener is immediately hooked on to. It is necessary to look for the ‘catch part’. If the ‘catch part’, however small, is copied, the whole of the latter work would amount to copyright infringement.⁵¹ The Court in this case, also clarified that there are other factors that may be considered too depending on the facts and circumstances of each case.⁵²

In another case of *India T.V. Independent News Service v. Yashraj Films Pvt Ltd*⁵³, the Delhi High Court held that minimal amount of song usage in a T.V. programme does not amount to copyright infringement. The Division Bench of the High Court stated that the same amounts to fair use which is a defence under Section 52 of the Copyright Act, 1957 and de minimis, which means the

⁴¹ Id., at para 23

⁴² (1996) PTC 439 (Del)

⁴³ Id., at para 7

⁴⁴ AIR 1960 AP 415

⁴⁵ Id., at para 10

⁴⁶ Ibid

⁴⁷ Story's United States Rep. Vol. 3 p. 768

⁴⁸ Id

⁴⁹ 2009 (40) PTC 78 (Bom.)

⁵⁰ Id., at ¶16

⁵¹ Ibid

⁵² Ibid

⁵³ 2013 (53) PTC 586 (Del)



usage is insignificant when compared to the whole programme.⁵⁴ In the case of *Supercassette Industries v. Nirulas Corner House (P) Ltd.*⁵⁵, the plaintiff alleged copyright infringement on the grounds that few audio clippings of songs in which they own copyright were played on a television in an enclosed room of the defendant's hotel. The Court rejected the defence of fair dealing.⁵⁶

It is pertinent to note that fair use and fair dealing, while used interchangeably, is distinctive from each other. The World Intellectual Property Organisation (WIPO) has laid down criteria which distinguishes fair use from fair dealing.⁵⁷ In order to determine whether the work is fair use or not, there are certain factors that must be taken into consideration such as purpose and character of the use whether it is for commercial purpose or educational purpose; secondly, nature of the copyrighted work; amount and substantiality of the portion used in relation to the copyrighted work; and lastly, the effect it has on the market of the copyrighted work.⁵⁸ However, in the case of fair dealing, the criteria laid down are slightly different such as whether the work has been published or not; quantity/quality of the unauthorized derivative use; motive of the user and the consequences of dealing; the impact of human rights and the public interest; and whether there are any less

intrusive measures available to ensure that no copyright infringement takes place⁵⁹.

Countries like India, U.K, Australia follow fair dealing concept whereas countries like U.S. follow the fair use doctrine. The Australian Government has distinguished between the concept of fair use and fair dealing.⁶⁰ It is stated that under fair use, the types of uses such as review or criticism, research, parody are merely illustrative in nature and fair use only deals with the fairness of the use of the copyrighted work.⁶¹ On the other hand, the fair dealing exception considers two factors; firstly, whether it is for the purposes mentioned in the copyright Act and secondly, if so, is the use fair considering the fairness factors.⁶² It is pertinent to note that the answer to both the aforementioned questions must be affirmative in order to claim the exception of fair dealing hence, making the fair dealing exception more restrictive than fair use defence. The Indian Copyright Act, 1957 does not distinguish between fair use and fair dealing instead lays down criteria as to what constitutes as fair dealing.

INTERNATIONAL PERSPECTIVES ON DIGITAL SAMPLING

The judicial system in India may not have provided sufficient clarity regarding digital sampling of music but there are various countries that have attempted to emphasize on music sampling through various

⁵⁴ Id., at para 60

⁵⁵ 2009 (40) PTC 78 (Bom.) para 16 at p. 86.

⁵⁶ Ibid

⁵⁷ Dr. Henning Grosse Ruse-Khan, *Fair Use, Fair Dealing and Other Open-Ended Exceptions, The Application of the 3-Step Test*, Max Planck Institute, Munich, Germany, 2nd November, 2009, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130081

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Copyright and the Digital Economy (ALRC Report 122), December 2nd, 2013, <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/6-the-new-fair-dealing-exception/differences-between-new-fair-dealing-and-fair-use/>

⁶¹ Ibid

⁶² Ibid



precedents and guidelines. Countries like U.S., U.K., Netherlands and Canada have thrown light upon the implications of unauthorized derivative use. The international position however, may be slightly better off than India as little has been done to clarify the position of digital sampling of music. In the international sphere, the record companies have chosen to self-regulate and there is a careful screening of all albums released to ensure that all the music samples are cleared⁶³. Since there is no specific legislation governing unauthorized derivative use, there is always fear of infringement of the music sampling of the original copyright holder and the samplers would be in fear because of the litigation proceedings.

Conclusion and Suggestions

The concept of music sampling is vast and has been covered in most of the countries. However, due to the absence of legislation or a concrete provision in the Indian Copyright Act, 1957 or ambiguity in the international scenario, the music industry faces a lot of problems like the problem of licensing, goodwill rights, economic rights, moral rights of the artists. After the analysis of the precedents and statutes, it appears that there is no sure shot solution to the problem of music sampling. However, various attempts have been made to address the same with little or no progress.

In the Indian context, there have been certain precedents which have dealt with such as modicum of creativity, doctrine of sweat and brow, de minimis principle, idea expression dichotomy in the context of music sampling.

The Indian Courts have mainly accepted the de minimis principle and ordinary observer test with reference to digital sampling of music. Although there has been no clarity, lot of principles came to fore with no avail to digital sampling. The owner of the original sound recording must show ownership of the same before the Court to establish copyright infringement on part of the sampler and according to the Copyright Act, 1957, cover versions of the original musical work does not amount to copyright infringement.

In U.S., the precedent established was that an artist must license the sample regardless of how minimal or trivial it is to ensure that there is no violation of copyright. The conflict within the circuits of U.S. as aforementioned, portrays the chaos in the concept of music sampling and whether de minimis principle must be used or not. In Germany, the European Court of Justice has been dealing with the case of music sampling from the past 20 years and yet hasn't been able to come to a conclusion. In U.K., it is compulsory for the artist to obtain license for the sampling which would be incorporated into a new musical work, from the original copyright holder. Unfortunately, there haven't been much precedents in the U.K. hence, reliance has been placed on U.S. precedents and other precedents to determine whether music sampling can be considered as copyright infringement.

The first research question is whether there is a need for separate legislation for digital sampling of music. It was found that there is no such need for a separate legislation however, an amendment is required in Section 31C (3) of the Indian Copyright Act,

⁶³ Stan Soocher, *As Sampling Suits Proliferate, Legal Guidelines Are Emerging*, N.Y.L.J., May 1, 1992, p. 5



1957 to include music sampling. The second research question is whether the issues of digital sampling of music has been dealt with under the present international regime. It was found that it has been dealt with but not in a precise manner. The Courts have set precedents but due to the ambiguous position in the copyright law, the sampler and the original artist are at a disadvantage. The third research question is what the struggles are that an artist undergoes while dealing with digital sampling. All these research questions have been answered in Chapter 4 of this dissertation where the problems of the sampler and original artist are highlighted through precedents.

The proposal is made for amending Section 31C (3) of the Copyright Act, 1957 to include music sampling as part of the Indian Copyright Law. The amended part is the definition of music sampling which states that:

Sampling of music is defined to include the act of any person taking a sample of a sound recording wherein, the sound recording is one that is the original work of any person or an artist who is an individual, with the person or the artist being the original copyright holder, and incorporating the same into a new sound recording, without the consent of such original copyright holder.

(Provided that the economic and moral rights of the original copyright holder are not affected severely)

Explanation: 1. For the purposes of this clause, the original copyright holder must be able to prove ownership of the sound recording in order to claim copyright infringement.

Explanation: 2. Sampler means any person, who is either an independent artist or an artist supported by a record label.

Explanation: 3. For the purposes of this clause, sample means and includes a small portion of a sound recording taken from the original copyright holder.

Explanation: 4. The punishment for violation of copyright of the original artist is recommended as under

i. Account of profit where the sampler would be obligated to return the profits obtained through the sampled recording to the original artist.

ii. Anticipatory Pillar Order where the copy of the sampled sound recording would be seized and damages to be paid according to the substantiality of the copyright infringement.

Note: This is subject to the discretion of the Court and as per the provision of Section 55 of the Copyright Act, 1957.

Through this amendment, there is an attempt to ensure that there is a balance maintained between sampling artists and the original artists with respect to the moral rights, economic rights and the incentive to produce new music and promote creativity in the field of music.
