
TRANSFORMATIVE USE IN MUSIC: WHY INDIAN COPYRIGHT LAW SHOULD RESIST THE U.S FAIR USE MODEL

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ABSTRACT

Today, the issue of transformative use is the talk of the town when it comes to music. More specifically, in instances where existing works are adapted into new creations in the form of remixes, mash-ups, samples, and parodies. The discussion on transformative use in the musical sphere raises fundamental questions on whether Indian copyright law should evolve towards a more flexible, but at the same time, unpredictable U.S. model of transformative use or stick to its current approach to providing limited exceptions to the rule? This article supports the former position, with a suggestion that India should not blindly import the U.S. fair use transformative use policy. This is because it could lead to uncertainty within the law, placing too much reliance on the subjective judgment of users, platforms, and the court while leaving little to the imagination of artists. In any event, India's copyright law already provides for certain public interest-based exceptions that include criticism, review, education, and research. Therefore, there is no need to expand the scope of exceptions through a more flexible and unpredictable transformative use.

Key Words: - *Transformative use, fair use, Music, Copyright law, Author's Rights.*

INTRODUCTION

Transformative use is today a critical concept in music copyright. Music is not simply reproduced, it is remixed and resampled. And with new technologies coming on board, artists are experimenting in new ways. From AI-generated music to the much more familiar practice of cover songs, the possibilities have increased exponentially. And as they have, questions about copyright have arisen. While some might argue that courts in countries with rich heritage of music such as India should follow the fair use model of the US, the problem is that our law is differently constituted. Section 14 of the Copyright Act defines the exclusive rights of a copyright owner, Section 51 describes what amounts to infringement of those rights, and it is only after these that Section 52 enumerates the specific situations where such infringement is allowed. Hence, transformative uses are just outside the reach of Section 14 itself. It is only after the Court has determined that there is no infringement of rights under Section 14 that questions of Section 52 may even arise, and whether the defendant's work is transformative is irrelevant to that inquiry.

Open-ended balancing is the hallmark of the U.S. fair use doctrine as illustrated by *Campbell v. Acuff-Rose*¹, which established that even where work is copied in full, the fact of transformation can weigh heavily in favor of a finding of fair use. In contrast, the approach of the Delhi High Court in *Syndicate of the Press of the University of Cambridge v. B.D. Bhandari*², was quite different, treating the plaintiff's guidebook to Indian and Pakistani architecture as an independent work of literature because it had a different purpose and different character from plaintiff's protected book. The Madras High Court took a similarly binary approach in *E.M. Forster v. A.N. Parasuram*³, finding that a student guide to the novelist's works did not infringe because it did not substantially incorporate the novelist's expression. These cases are noteworthy not because they adopt the U.S. fair use doctrine, but rather because they reflect an understanding on the part of Indian courts of the concept of different purpose and different character, quite apart from the influence of the transnational discussion regarding a transformation test.

¹ 510 U.S 569 (1994)

²2011 SCC OnLine Del 3215

³ AIR 1964 Madras 331

However, music, even more than other forms of intellectual property, is a difficult field to extend the principle of fair dealing to. In *Super Cassettes Industries Ltd. v. Chintamani Rao*⁴, the Delhi High Court refused to extend protected fair dealing to the defendant's use of plaintiff's songs and sound recordings by categorizing such use as 'fair'. The court was clearly disinclined to permit defendant's creative re-mixing, entertainment value, or the different context in which the material was used to amount to fair dealing. Of course, reuse of music is not illegal, but it is the particular expression that is protected by copyright that is the focus of inquiry, not whether the challenged work gives rise to a balance of competing considerations that tilt in favor of the defendant. In music, therefore, "transformation" is at best an accurate description of defendant's conduct, but does not give defendant a licence to copy substantial portions of protected expression.

After the recent *A.R. Rahman- Dagar* litigation, a broad transformative-use rule would be especially dangerous for Indian music. In 2025 Delhi High Court in *Ustad Faiyaz Wasifuddin Dagar v. A.R. Rahman*⁵, found that the grammar of the ragas are in public domain and cannot be proprietary rights of anybody merely because the composer is drawing inspiration from the tradition of Hindustani classical music. While the Court was quick to recognize that a performer such as Dagar might have performer's rights to particular renditions of ragas, it was equally insistent that the performer was not the author of the compositions performed. It further observed that originality in the Hindustani classical music must be assessed after excluding common domain elements, because otherwise copyright would monopolise the very root of the tradition. Such reasoning is a powerful argument against overbroad transformation analysis that if courts begin by asking whether a later song is sufficiently "novel", they risk protecting the raga structure, swara patterns, and classical grammar themselves.

Our premise is that Indian copyright should not adopt a fair use approach similar to that embodied in the U.S. copyright statute with respect to music. As it is, music already lends itself too easily to excessive stockage with too few authentic notes of originality in the market place. Rather than such an open-ended market-balancing approach to the copyright/rights clash, we recommend a filtration approach to the copyright issue. First, courts must distinguish between material in the public domain and material that is protected by copyright. This would include certain ragas, conventions of scale and raga structure, certain musical progressions that are

⁴2011 SCC OnLine Del 4712

⁵FAO(OS) (COMM) 86/2025

standard in classical as well as popular music, motifs and scenes à faire that are found in much traditional music. The remaining protected material is that to which the defendant has adapted the plaintiff's work. Our method of definition, therefore, safeguards the right to free and creative exercise of a classical music tradition while preventing the private appropriation of tradition. This approach to the protection of copyrighted music is consistent with the law's longstanding definition of copyrightable subject matter as protected expression, not protected genre, atmosphere or market share.

An additional reason to resist U.S. style fair use is that it would create instability in a field where rights already overlap. Music ownership provides a good example of the multiple layers of rights that are involved in one work. A song will have a musical composition element owned by one person or company, a sound recording owned by another and the cinematograph film version owned by yet another. The 2012 amendments⁶ to the Copyright Act were concerned to strengthen the royalty interests of authors precisely because Parliament did not wish the composer's rights to be overrun by the producer's commercial interest. A transformative-use test would have the opposite effect in copyright, permitting unlicensed use of material where the result is more entertaining or more commercially valuable than the original. This is not a competitive rule that Indian copyright law has ever embraced.

But someone will say that copyright law should not stifle criticism, comment, parody, scholarship, and independent creation; and that a fair use defence (like the one afforded in U.S. copyright law) is necessary to achieve that end. But it is possible to defend legitimate secondary uses within the parameters of the current copyright statute without importing the vagueness of a 'fair use' defence. It is well settled by the Indian courts that criticism and comment can be distinguished from the original work solely by the change of language, and even commercial guides and manuals can be pirated provided they are substantially new and contain enough original thought. This approach is not anti-creativity; it is anti-vagueness.

CONCLUSION

If India is to consider the concept of transformation, it should reject transformation as a stand-alone American-style balancing test. In music, a field where the fine line between inspiration and copying can be difficult to distinguish, the potential for a broad fair use doctrine to undermine

⁶The Copyright (Amendment) Act, 2012 (Act 27 of 2012).

doctrinal certainty is too great. Music copyright law in India is stronger, not weaker, by keeping the inquiry disciplined. It should identify the protectable expression, filter out whatever is in the public domain, and conduct a substantial similarity inquiry. Only then can a court consider whether any of the specific statutory exceptions to copyright infringement might apply. This approach can safeguard the rights of authors while not taking music out of the nation's cultural repertoire. It also fits the recent direction of the Delhi High Court in the Dagar Litigation, which insists that classical music's common grammar must remain available to all.

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