

## **Copyright and Related Rights Law**

**Dr. Rohan Cherian Thomas**

**Faculty of Law**

**NALSAR University of Law, Hyderabad**

**WEEK - 03**

**LECTURE - 13**

### **Meaning of 'Music' - Part 2**

Welcome back to this course on copyright and related rights law. In the previous session, we looked at the meaning of music broadly within the domain of understanding the subject matter of musical work. What we understood is that music is a type of sound that is perceived as pleasingly harmonious. It is different from other sounds, such as noise, which are perceived as disturbing or distressing by listeners. But what we saw is that a meaning of music does not necessarily explain whether its form of fixation in the form of graphical notations or musical score; is, in fact, a composition in itself, and therefore can we make a distinction between a musical score and music? Therefore, in this session, we are going to focus on whether music can be distinguished from its fixation. What is fixation? To quickly recap, when we discussed literary works, we noted that content which is in a written form is a fixed expression.

Similarly, a brush stroke with a particular paint on canvas is a painting because it is fixed to a surface. Similarly, then, can we say that music is fixed on this sheet through graphical notations? If that is the case, then isn't this musical score music in itself? Is there really a distinction between its fixation and the content? For this, we must first look at how the musical score is understood. The meaning, as we see in the Oxford dictionary, is that a musical score is a copy of a composition on a set of staves braced and barred together. What we note here is that a musical score is considered a composition.

Therefore, from the previous session where we discussed that human sounds are capable of being creatively expressed and therefore are an exercise of compositional faculties; a representation of such a compositional effort could be the musical score. Let us consider this case once more. This is *Sawkins v. Hyperion Records*. In this particular case, the court is saying music must be distinguished from the fact and form of its fixation as a record of a musical composition.

The score is the traditional and convenient form of fixation of the music and confirms to the requirement that a copyright work must be recorded in some material form. But the fixation in the written score or on a record is not in itself the music in which copyright subsists. We see that the court is making reference to a mandate under the Copyright Act that unless an expression is fixed in some form, it would not be possible to provide copyright protection for it. But importantly, we must see that this requirement is found in the UK Copyright Act. The question of whether there is a consistent application of the fixation requirement in different copyright acts is an important one that we will see in the following slides.

But before that, what the court emphatically helps us to distinguish is that the form of fixation is different from the music itself. To read this again, you can see that fixation in the written score or on a record is not in itself the music in which copyright subsists. Therefore, what we see is that compositional faculties, in its use in the creation of an expression, could be considered as music. Therefore, what we see is that to use one's compositional faculties in creating a musical expression, one does not necessarily need to put it down in the form of any writing through graphical notations. And if such a requirement is mandated by the Copyright Act, then that is a separate requirement from a consideration of whether an expression is a musical work or not.

Consider this image. You can see this individual singing. Imagine that this singing is spontaneous. What do we mean? There is no preset design, nor is there any composition that exists which has led to this singing. The spontaneity of the singing makes one issue very clear, which is that there is nothing fixed.

There is no record of such a composition. But the fact that there is music that accompanies the lyrics being sung. Will this music not be considered a musical work? There is no musical score. The problem we are looking to highlight here is that if music and its copyright protection is tied to the existence of musical scores; then creative expressions that might appear through performance,s such as spontaneous singing could possibly not be eligible for copyright protection. Consider this image.

Now in this image, we are considering a different form of creative expression; instead of singing, this person is humming. There are no lyrics. But humming can be based on a tune or can create a tune. If it's based on a tune, then perhaps we can say that there is a pre-existing composition, maybe through a musical score, maybe recorded in some form. But if it is created, it is not based on any recordings or any fixations.

In the same case, *Sawkins versus Hyperion Records*: The court is explaining that there is no reason why a recording of a person's spontaneous singing, whistling, or humming, or of improvisations of sounds by a group of people— with or without musical instruments should not be regarded as music for copyright purposes. The fact that in musical

copyright the sounds are more important than the notes in the text is recognized, for example, in the approach to infringement. It is not a note-by-note textual comparison of the scores. It involves listening to and comparing the sounds of the copyrighted work and the infringing work. What the court is looking to explain is that the sound itself, which we understand as music, is clearly separable from the notes that represent that music.

And therefore, theoretically, it should be possible for spontaneous singing and humming that incorporate a particular piece of music to be considered a musical work. This musical work, if seen under the mandate of fixation, could possibly be satisfied without any graphical notations per se. It could simply be recorded. And therefore, if spontaneous singing was, say for example, recorded on a phone, we can say that the fixation criterion has been satisfied. You can see how we have managed to arrive at this understanding.

If graphical notations are different from the music itself, and fixation is a necessary consideration for the grant of copyright, then isn't it enough that a recording in some form happens? And if that form is through the medium of a smartphone, then isn't the fixation requirement satisfied? Interestingly, we see that in early copyright legislation, musical scores were in fact protected as literary works. But later understandings that we see in copyright acts, and as we have seen in the Indian Act as well, are that graphical notations, where they are present, are included in the definition of musical work. Though they are expressive of symbols and fit within an understanding of literary work, because graphical notations are so closely tied to the composition, they are considered a part of the musical work. But in saying so, we must understand that the graphical notations themselves are different from the music. Let us then come to another important consideration.

In the previous slides, we discussed how there could be a mandate for fixation in order for musical work copyright to subsist. Is it possible for this fixation requirement to not be made applicable? We find such an example in the Indian Act. You can see that Section 2(d) of the Indian Copyright Act interprets an author in relation to a musical work as a composer. It then states under section 2(ffa) that a composer in relation to a musical work means the person who composes the music, regardless of whether they record it in any form of graphical notation. What this provision tells us is that recording in graphical notations is not a necessary requirement for a person who has expressed a pleasingly harmonious sound to be considered a composer.

This understanding of who a composer is and what he does was brought into the Copyright Act in 1994 by way of an amendment. But what this amendment also changed was the definition of musical work in the original Copyright Act, in which, prior to the 1994 amendment, musical work was defined as: Musical work means any combination of melody and harmony or either of them printed, reduced in writing or otherwise graphically produced or reproduced. The definition of musical work has changed with the 1994 amendment in such a way that the recording component or the fixation component

has effectively been done away with; wherein we can see this reflected in the current provision, which says that: 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 the music. What could be the possible objective behind the Indian legislators choosing to remove a fixation requirement from musical works? Could it have something to do with the traditional forms of music in India? You can see a representation of Indian classical music in this image on the screen. Professor Alka Chawla, in her treatise on copyright, points to this issue and explains as follows.

She says that, according to the unamended definition, the fixation of music was essential before it could be protected. There are a number of examples from Indian classical music and the music industry, wherein it can be shown that the composer of music and the performer of music are the same person. Such a person improvises within the framework of a highly developed discipline on a pre-selected traditional theme without fixing his composition to a piece of paper. Look at this image. You can see folk artists performing music.

Such a performance of music may not have any fixed form. In fact, the music that is being performed, which we can understand, is coming from traditional roots wherein the community has culturally developed some music. And without it being in any fixated notational format or in any other form for that matter, it has been passed on. On this point, Professor Chawla continues and states that the amendment was brought in 1994 to protect Indian classical music and even folklore. Which descends from generations without fixations and without anyone claiming a right to the music.

She says, "Western classical music is created by composers who conventionally record the composition in writing on paper using an elaborate, well-established system of musical notation." She explains that the question of fixation, specifically the consideration of graphical notations, is not connected to the Indian classical music form. Rather, it is derived from a Western conception of musical composition. The Delhi High Court in *Ustad Dagar versus A. R. Rahman* has explained that there can in fact be compositions which are based on Hindustani classical music; and as long as they are original, they will be considered original musical works and therefore be entitled to protection under the Copyright Act. But bear in mind this is only if such a composition is original. Now let us consider whether folk music can be considered musical works. We have understood that the meaning of a musical work has been amended to no longer require fixation specifically in graphical notations. Can folk music then be protected as musical works? We see that it is still not possible, and this is because of a wider understanding of intellectual property and its functioning.

Intellectual property is considered a protection system incentivizing innovation or originality coming from individual sources. And therefore, folk music, which is grounded in community generation and which could possibly not identify a single person who may have originated it, would fall outside its sphere of protection. This point is criticized by critical race theorists, such as Anjali Vats. Critical race theory posits that racism isn't just individual; it can also be systemic. She contends that such a kind of racism is also possibly seen in intellectual property in a book called *The Color of Creatorship: Intellectual Property, Race, and the Making of Americans*.

She contends that the very definition of creatorship in IP law is racialized, privileging white inventors and artists while deeming non-Western innovations as communal or unoriginal because of its focus on individual innovation and originality. The fact of communal generations is considered unoriginal and not something that copyright specifically seeks to protect. Without a clear identification of an author, it would seemingly be difficult for copyright law to proceed with the question of the subsistence of copyright. I hope that with this we have understood the meaning of music thoroughly. We have seen that music is different from the form of its fixation; we have understood that the determination of a sound as music is a question of perception.

We have also seen that, in terms of such a perception, we should possibly be considering the perception of a substantial section of the public. In the next session, we are going to consider an important question of whether musical expressions are limited in nature. As compared to other subject matters, such as the ones we have already studied, literary works and artistic works. Thank you for joining me.

See you in the next session. Thank you.