

Version Recording Rights- An Overview¹

I. Introduction- Version Recordings- Origin & Concept

A “version recording” or a “cover version” is a sound recording made of an already published song by using another voice or voices usually with different musicians and arrangers. In the parlance of the Indian music industry, version recordings are also popularly known to be “singing of a well known song by a lesser known singer. Hence, a version recording is essentially a “sound recording” which is neither a copy nor a reproduction (if that would be the case then it would amount to infringement) of the original sound recording. Essentially, an original soundtrack or a recording enumerates two sets of rights viz., the rights of the authors/owners of the underlying original works .i.e. lyrics(literary work) , musical notation, arrangement(musical work) embedded in the track and the rights of the producer who takes the initiative and responsibility of the putting all the elements in sum. The law relating to version recordings had been facing a lot of scrutiny in the recent past with the lobbying of the big music companies for deletion of Section 52(1) (j) which takes the making of such recordings outside the purview of infringement. Eventually the music companies succeeded in getting rid of Section 52(1) (j) and instead the Legislature introduced statutory licensing of cover versions vide Section 31 C in the Copyright Amendment Act, 2012. Since much litigation and interpretation has been with regard to this deleted section, it would be prudent to dwell upon the same.

Section 52 carves out exceptions to Section 51, which lists down acts which constitute infringement. Section 52(1) (j) was one such exception which gave the making of version recording the sanction of law. The purpose of providing this exception, which was introduced by amendment to The Copyright Act in 1983, was to encourage the thrive of small scale music

¹ SATARUPA GUHA, 4th Year, B.Sc (Hons.)LL.B (Hons.), National Law University, Jodhpur

companies and as a consequence limit the monopoly of the giant recording companies in the Indian music industry. This exception provides an opportunity to these small companies to be creative in making of the cover versions by engaging a new set of singers, composers, orchestra, arrangements etc. Hence, a sufficient amount of labour and skill goes into the making of a version recording. Section 52(1) (j) provided that making of sound recordings of any literary, dramatic work or musical work would not constitute infringement

- If there is already a sound recording made of the original literary or musical work and the person intending to make the version has taken a license or consent of the owners of the original works.
- The person making the records has given a notice of such intention and paid to the owners of the original works the royalty as prescribed by the Copyright Board.

The proviso to the sub-clause (j) also puts certain limitations on the making of version recordings such as

- The person intending to make a cover version cannot make any alterations or substantial changes in the work, which are not reasonably necessary for the adaptation of the work for the purposes of making the version. For making alterations previous consent of the owner of the rights must be taken.
- Also the sound recordings must not be issued in any form of packaging or with any label so as to confuse or mislead the public as to the identity (authorship) of the work.

These limits in the proviso intends to safeguard the moral rights as well as the exclusive rights of the authors of the underlying original works making sure that the original works are not stripped of their essence. Rule 21 of The Copyright Rules, 1958 lays down the procedure employed to make sound recordings under Section 52(1) (j) of the Copyright Act, 1957. The rule provides

that the person making the records has to not only give notice of his intention to make such record but also ensure that the royalty is paid fifteen days in advance at the rate prescribed by the Copyright Board. Moreover, they are also required to provide the labels or covers under which the versions are intended to be sold and also any intention of alteration of the original recording needs to be communicated.

II. Version Recordings- Whether “adaptation” of musical work within the Copyright Act?

Section 14(1) (a)(vi) enumerates the right to make an adaptation of the work(original works) as an exclusive right of the copyright owner and such right can be obtained only with the prior permission of the copyright holder in accordance with procedures in the Act. Adaptation in relation to musical work means “any arrangement or transcription of the work”, and the use of any such work involving its re-arrangement and alteration. The author of the musical work is the “composer” of the work, which means the person who composes the music regardless of its recording in any form of graphical notation. There is a dearth of landmark decisions in the Indian scenario as to what constitutes a rearrangement or alteration of musical work. In *Super Cassettes Industries Ltd v. Bathla Cassettes Industries Pvt. Ltd*, Learned Single Judge of the Delhi High Court held that a change of the singer who sings the same lyrics to the same musical score for producing the version recording amounts to an alteration and that change of a singer in a vocal recording is a change in the most vital constituent of the recorded song. The reasoning followed in the judgment seems to be flawed since it has not taken into account the fact that the copyright of the author is in the literary, dramatic or musical work and not in the voice of the singer who may have been employed to make the initial sound recording. And also if this reasoning is accepted then the whole purpose of keeping version recordings outside the scope of infringement

(subject to certain restrictions) will be rendered redundant since even changing the singer in a version will require the consent/license from the copyright holders. Hence, making of a version recording does not amount to adaptation of the underlying musical work and if the person intends to make necessary alterations and re-arrangements amounting to adaptation, then he has to get the prior consent of the owners of the copyright in the underlying original works.

III. Analysis of Version Recording Rights in light of Judicial Pronouncements

The single bone of contention in cases involving the question of version recording rights has been whether a license/consent of the copyright holder of the original sound recording/copyright holders of underlying literary, musical works is required for making a version recording. The text of the Section 52(1) (j) is the starting point of ambiguity regarding this requirement. While the sub-clause (i) mentions the need of obtaining a “license or consent of the owner of the right in the work” the next mandates the communication of a notice of intention to make such a version. If both these sections are read conjointly then (ii) would become redundant. Hence, the Supreme Court in *Gramophone Company v. Mars Recordings Ltd* held that the two sub-clauses should be read disjunctively but did not answer still as to whether the consent is required. Hence this section is still open to interpretation and the question has been subsequently taken up by the various High Courts of the Country.

One of the earliest cases in this regard is *Gramophone Company of India v. Super cassettes Industries Pvt. Ltd.* In this case the defendants had launched an audio cassette (version recording) under the same title as the plaintiff’s original soundtrack. The Court noted that an alternate title should be given with a declaration in bold letters that the record is not the original soundtrack. This case was followed by a similar case in the Delhi High Court, *Gramophone Company of India v. Super cassettes Industries Pvt. Ltd.*, the Court held that no doubt Section

52(1)(j) permits version recording but it has to be read in consonance and conformity with the various provisions of the Act which confers exclusive rights on the copyright holders. In this case, despite the plaintiffs' clear instructions denying the permission to make version recordings, the defendants had gone ahead and made the versions anyway. The Court observed that granting the injunction, that in this situation the plaintiffs would suffer irreparable injury if the same was not granted.

Pronouncement of the Supreme Court on the Subject

The Supreme Court for the first time shed light on the concept of version recordings in 2001 in *Gramophone Co. of India v. Mars Recording Pvt. Ltd.* The answer to the question was traced to the interpretation of Section 2(m)(iii) and 52(1)(j) of the Act. The judgement highlighted the fact that version recordings are "fresh recordings" made using a new set of musicians and also that the only ingredient to be satisfied to attract Section 52(1)(j) was that there should be a literary, dramatic or musical work from which a person desires to make sound recordings, sound recordings in respect of such works have been previously made with the consent of the copyright owner and that the person making such recordings has given the prescribed notice and paid the royalty fixed by the Copyright Board. But the Supreme Court categorically refused to give a concluding answer to the question as to whether consent of the copyright owners are required.

According to the researcher's understanding, a combined reading of clause (iii) of the proviso of the erstwhile Section 52(1) (j) of the Act made it clear that the consent requirement is for the first recording and not for the subsequent version of it. Hence, in light of Section 2(m) (iii), infringement in respect of sound recording occurs only when any other sound recording is made embodying the same sound recording, which is definitely not the case with version recordings which is a completely "new recording" only embodying the lyrical and musical work

of the original soundtrack. Hence, notice is to be given not to the producer of the soundtrack but to the copyright owners of the literary work (lyrics) or musical work (notations). This same view was reiterated in the most recent case of *Gramophone Company of India v. Super cassettes Industries Pvt. Ltd.*, wherein apart from making version recordings the defendants had also incorporated the recordings in cinematographic films. The Delhi High Court held that the ambit of Section 52(1) (j) is limited and resort cannot be made to the provision for inclusion of a sound/version recording in a cinematographic film. Hence, version/sound recording can only be incorporated in a cinematographic film with the permission of the concerned copyright owners.

Copyrightability

The question of copyrightability of version recordings came up in the case of *Super Cassette Industries Ltd v. Bathla Cassette Industries Pvt. Ltd*, wherein the defendant had made a version recording of the plaintiff's version recording of the song "Chalo Dildar Chalo" from the film "Pakeezah". The Court held that the defendant could not have infringed the copyright of the plaintiff's since a version recording is incapable of acquiring any independent right because it does not meet the threshold of originality required for a work to be copyrightable. The Court held that changing the singer is a substantial change and hence if such changes are made to the sound recording then it would not under come under the ambit of Section 52(1)(j). This interpretation if accepted will defeat the purposes of copyright since version recordings with insignificant variations will be protected by Section 52(1) (j). In determining whether the newly created versions are entitled to separate copyright protection the Delhi High Court in *Eastern Book Company v. Navin J. Desai*, took an interesting approach and observed that "in determining whether a work based upon a prior work is separately copyrightable as a derivative or collective work, the courts may not properly consider whether a new work is a qualitative

improvement over the prior work. However in order to qualify for a separate copyright as a derivative work, the additional matter injected in a prior work or the manner of rearranging or otherwise transforming a prior work must constitute more than a minimal contribution.”

Hence, it cannot be said that version recordings per se are not copyrightable. If sufficient alterations are made so as to come under the definition of “adaptation” of the work, then it can be accorded copyright protection provided the alterations had been made with the consent of the copyright holders in the underlying works.

IV. Provisions with respect to Version Recordings in the Copyright Amendment Act, 2012

The amendment comes in the form of a new Section 31 C under the title “Statutory License for Cover Versions”. It is for the first time that the “cover version” is being used, till date the Copyright Act has never used either “version recording”/ “cover version”. The possible implication of this amendment is that for the first time cover versions are recognised under a statutory licensing framework and not merely as a defence to an infringement of a copyright viz., section 52(1)(j). The Statement of Objects and reasons of the provision in the Bill sets out that the purpose of introducing statutory licensing for version recordings is to ensure that while making a sound recording of any literary, dramatic or musical work the interest of the copyright holder is duly protected. Section 52(1) (j) the earlier existing provision has been deleted. Certain changes have been made in the provisions of cover versions in Section 31C in comparison to its predecessor in Section 52(1) (j)

- The version recording can only be made after five years (presently, two years) after the end of the year in which the first sound recording of the work was made.

- Royalty for the making of version recordings shall be paid for a minimum of fifty thousand copies (irrespective of whether this number of copies is sold not) of each work during each calendar year in which copies of it is being made.
- The version recording shall be in the same medium as the last recording, unless the medium of the last recording is no longer in current commercial use.

It is pertinent to note that the changes are really illusory and do not in essence change the position of law as to the rights in version recordings as such and hence the subject is open to a wide range of litigation. But still, extending the time of making the version i.e. from two years to five years will not let the producers of the version recordings to ride on the goodwill of the original soundtrack which will eventually fade away from the minds of the public after such considerable period. Also the mandatory payment of royalty with regard to a minimum of fifty thousand copies will ensure that the original copyright owners get their proper due as the royalty amount (3-5%) is in reality a paltry sum when compared to the huge profits that the version recordings these days rake in.

V. Conclusion

Though the Legislature by introducing the statutory licensing provisions for cover versions has consolidated the law on this subject and also to an extent resolved the ambiguity prevailing over the interpretation of Section 52(1) (j) but the technological advances has made the making of version recordings very easy as now the rhythm, beat, tempo i.e. each minute component of a recording can be manipulated within minutes digitally making the rights of the authors of the original underlying works running the risk of being impinged. Hence, the duty lies upon the judiciary to find that delicate balance between the protection of the exclusive rights of the copyright owners in the original works and the producers of the cover versions so that version

recording which incorporate only illusory changes in the original track or hamper the moral rights of the copyright owners by mutilating or disrespecting the essence of the original composition are not given any form of statutory protection.

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**Center for Study & Research in Intellectual Property Rights.
National University of Study & Research in Law, Ranchi (Jharkhand)
Website: www.csripr.org**