

EXPLORING THE IMPACT OF THE FINITENESS OF MELODIES: FUTURE OF COPYRIGHT INFRINGEMENT CLAIMS IN MUSICAL WORK

*Bhavyakirti Singh**

The advent of mainstream genres in music has given rise to a plethora of copyright claims, pitting top artists against each other. For instance, The Hollies's claim of infringement against Radiohead over 'Creep', which followed Radiohead's own claim relating to the track against Lana Del Ray. The note aims to assess whether such concerns pertaining to infringement are overstated, especially in light of various factors that propel the composition of music today. First, many mathematical studies indicate that the number of harmonies that may be constructed on a given number of bars are finite. Second, 'pop' or 'rap' music artists today show a trend of utilising similar scales, chords, time signatures and beats (i.e., easier scales on smaller and repetitive bars that could be popularised amongst the audience due to their ease of making 'covers', amongst other methods). Third, the creation of marketable music draws on the pre-existing corpus for inspiration, which is the reason why one witnesses the amount of remixing and sampling of music as done today. The author understands that the basis of copyright lies in the recognition of an individual's creative efforts. However, this may be offset by the increasing commercialisation of tunes in the twenty-first century. This note proposes to explore arguments furthering the above-mentioned statements, essentially to determine whether courts should be taking such claims of copyright infringement as seriously.

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* Graduate of National Law University, Jodhpur. The author is grateful to the team at NUJS Law Review for their editorial assistance. All errors, if any, are solely attributable to the author. The author may be contacted at singh.bhavyakirti@gmail.com for any feedback or comments.

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I. INTRODUCTION

The Western music system consists of the basic twelve notes (an octave), repeated over various octaves, which may be higher or lower in sound. A standard melody consists of at least four bars, which may be equated to a sentence in musical terms. About four notes make up one bar, implying that each melody has a minimum of sixteen notes from the octave arranged in a certain manner. Therefore, the space for sixteen notes may be each filled in twelve ways, thereby resulting in 12^{16} combinations. The rough indication of this mock-up calculation is that the possible number of melodies of a particular length are determinable.

The above example is ridden with insufficient and exceedingly restrictive assumptions, *inter alia*, those on the time signature, note size and rests. However, the idea behind determining the finiteness of melodies has not been left unexplored. The most notable thought experiment has been undertaken recently by Damien Riehl, a copyright lawyer, and Noah Rubin, a coder.¹ The objective of the experiment was to construct an algorithmic tool which could produce all the eight-note simple melodies possible through brute-forcing,² effectively ending copyright claims over any melodies that fall within their experiment. The rationale behind the same lies in the finite universe of melodies, which could lead to the possibility of two musicians, without even ever having heard each other’s work, to pick the same melody from the dataset merely by chance, thereby rendering any utilised melody a ‘landmine’.³

This may be better understood by defining ‘melody’, which “is a timely arranged linear sequence of pitched [notes] that the listener perceives as a single entity”⁴. The number of notes are limited, and have been defined since

¹ Damien Riehl, *Copyrighting all the Melodies to Avoid Accidental Infringement*, TEDxMinneapolis, YouTube, January 30, 2020, available at <https://www.youtube.com/watch?v=sJtm0MoOgiU> (Last visited on November 30, 2023) (through this experiment, they have produced 68 billion melodies and continue to expand the same) (‘Riehl’); Alexis C. Madrigal, *The Hard Drive with 68 Billion Melodies*, THE ATLANTIC, February 26, 2020, available at <https://www.theatlantic.com/technology/archive/2020/02/whats-the-point-of-writing-every-possible-melody/607120/> (Last visited on November 30, 2023).

² Riehl, *supra* note 1, 4:41 minutes (brute-forcing, usually used in the context of computer password hacking, is a method of running all possible combination (11111, 11112, 11113... 99999) to find out the password).

³ *Id.*, 2:29 minutes.

⁴ Melody, Introduction, LUMEN MUSIC APPRECIATION, available at https://courses.lumenlearning.com/musicappreciation_with_theory/chapter/melody-an-overview/ (Last visited on November

time immemorial, thereby making their possible combinations over a given set of spaces limited. This may be contrasted with other forms of ‘work’ such as ‘artistic work’, where no definition (of length, size, etc.) may be provided to a paint smear or charcoal mark, causing the infiniteness of drawings or paintings. This innate difference is central to dismantle the motive for copyright protection in music, since melodies are not entirely the product of a musician’s innate creative ability but an informed and subjective selection from a given universe. It has been found that, “[t]he potential flaw in using math and logic to create melodies is *good* melodies aren’t decided by raw logic. The artistry in making music comes from subjectively choosing appealing sounds”⁵ (emphasis supplied).

This is interpreted differently in the thought experiment, where Riehl uses the mathematical properties of melodies to imply their factual and evergreen nature. Given that facts may not be protected by copyright, melodies would not be within the purview of copyright protection and consequently, disputes.⁶ Such an observation would have proven instrumental in cases where the basic elements of a track, such as the melody, have been subject to allegations of copyright infringement. Some notable examples of the same include George Harrison’s ‘My Sweet Lord’ the melody of which was similar to The Chiffons’ ‘He’s So Fine’,⁷ Sam Smith’s ‘Stay With Me’, the melody of which was similar to Tom Petty’s ‘I Won’t Back Down’, Katy Perry’s ‘Dark Horse’, similar to Marcus Gray’s ‘Joyful Noise’,⁸ and ‘*Vahara Roopam*’ from the Kannada movie *Kantara*, the melody of which is similar to *Thaikkudam Bridge*’s ‘*Navasaram*’.⁹

While the above-discussed experiment is serious food for thought in the music copyright academia, its shortcomings make it insufficient protection for artists. *First*, it operates on a limited range of music (i.e., only the C scale, on one octave, with the same size of the notes, same time signature, limited number of bars). *Second*, the melodies are on a software and there are doubts about its accurate conversion to melodies on actual musical instruments, thereby diminishing its effectivity in preventing melody lawsuits. *Third*, melodies are only one component of an entire song, which also contains chords, lyrics, rhythm, harmony,

30, 2023).

⁵ See Hubert Davis, *Musician Creates Algorithm to End Music Copyright Lawsuits*, SCREEN RANT, March 2, 2020, available at <https://screenrant.com/music-copyright-lawsuit-algorithm/> (Last visited on November 30, 2023).

⁶ See *Feist Publications, Inc. v. Rural Telephone Service Co. Inc.*, 1991 SCC OnLine US SC 46 : 113 L Ed 2d 358 : 499 US 340 (1991), 347.

⁷ Bobby Owsinski, *Music Copyright Infringement is Beginning to Make Sense Again*, FORBES, April 1, 2020, available at <https://www.forbes.com/sites/bobbyowsinski/2020/03/31/music-copyright-infringement-makes-sense-again/?sh=c66d3552ecf3> (Last visited on November 30, 2023).

⁸ Charles Cronin, *Tom Petty v. Sam Smith*, GEORGE WASHINGTON UNIVERSITY OF LAW BLOGS: MUSIC COPYRIGHT INFRINGEMENT RESOURCE, available at <https://blogs.law.gwu.edu/mc/ir/case/inplay-tom-petty-v-sam-smith/> (Last visited on November 30, 2023); For other examples, see *7 Times Artists Sued Others for Copying their Music*, SMOOTH RADIO, October 16, 2020, available at <https://www.smoothradio.com/features/copyright-infringement-cases-music/> (Last visited on November 30, 2023).

⁹ *Hombale Films LLP v. Thaikkudam Bridge*, 2022 SCC OnLine Ker 5973.

expression and structure.¹⁰ *Fourth*, and on a slightly unrelated note, in generating all the melodies, have the authors of the algorithm infringed on thousands of underlying copyrights?¹¹

The present note in Part II explores the case for reconsidering copyright claims in music, and dispute the nature of exclusivity provided to copyright in musical work given its inherent derivative nature. In Part III, legislative and judicial developments in India and the United States have been discussed to provide the way forward in Part IV. Part V offers concluding remarks.

II. A CASE FOR RECONSIDERING COPYRIGHT CLAIMS IN MUSIC

Despite its shortcomings, the experiment discussed in the previous part reveals that the dubiety of copyright claims in music is persistent. Artists and music labels today are opting for heavy insurances to protect their interests.¹² The effect of this has also spilled over onto under-production music, with popular artists in the West clambering to prevent such claims by listing as many individuals in the lyrics credit as possible and thereby causing problems in royalty distribution, further licensing etc. Drake's popular tracks 'In My Feelings' and 'Nice For What', have sixteen and twenty-one credits each.¹³ Travis Scott's 'Sicko Mode' has thirty credits.¹⁴ While such credit may be well-intentioned and well-deserved, the case for re-examining copyright in music is furthered by certain additional notable trends, that supplement the findings on the mathematical finiteness of melodies.

A. WIDESPREAD SAMPLING CULTURE

Sampling, in music, refers to the act of taking inspiration from, or even cutting patches of original music and incorporating it into a new track, mostly with the requisite permissions and crediting. The delineation of rights and royalties is mostly directly negotiated with the master holders or songwriters, and therefore, depends on the terms of the individual agreements.¹⁵ For instance, Dua Lipa's hit 2021 single, 'Love Again', samples the intro of 'My Woman', recorded

¹⁰ Natalie Sarrazin, *MUSIC AND THE CHILD*, Chapter 2: Music: Fundamentals and Educational Roots in the U.S. (Milne Publications, 2016).

¹¹ Madrigal, *supra* note 1.

¹² Amy X. Wang, *How Music Copyright Lawsuits are Scaring Away Hits*, ROLLING STONE, January 9, 2020, available at <https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/> (Last visited on November 30, 2023).

¹³ Bobby Owsinski, *It Looks Like You Need 9.1 Songwriters to Write a Hit Song These Days*, MUSIC 3.0 MUSIC INDUSTRY BLOG, January 11, 2019, available at <https://music3point0.com/2019/01/11/songwriters-hit-song/> (Last visited on November 30, 2023).

¹⁴ *Id.*

¹⁵ Dmitry Pastukhov, *Music Publishing 101: Copyrights, Publishing Royalties, Common Deal Types, & More*, SOUND CHARTS, available at <https://soundcharts.com/blog/how-the-music-publishing-works> (Last visited on November 30, 2023).

by Lew Stone & his Monseigneur Band, and originally composed by Bing Crosby, Max Wartell, and Irving Wallman, who are all credited as writers.¹⁶ Kanye West's 2016 track 'Famous', featuring Rihanna and Swizz Beats, samples 'four' tracks, including Sister Nancy's 'Bam Bam', Nina Simone's 'Do What You Gotta Do', Il Rovescio Della Medaglia's '*Mi Sono Svegliato E... Ho Chiuso Gli Occhi*' and Kanye West's own 'Wake Up Mr. West'.¹⁷

The modern origins of this practice lie in the traditional 'beat mixing' carried out by disc jockeys, who played mash-ups of popular tracks with undertones of their revamped harmonic thought. Today, almost fifteen percent of the songs on the coveted Billboard Hot 100 have been sampled,¹⁸ and the general perception is that a sampled track "can be recreated from its source material to become an entirely new whole".¹⁹ This indicates a paradigm shift within the music industry (especially within the more popular genres such as hip-hop, rhythm and blues and pop), which is reusing old compositions for a variety of reasons. These include, *inter alia*, paying homage to the original artist, adding their creative elements to make it appealing to today's audience or merely banking on the popularity of the old track.²⁰

Arguments protecting the art of sampling also indicate the loopholes within the music copyright system. Harmony Samuels, who produced Ariana Grande's 'The Way', comments, "As a child you listen to music and it stores in your memory somewhere. Basically I was gonna sample a sample. Take a hit song and make another hit song, that came from a hit song".²¹ The utilisation of samples in new tracks has also been compared to an instrument, much to the likeness the guitar, drums or piano.²² Further, popular producers such as Mark Ronson recognise and give patronage to this trend, stating that great music has come from "borrowing and re-borrowing".²³ He takes support from the comments of Paul

¹⁶ Eve Edwards, *What Song did Dua Lipa Sample in Love Again? Al Bowlly Track Explored*, THE FOCUS, July 2021, available at <https://www.thefocus.news/music/dua-lipa-love-again-sample/> (Last visited on November 30, 2023).

¹⁷ Kanye West, *Songs Sampled in Famous*, WHOSAMPLED, available at <https://www.whosampled.com/Kanye-West/Famous/samples/> (Last visited on November 30, 2023).

¹⁸ *Tracklib Presents State of Sampling 2019*, December 31, 2019, available at <https://www.tracklib.com/blog/tracklib-presents-state-of-sampling-2019> (Last visited on November 30, 2023).

¹⁹ Jacca-RouteNote, *Sampling Culture: How has it Evolved and How Much of Modern Music Uses Samples*, ROUTENOTE, February 7, 2020, available at <https://routenote.com/blog/sampling-culture-how-has-it-evolved-and-how-much-of-modern-music-uses-samples/> (Last visited on November 30, 2023).

²⁰ See Rory Seydel, *Why You Should Stop Thinking of Sampling as Theft*, LANDR BLOG, June 20, 2016, available at <https://blog.landr.com/sampling-isnt-theft/> (Last visited on November 30, 2023).

²¹ *Id.*

²² *Id.*, (the author evokes emotion in his comment, "it's already the main instrument of many of today's most... artists... it revolutionizes what it means to be an artist. New art doesn't mean starting from scratch – it's about reinventing our existing culture").

²³ TED Radio Hour, *What is Original?, Why Would More than 500 Artists Sample the Same Song*, NPR, June 27, 2014, available at <https://www.npr.org/2014/06/27/322721353/why-would-more-than-500-artists-sample-the-same-song> (Last visited on November 30, 2023).

McCartney, one of the Beatles, who famously warned of the impossibility of writing new music in the coming years due to the extensive utilisation of popular melodies.²⁴ Ronson states about McCartney, “he said that by the year...2007, all chord progressions were going to be used. It was going to be impossible to write anything new. And the only way that we manage to progress is by taking what’s there and ripping it apart at the fabric of it.”²⁵

In India, many folk songs and music that is oft-sampled falls under the ambit of ‘traditional cultural expression’, which is rooted in untraceable community origins. From a legislative standpoint, no statute protects cultural or folklore expressions, though some protection may be accorded by virtue of ‘performers’ rights’ under the Act.²⁶ However, this is limited in nature since the scope of performers’ rights themselves are quite restricted and no protection is accorded to the expression itself. Thus, the exploitation of such expressions for commercial purposes outside the community is technically permissible and legal.²⁷ This is noted in music and cinema media especially, with adaptations of folk songs, theatres and stories reproduced in modern media.²⁸ A prominent example is Badshah’s song ‘*Genda Phool*’, which borrows melody and lyrics from a Bengali folk song ‘*Boroloker Biti Lo*’, and credits ‘traditional Bengali folk’ where it streams.²⁹

Traditional cultural expressions are essentially inter-generational intellectual labour formed in a composite manner by a representative and dispersed group of individuals within one cohesive community.³⁰ The lack of proper attribution channels is caused due to the unique nature of this intellectual property, which finds no proprietor to credit to, or alternatively can be credited to a mass of unidentifiable individuals. Artists argue that even following proper due diligence, it is difficult to establish unfailing accreditation. Sona Mohapatra contends that folk music, by virtue of its being in the public domain, “is open for reinterpretation by other artists”, and that the purpose of such reinvention is more benign – to

²⁴ *Id.*

²⁵ *Id.*

²⁶ The Copyright Act, 1957, §§38, 39.

²⁷ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*, November 25, 2002, available at https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf (Last visited on November 30, 2023).

²⁸ Disputes regarding the same, if arise, are dealt with under the framework of copyright law. For instance, the Sambalpuri song dispute, see Priyanka Dasgupta, *Remake of Sambalpuri Song Runs into Copyright Storm*, July 7, 2015, available at <https://timesofindia.indiatimes.com/city/kolkata/remake-of-sambalpuri-song-runs-into-copyright-storm/articleshow/47979477.cms> (Last visited on November 30, 2023).

²⁹ Senjuti Chakrabarti, ‘*Genda Phool*’: *What Punjabi Rapper Badshah Got Wrong When he Borrowed a Bengali Folk Song*, SCROLL.IN, April 2, 2020, available at <https://amp.scroll.in/reel/957912/genda-phool-what-punjabi-rapper-badshah-got-wrong-when-he-borrowed-a-bengali-folk-son> (Last visited on November 30, 2023).

³⁰ Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, Vol. 36, HOFSTRA L. REV., 1180 (2008).

promote the traditional music.³¹ Similar arguments have been made in the West as well, advancing that sampling may well be a method to “build communities across time”.³² This implies that any benefit sharing with the communities of origin can be either benevolent or potentially an equitable remedy bestowed by courts following a loose recognition of traditional expression. In the first scenario, the responsibility for research and the precise and technical identification of beneficiaries is, in the opinion of the author, an unjust burden, which has not been met even by intellectual property jurisprudence.

B. GENRE CONFORMITY AND INSTRUMENTAL LIMITATIONS

The various genres of music have certain distinguishing factors, however the music within their ecosystem is based on certain internal rules or patterns. This may be noted most frequently in genres such as blues and rap. In the former, bass forms an important element, and melodies along the same blues or jazz scales are used, possibly giving them similar sounds. Aram Sinnreich finds that,

“[m]ost performers in the era routinely covered ‘authorless’ traditional and blues songs, and the movement’s shining star, Bob Dylan, used lyrical and musical pastiche as a badge of pride and display of erudition – “Look how many old songs I can cram into this new song!” – rather than as a guilty, secret crutch to hold up his own compositions.”³³

In fact, the process of ‘interpolation’ or improvising on existing music to create new work is a ‘key compositional technique’ of the genre.³⁴ In rap and trap, many tracks operate on the same beat and timing, and mostly not by virtue of a lack of creativity but due to conformity to narrowing trends for the production of marketable music.

The root melody, when produced on a single instrument that consists of fewer notes can also limit the production of ‘original’ tunes. For instance, a harmonium simply has lesser keys. Similarly, drone instruments in Indian music provide background pitch – some sustained sound on top of which melodies are layered. The tradition of the music plainly just requires the inclusion of such cluster to give it its distinct identity and identifiability. The basic melodies produced,

³¹ Dasgupta, *supra* note 28.

³² Seydel, *supra* note 20.

³³ Aram Sinnreich, *Plagiarists or Innovators? The Led Zeppelin Paradox Endures*, THE CONVERSATION, September 6, 2018, available at <https://theconversation.com/plagiarists-or-innovators-the-led-zeppelin-paradox-endures-102368> (Last visited on November 30, 2023).

³⁴ J.M. Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, Vol. 10, MICH. TELECOMM. & TECH. L. REV., 407 (2004).

or the *ragas*, are in fact set and open only to layered ornamentation.³⁵ It has been noted that “two compositions in the same Raaga, or involving a similar mixture of Raagas, will inevitably involve a certain amount of similarity in the way notes travel through the composition”.³⁶

Congruent arguments have been made even in Western classical music. It has been argued that such “borrowing... did not make these works any less creative. The works simply incorporate motives with which the audience is already familiar. This helps to evoke a certain emotion, place, or era”.³⁷ Classical musicians often write music in ‘response’ to melodies. This assists them in connecting with other composers and “their culture in a way that their audience could personally recognise and relate to”.³⁸ For instance, arpeggios have been found to be basic elements of any classical composition “firmly rooted in... tradition and are not copyrightable as a matter of law”.³⁹

Diverging from such central elements of the genre or sub-genre may give an entirely different sound and remove the composition from the purview of the category altogether. This lessening diversification, in turn, possibly leads to a cycle of reduced inspiration and further conformity.

C. ECONOMIC AFFAIRS

The core influence behind musical work originating today, though, is the audience. In the competitive music industry, artists are looking to sell what sells, thereby placing more reliance on the trends emerging from bestselling music. Further, especially in the pop genre and even Bollywood, many artists choose to work with a limited vocal range, use simple chord progressions and time signatures to ensure the relatability of their music. This is done so that their audience *first*, is less restricted from performing and recording covers, *second*, recommends the composition to their acquaintances, and *third*, streams their ‘easier’ music more. This is especially important in Indian film music, as the industry, as opposed to in the West, banks upon the soundtrack more to advertise the film and draw in the audience for a musical theatrical experience. Movie soundtracks form bulk of the music played in India.⁴⁰ The simpler octaves, chords, melodies

³⁵ Anna E. Evans, *Music in India: An Overview*, April 20, 2016, available at <https://core.ac.uk/download/pdf/301479799.pdf> (Last visited on November 30, 2023).

³⁶ Akshat Agrawal, *Copyright and Classical Music: Not the Best Fusion?*, SpicyIP, November 25, 2022, available at <https://spicyip.com/2022/11/copyright-and-classical-music-not-the-best-fusion.html> (Last visited on November 30, 2023).

³⁷ Amanda Scales, *Sola, Perduta, Abbandonata: Are the Copyright Act and Performing Rights Organizations Killing Classical Music?*, Vol. 7, VAND. J. ENT. L. & PRAC., 285 (2005).

³⁸ Dawn Leung, *Did Copyright Kill Classical Music? Copyright's Implications for the Tradition of Borrowing in Classical Music*, Vol. 3, ARIZ. ST. SPORTS & ENT. L. J., 361-362 (2014).

³⁹ Marcus Gray v. Perry, 2020 WL 1275221.

⁴⁰ Jayson Beaster-Jones, *Evergreens to Remixes: Hindi Film Songs and India's Popular Music Heritage*, Vol. 53(3), ETHNOMUSICOLOGY, 425-448 (2009).

and time-signatures are mathematically limited and can even be ‘counted’ by an average musician.

Today, with over 200 million tracks merely on one platform, SoundCloud,⁴¹ the replication or sampling of music seems inevitable merely due to the sheer size of available music and inspiration. These tactics to improve popularity are not limited to music, and can be seen even in choreography. Very recently, many artists are also toning down the complexities of their choreographies in music videos so as to create ‘TikTok trends’ that can be widely and easily replicated by the audience. Professor Rachel Hall observes regarding the hit ‘Blurred Lines’,

“They took the groove and made a melody that wasn’t that close...This is something musicians are doing a lot. That’s how human culture, fashion and art work...There’s always a balance between originality and not being so original that people can’t relate what to what you are doing.”⁴²

Another attributable factor is the availability of freely available and inexpensive music production software, which can either have limited functions or exemplar compositions that may be written over. A surprising and popular example of this can be seen in Lil Nas X’s ‘Old Town Road’, the instantly recognisable banjo beat of which was sourced for USD thirty from a digital marketplace, BeatStars, where musicians can buy and license beats from each other, thereby making it available to anyone who can pay.⁴³

D. WHO LET THE DOGS OUT?: COINCIDENCES AND INTENT

The idea behind the aforesaid question is the hypothesis forwarded by Ben Sisto, self-proclaimed ‘leading expert on [the song] Who Let the Dogs Out’.⁴⁴ He purports the possibility that an idea may not belong just to one individual,⁴⁵ the context of which lies in the history and origins of the popular track ‘Who Let the Dogs Out’, the most widely-recognised version of which was recorded and

⁴¹ Dani Deahl, *Over 200 Million Tracks have been Uploaded to SoundCloud*, THE VERGE, February 13, 2019, available at <https://www.theverge.com/2019/2/13/18223596/soundcloud-tracks-uploaded-200-million> (Last visited on November 30, 2023).

⁴² See Eric Niiler, *Blurred Lines: Is the Number of Pop Tunes Finite?*, SEEKER, March 16, 2015, available at <https://www.seeker.com/blurred-lines-is-the-number-of-pop-tunes-finite-1769613288.html> (Last visited on November 30, 2023).

⁴³ Amy X. Wang, *The Music-Making Site that can Get You a Global Hit (Or a Lawsuit)*, ROLLING STONE, May 28, 2019, available at <https://www.rollingstone.com/music/music-features/beatstars-lil-nas-x-old-town-road-826936/> (Last visited on November 30, 2023).

⁴⁴ Search result preview to his website reads “Ben Sisto is an artist, dad, and marketing manager for Staten Island Arts in New York City. He is the world’s leading expert on Who Let the Dogs Out”, see *Who Let Who Let the Dogs Out Out*, WLWLTDOO, available at <http://www.wlwltadoo.com/> (Last visited on December 7, 2023).

⁴⁵ Ben Sisto, Podcast No. 389 (Roman Mar), *Whomst Among us has Let the Dogs Out*, APPLE PODCASTS (February 12, 2020).

released in 2000 by the Baha Men. This may be better understood with the help of Sisto's research on the chronology of the origins of the distinctive lyric accompanied by barking, which notes a multitude of origins including a High School, artist Miami Boom Productions, group 20 Fingers, producers Patrick Stephenson and Leroy Williams, and junkaroo band Baha Men.⁴⁶

Notably, Michigan residents, Miami Boom Productions, 20 Fingers, Patrick Stephenson and Leroy Williams, all of whom were based out of different states, discovered the popularity of the tune only after the 2000 version by Baha Men, simultaneously observing the similarity with their own creation. Following this discovery, Sisto postulates that the legal adage (i.e., art is made by individuals) is a myth that the 'art market is propped up on',⁴⁷ and that it would be near impossible to accurately create a distinction between artists' inventions and their inspirations/borrowings. For instance, in the 'Who Let the Dogs Out' case, the 1986 version was written as a sport chant. On the other hand, the 1994–1999 versions aimed to address the heteronormative and misogynistic dance culture of, say, clubs.⁴⁸ This has also been observed in other work – such as Sona Mohapatra's version of '*Rangabati*', which contending producer Prabhudatta Pradhan states is titled after the name of the girl while hers "in *Sambalpuri* refers to the third gender".⁴⁹

This may also be supported by psychological studies on the collective consciousness of multi-instrument musical improvisation, which relies heavily on musical archetypes.⁵⁰ Improvisations are usually instinctive pieces of music performed on-spot thereby requiring largely 'original' thought. However, the coordination among instrumentalists therein is derived from reliance upon traditional structures and their shared understanding of the same, inevitably leading to unconscious replication. Alternatively, replication may be a harsh term to use. Instead, it may be that patterns of tunes arising from the wide utilisation of the same strict rules of music (which are usually quite mathematical in nature) may converge or intersect due to the very size of such universe.

The above is widely noted in Hindustani music, which consists of predominantly improvised melodies with very little advance composition. The origin of this is found not in strict rules of the art but in its instruction, which is mostly oral, and therefore, focussed on the transfer of shorter, limited phrases.⁵¹

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Transcript: Ep. 4-Who Let the Dogs Out-and Who Really Owns a Song?*, TVO TODAY, June 11, 2019, available at <https://www.tvo.org/transcript/129044/ep-4-who-let-the-dogs-out-and-who-really-owns-a-song> (Last visited on November 30, 2023).

⁴⁹ Dasgupta, *supra* note 28.

⁵⁰ Jared B. Burrows, *Musical Archetypes and Collective Consciousness: Cognitive Distribution and Free Improvisation*, CRITICAL IMPROV., 2004, available at <https://www.criticalimprov.com/index.php/csieci/article/view/11/35> (Last visited on November 30, 2023).

⁵¹ *Rhythm and Raga: Learn the Basics of Indian Music*, THE KENNEDY CENTER, available at <https://www.kennedy-center.org/education/resources-for-educators/classroom-resources/>

Most performance is a combination of these taught phrases with the creative twist of the musician, therefore “grounding each performance in both the past and the present”.⁵² Reference to this has been made in discussions surrounding the controversy on A. R. Rahman’s ‘*Veera Veera*’, that credits the Dagarvani ‘*Shiva Stuti*’, which Dhrupad maestro Ustad Wasifuddin Dagar claims was composed by his family. One of his students finds that “[t]he true spirit of *guru-shishya parampara* is that once something is taught to you, it becomes yours”,⁵³ which is a potential dichotomy created by the tradition with the standards of copyright law. Following this line of thought, the vesting of statutory moral rights, i.e. of attribution and integrity,⁵⁴ might also be difficult. The former since tracing exercises can produce a divergent plurality of competing independent sources. The latter postulates the protection of work from “distortion”,⁵⁵ which inevitably occurs as a result of tradition.

III. TRACING JUDICIAL TRENDS

In context of the above discussion, the author opines that existing jurisprudence in music copyright is rendered insufficient, especially in recognition of its differences from artistic, literary or dramatic work. Therefore, the first step in correcting the regime would be a judicial ‘reading in’, if not blatant legislative correction of the intersection between the definition of musical work and its originality condition.⁵⁶ The objective of such correction is not to allow unauthorised use of musical work but to *first*, preserve the traditional ethos and culture of music, *second*, prevent restrictions on the creativity of inspired artists, and *third*, end the barrage of frivolous lawsuits regarding copyright infringement.

Courts have generally not taken kindly to overcautious entitlement. For instance, in *Saregama India Ltd. v. Viacom 18 Motion Pictures*,⁵⁷ it was held that a seven second iteration of a musical work in a movie would be trivial and thus, the petition was rejected. The court also noted that *in arguendo*, assuming it constituted infringement, it had “no impact, no effect and cause[d] no loss to anybody” and may be ignored for this reason as well.⁵⁸ In *Saregama India Ltd. v. Mosley*, before a US Court,⁵⁹ Saregama sued for the unlicensed use of a one second long clip of Lata Mangeshkar’s ‘*Baghon Mein Bahar Hai*’ looped in Timothy

media-and-interactives/media/international/rhythm-and-raga/ (Last visited on November 30, 2023).

⁵² *Id.*

⁵³ Unnati Sharma, *Did AR Rahman ‘Lift’ Dagar’s Shiva Stuti for PS2 Veera Raja? A New Music Ownership Battle*, THE PRINT, April 28, 2023, available at <https://theprint.in/feature/did-ar-rahman-lift-dagars-shiva-stuti-for-ps2-veera-raja-a-new-music-ownership-battle/1543375/> (Last visited on November 30, 2023).

⁵⁴ The Copyright Act, 1957, §57.

⁵⁵ John Merryman, *The Refrigerator of Bernard Buffet*, Vol. 27, HASTINGS L. J., 1025 (1976).

⁵⁶ The Copyright Act, 1957, §§2(p), 13(1)(a).

⁵⁷ *Saregama India Ltd. v. Viacom 18 Motion Pictures*, 2013 SCC OnLine Cal 3729.

⁵⁸ *Id.*, ¶14.

⁵⁹ *See Saregama India Ltd. v. Mosley*, 635 F 3d 1284 (11th Cir 2011).

Mosley's 'Put You on the Game'. Though the petition was rejected on the grounds of lack of statutory standing, the court identified the time stamps and note technicalities of both tracks, and might have come to similar conclusions from a substantive point of view as well.⁶⁰

The judicial recognition of the listed factors is already in its nascent stage in the United States, notably in Flames' dispute with Katy Perry regarding her hit song 'Dark Horse'. Both the songs consist of a melody progression in the minor-key with B and C notes on the same time signature, and both fall into a genre somewhere in between trap, pop and electronic dance music.⁶¹ Katy Perry's defence rested on the generic nature and fundamentality of the riff in question. They argued that the riffs are basic and simple enough to be generated through a computer programme (reminding somewhat of Riehl and Rubin's thought experiment), and copyright protection to Flames' track would lead to a disastrous result within the music community, a 'chilling effect' on creativity.⁶²

After a discouraging jury decision, this case was eventually overturned in favour of Katy Perry when the judge ruled that the similarity of a single element would not be sufficient, as matter of law, to rule on a copyright infringement, especially since the Plaintiff's expert witness conceded that certain common sounds would be 'very difficult to monopolise'.⁶³ This was also echoed in a decision regarding Led Zeppelin's 'Stairway to Heaven', where the court ruled that for such a claim to subsist, "for works where there is a narrow range of available creative choices, the defendant's work would necessarily have to be 'virtually identical' to the plaintiff's work in order to [meet the threshold of] substantially similar".⁶⁴ Therefore, the finiteness of musical structures such as melodies, or at least the finiteness of structures that may be utilised in conformity with the rules of the genre is starting to see some recognition.

Legislative references have also been made in cases such as *Estate of James Oscar Smith v. Cash Money Records*,⁶⁵ where the Court considered the codified bounds of fair use under the United States Code, which include, *inter alia*, the purpose and character of use, nature of original work, quantified portion of the original work used and the effect of the same on the market or commerciality of the

⁶⁰ *Id.*, 1288-1289.

⁶¹ Nastia Voynovskaya, *Copyrighting the 'Building Blocks' of Music? Why the Katy Perry Case Alarms Producers*, KQED, August 6, 2019, available at <https://www.kqed.org/arts/13863015/perry-dark-horse-flame-joyful-noise-copyright-infringement-precedent> (Last visited on November 30, 2023).

⁶² *Id.*

⁶³ Techdirt, *Surprise: Judge Throws Out Jury's Awful Copyright Infringement Decision Over Katy Perry Song*, ABOVE THE LAW, March 20, 2020, available at <https://abovethelaw.com/2020/03/surprise-judge-throws-out-jurys-awful-copyright-infringement-decision-over-katy-perry-song/?rf=1> (Last visited on November 30, 2023); see also Gray, *supra* note 39.

⁶⁴ Michael Skidmore v. Led Zeppelin, No. 16-56057 DC No. 2:15-cv-03462- RGK-AGR, 48.

⁶⁵ Estate of James Oscar Smith v. Cash Money Records, 2020 WL 522013 (2nd Cir February 3, 2020).

original work.⁶⁶ In this case, the court considered the appellant's objection to the sampling of thirty-five seconds of a song in the defendant's track, and concluded that the 'transformative' nature of the work rendered the use fair, as the original work has been used for a purpose that transforms its character.⁶⁷ Here, a uniquely low threshold was considered, wherein the secondary use of such sound recording may be permitted if transformative and reasonable in fulfilling the 'purpose' of such secondary recording.⁶⁸ The last and more commercially significant point discussed was as regards the usurpation of commercial benefit to the original author.

As noted through the specific facts of this case and the author's general observations, most samples are borrowed usually from music belonging to a different genre, or at least a different era in the evolution of music. This gives rise to the reasonable inference that the common consumers of such music would be limited. Alternatively, and as mentioned previously, the reintroduction of erstwhile tracks could be beneficial to the original work, which could potentially see more traction from listeners of the (crudely put) derivative work. A notable instance is in the *Sony BMG Taiwan – Tips Industries dispute*, where it was alleged that the song '*Zara Zara Touch Me*' composed by Pritam was a copy of Wang Lee Hom's song '*Deep in the Bamboo Grove*', the rights to which were owned by Sony. Technicalities of the dispute aside, Lee Hom himself commented "to a composer, to be copied means acknowledgement, because only the good things will get copied".⁶⁹

From a statutory perspective, the Act makes no specific distinction in the judicial consideration of musical work. §13(1)(a) places the conventional blanket standard of 'originality' unqualified by permission for factoring in unique practices of 'work' under the Act.⁷⁰ §13(a) of the Copyright Act, 1957, ('the Act') states that copyright may subsist only in 'original' literary, dramatic, musical and artistic works, which would not cover facts by implication, and it has been noted that "Copyright does not ordinarily protect titles by themselves or names, short word combinations, slogans, short phrases, methods, plots or factual information"⁷¹ (emphasis supplied). We can argue that the standard of 'originality', when juxtaposed with the findings of mathematical finiteness of melodies (i.e., elements of music are math, and therefore, facts, which cannot obtain copyright protection), implies the exclusion of such elements from the ambit of the Act entirely,

⁶⁶ Title 17 United States Code, §107.

⁶⁷ *Estate of James Oscar Smith v. Cash Money Records*, 2020 WL 522013 (2nd Cir February 3, 2020), 19-28.

⁶⁸ *Cariou v. Prince*, 714 F 3d 694, 710 (2nd Cir 2013).

⁶⁹ Gowree Gokhale & Aditi Nadkarni, "*Zara Zara Touch Me*" of *Race Caught in Legal Tangle: Sony BGM Taiwan Claims Damages for Copyright Infringement*, NISHITH DESAI, August 28, 2008, available at <https://www.nishithdesai.com/generateHTML/5800/4> (Last visited on November 30, 2023).

⁷⁰ The Copyright Act, 1957, §13(1)(a).

⁷¹ DEPARTMENT FOR PROMOTION OF INDUSTRY AND INTERNAL TRADE, MINISTRY OF COMMERCE AND INDUSTRY, A HAND BOOK OF COPYRIGHT LAW, available at <https://copyright.gov.in/documents/hand-book.html> (Last visited on November 30, 2023).

making any claims arising from the same moot. Further, the Act provides certain exceptions for actions that are not considered infringement of copyright,⁷² including specified instances of what constitutes ‘fair dealing’. This, therefore, does not leave space for independent consideration of what may constitute ‘fair use’ as in the United States, or any limitation on exclusive rights for intellectual property. Alternatively,

This understanding may also be furthered by importing the observations of the Supreme Court in the case *R.G. Anand v. Delux Films*,⁷³ (‘R.G. Anand’) where it was noted that the common source of an idea inevitably leads to similarities in any works developed from the same. The court recognised the *scenes à faire* doctrine, which purports that elements common to a genre would not be protected and that actionable similarities must transcend “common ideas which are unprotectable and fundamental or substantial to the expression adopted”.⁷⁴ Therefore, resort must be taken to an evaluation of whether the subsequent work is materially and substantially similar, and whether the same or similar theme has been ‘presented and treated differently’ so as to make any subsequent work entirely removed from the ‘original’ and ‘new’.⁷⁵ The fragments of a work cannot be looked at independently and the scope of protection is over the overall expression. Further, the court prescribed an exclusion for coincidences,⁷⁶ which are significant in music copyright keeping in mind observations regarding the usage of generic sounds, such as in the Katy Perry or Led Zeppelin cases.

This can be notably seen in the recent *Thaikuddam Bridge – Kantara* case, where more than one Indian court avoided delving into the basic jurisprudential questions of determination of the ownership of copyright in a musical work or whether the disputed elements would even be capable of copyright protection. The courts took a *prima facie* view, without delving into the principles of the music forming the subject matter of the suit. A technical analysis of the tracks has revealed that they involved the application of certain standard *ragas*, revealing that “[w]hen these signature elements are stripped away or filtered from the similarity analysis, the overall expressive form of the two songs is in no way unmistakably similar, especially due to the volume of lyrical and expressive differences”.⁷⁷ This dispute seems to unfortunately abate without furthering discourse owing to a settlement between the parties.⁷⁸ However, a more technical look into the components of contentious musical works may indicate for the need of application of the *scenes à faire* doctrine while conducting a judicial analysis in infringement suits.

⁷² *Id.*, §52.

⁷³ *R.G. Anand v. Delux Films*, (1978) 4 SCC 118, ¶52(2).

⁷⁴ *Id.*, see *supra* note Part II.B on “Genre Conformity and Instrumental Limitations”.

⁷⁵ *R.G. Anand v. Delux Films*, (1978) 4 SCC 118, ¶46.

⁷⁶ *Id.*

⁷⁷ Agrawal, *supra* note 36.

⁷⁸ *Vijay Kirgandur v. State of Kerala*, CrI. MC Nos. 649, 1356 & 4182 of 2023, ¶7.

IV. LOOKING AHEAD: MUSICAL WORK IN INDIA

The copyright regime in India functions with indications of legislative requirement or limits arising from the industry as opposed to finding origins in the legislature. Action on parts of melodies as noted in the above-discussed cases seem unlikely where the entertainment industry, especially in the recent years, is structured upon heavy inspiration from media in other languages and ‘remixes’ of old tracks. However, this provides an opportune occasion for the Indian legal fraternity to develop modern and practical jurisprudence on copyright infringement cases in music as and when such action becomes more common to note in India. Judges will have the latitude to answer more-than-legal questions with the help of experts, including but not limited to the boundaries of ‘inspiration’, recognising the rules of a niche subject, and in general how to further the uninhibited production of intellectual property.

At the outset, under sub-part IV(A), the author recommends means of testing for infringement in musical work, and thereafter under sub-part IV(B), the paper reassesses the standards of infringement by drawing inspiration from other forms of intellectual property such as design law, and takes a look at industry practice as well as traditional cultural expression.

A. TESTING FOR INFRINGEMENT IN MUSICAL WORK

The subjective technicalities of music production and the sheer variety of genres makes it difficult to identify particular elements that can be included or excluded from identification as ‘original’. Thus, a few considerations may be relevant for a court to keep in mind while determining the factum of infringement or ‘originality’, in addition to the foundational assessments of substantial similarity, audience test and chronological access.

First, whether the findings of similarity may be set-off by the existence of elements that cannot be individually protected (requiring expert determination). Here, a court may seek to assess whether the constituents of the work is such that it may benefit from the application of the *scenes à faire* doctrine or the merger doctrine. The latter might be significant in that it attacks directly the idea-expression dichotomy in copyright law, postulating that where an expression is so interlinked to the idea so as to lead to an inseparability of both, such expression may not be afforded protection. In *Mattel, Inc. v. Jayant Agarwala*,⁷⁹ it was noted that courts could not protect the expression of an idea which may be “expressed only in a very limited manner, because doing so would confer monopoly on the idea itself”. In conjunction with the *scenes à faire* doctrine, the merger doctrine may protect musical work employing rules of a genre or mathematical limitations of musical expression. While its judicial use has been noted mainly in artistic and

⁷⁹ *Mattel, Inc. v. Jayant Agarwala*, 2022 SCC OnLine Del 724, ¶3.

literary work, the ‘idea’ here can be interpreted to mean the making of music in a particular genre, which would necessitate the usage of certain foundational and inalienable elements that are decorated by the creative input of the composer.

Second, whether the taking of inspiration or sampling may be paralleled with the principles of ‘industry or trade practice’ (requiring expert determination). The use of samples in sound recordings is usually not made to misrepresent the origins of musical work, but to enhance its aesthetic value. Popular examples include the inclusion of Lata Mangeshkar’s ‘*Thoda Resham Lagta Hai*’ in ‘Truth Hurts ft. Rakim – Addictive’, and S.P. Balasubrahmanyam’s ‘*Tere Mere Beech Mein*’ in Britney Spears’s ‘Toxic’, which very apparently make no effort to misappropriate the borrowed elements as theirs or cause economic loss to the preceding work, especially because they belong to different, even far from adjacent genres. An argument may be made for its lenient consideration as industry practice, especially where an ‘infringing’ composer credits and remunerates or indicates willingness to credit and remunerate where equitable. The *de minimis* doctrine has been recognised in India to gloss over trivial violations of copyright law,⁸⁰ and may also come into play here, especially to protect relatively smaller independent artists.

Third, whether evidence can be adduced to prove that the method of production of the infringing music is such to indicate an independent creation (requiring expert determination). In addition to the access test and similarity analysis, it may be worth looking into a documented explanation of the creative process behind the creation of contentious works to examine and assess whether they could have independent origins rooted in the prescriptions of a particular genre. Mainstream artists such as Ed Sheeran have already publicly declared their intentions to pre-emptively record the development process.⁸¹

B. REASSESSING STANDARDS OF INFRINGEMENT: TAKING INSPIRATION FROM DESIGN LAW

Inspiration may be taken from established principles of design law, which also creates space for the unhindered usage of functional elements and those common to the trade.⁸² Granting protection to novel applications of pre-existing work is not uncommon in the intellectual property regime. For instance, in *Asian Rubber Industries v. Jasco Rubbers*,⁸³ design protection was challenged to footwear developed on the basis of traditional ‘*paduka*’ design. However, pro-

⁸⁰ India TV Independent News Service (P) Ltd. v. Yashraj Films (P) Ltd., 2012 SCC OnLine Del 4298, ¶¶60-65.

⁸¹ Tim Adams, *Ed Sheeran has a Plan to Tackle Claims of Plagiarism*, THE GUARDIAN, April 9, 2022, available at <https://www.theguardian.com/commentisfree/2022/apr/09/ed-sheeran-has-plan-tackle-claims-plagiarism> (Last visited on November 30, 2023).

⁸² APL Apollo Tubes Ltd. v. Surya Roshni Ltd., 2017 SCC OnLine Del 6380, ¶¶60, 63, 65.

⁸³ 2012 SCC OnLine Bom 355, ¶3; *see also*, Havells India Ltd. v. Panasonic Life Solutions India (P) Ltd., 2022 SCC OnLine Del 1662, ¶77.

tection was recognised as it formed a corpus of the designs that are old yet original in their application, which may be validly protected.⁸⁴ As with copyright in *R.G. Anand*, design law and trade dress also focus on the overall impression as a whole.

The same understanding may be imported for samples of classical work or elements of genres, which are applied new in every ‘remix’. This is also supplemented by the copyright doctrine of the modicum of creativity, which has been adopted from the United States as well. In the case of *Indian Express Newspapers (Bombay) (P) Ltd. v. Jagmohan Mundhara*,⁸⁵ it was found that usage of the same ‘facts’ with the application of a modicum of creativity as to presentation and arrangement can lead to a finding of non-infringement. In the context of musical work, certain arrangements being fundamental and mathematically factual, would make allowance for their exclusion as functional over which creative input is required for the then resulting production of original work. For instance, in Hindustani classical music, the ‘*Raga Pahadi*’, not only technically (in terms of notes) but also tonally creates similar imagery. Many film songs composed basis the *raga* are set in natural landscapes such as mountains to create a particular tone, generated on the bedrock of the melody.⁸⁶ Some examples of songs composed on this *raga* include, among others, ‘*Lag Ja Gale*’ sung by Lata Mangeshkar, and ‘*Chaudhvin ka Chand*’ and ‘*Suhani Raat Dhal Chuki*’ sung by Modh. Rafi.⁸⁷ The tonal feel of the songs, owing to the *raga*, might thus evoke similar imagery, and would perhaps be injured by statutory monopoly over the element, which is meant to be functional in producing a song in this particular genre appropriate for a specific cinematic setting.

C. INDIAN INDUSTRY PRACTICE AND MUSIC AS PART OF TRADITIONAL CULTURAL EXPRESSION

Much of the music sampled in mainstream Indian tracks arise from either traditional/folk music with untraceable root or production and ownership of the very few dominating labels, which often recycle and remix their own music without requiring licence. With regard to the former category, an ideal system of protection can be created by the involvement of and contemporaneous action by at least two of the three major stakeholders (i.e., the folk community, the potential users, and the government).

For instance, the mere cataloguing of traditional music would assist efforts in attribution and credit-sharing. While concerted legislative efforts have to be made for statutory profit-sharing, this might at the minimum encourage

⁸⁴ *Asian Rubber Industries v. Jasco Rubbers*, 2012 SCC OnLine Bom 355, ¶16.

⁸⁵ 1984 SCC OnLine Bom 256, ¶12.

⁸⁶ Sharada Iyer, *Bollywood Songs Based on Raga Pahadi*, July 23, 2020, available at <https://myviewsonbollywood.wordpress.com/2020/07/23/bollywood-songs-based-on-raga-pahadi/> (Last visited on December 7, 2023).

⁸⁷ *Id.*

a practice by music producers of attempting to attribute and converse with the representatives of communities that assisted in the emergence of such music. Further legislative steps may be inspired from jurisdictions such as Cameroon and Senegal, which provide for a system of ownership by communities and license structures for transfer of royalties to them.⁸⁸ Copyright office publications may also assist in drawing up draft licence and acknowledgement agreements that can be utilised by artists and labels to attribute and royalty-share. In the interim, public discourse on popularised folk practices and community rights continues to assist in attribution and remuneration rights. For instance, the popularity of the film ‘*Kantara*’, which included within in a showcase of the ritual of ‘*Bhoota Kola*’, led to the announcement of monetary allowance for practitioners of the ritual by the Karnataka Government.⁸⁹

With regard to the second category, there are very few and proportionately dominating record labels in India, including T-Series, which has a thirty-five percent share of the Indian music market, followed by Sony, which has another twenty-five percent.⁹⁰ The ‘remaking’ of songs is a popular method employed in the Hindi film industry as a method of advertising the film and attract more listeners. For instance, the song ‘*Tamma Tamma Loge*’, (1989), owned by T-Series, is remade in ‘*Tamma Tamma Again*’ (2017), also owned by T-Series. Further, owing to the existence of fewer competing players, cross-licensing through direct negotiation seems to be an easier feat within the mainstream industry, where control vests usually with producers, who are either interpreted as first owners of copyright or contractually have the rights bestowed upon them. Though the conscionability of permitting remakes without the artists’ consent may be called into question, the legality rarely is, even with public controversies.⁹¹

V. CONCLUSION

While global trends look promising, the ground reality is that claims in copyright are adjudged mostly by individuals with little to no grassroot understanding of the music industry and its practices. One producer states that when an artist requests for a track to be produced with a certain texture, feel or tone, “[t]here are only so many notes or chord progressions or bass lines that can be

⁸⁸ Law No. 2000/011 on Copyright and Neighbouring Rights, 2000, §5 (Cameroon); Law No. 2008/09 on Copyright and Neighbouring Rights, 2008, Art. 157 (Senegal).

⁸⁹ *Following Kantara’s Success, Karnataka Govt Announces Allowances for Daiva Narthakas Depicted in the Film*, HINDUSTAN TIMES, October 20, 2022, available at <https://www.hindustantimes.com/entertainment/others/kantara-impact-karnataka-govt-announces-allowance-for-daiva-narthakas-in-state-101666271330060.html> (Last visited on November 30, 2023).

⁹⁰ Aarohi Agarwal, *The History and Current State Indian Music Industry in 2022*, DAILY MUSIC ROLL, July 27, 2022, available at <https://www.dailymusicroll.com/entertainment/the-history-and-current-state-indian-music-industry-in-2022.html> (Last visited on November 30, 2023).

⁹¹ *Badshah on Masakali 2.0 Controversy: AR Rahman Liked my Remixed Version of Humma Humma*, INDIA TV, April 11, 2020, available at <https://www.indiatvnews.com/entertainment/news/badshah-masakali-controversy-ar-rahman-humma-humma-remix-606766> (Last visited on November 30, 2023).

played⁹² Such subtleties remain ill-understood by laymen outside the community and therefore require increased noting of industry practice in the adjudication of copyright claims.

Through a technical and industry practice study, it is hypothesised that the nuances of musical work and sound recordings point towards the benefit of a more liberal approach in adjudicating copyright infringement claims. This is owing to esoteric factors, such as the finiteness of elements, limitations to production on specific instruments, rules of particular genres and methodological convergences in creation of the work, as well as more artistic and vogue factors, such as sampling, creation of commercially focussed musical work and simply drawing inspiration from pre-existing art.

However, it is recognised that Western music and its tradition and technicalities diverges from the landscape of music in India. Limited jurisprudence on infringement of musical work presents difficulties in predicting judicial responses to claims of copyright infringement. For the Indian regime, though, these concerns look to be at length. We have only just caught up with international standards in remuneration and credit to artists,⁹³ and scholars note that cases in intellectual property still remain low-priority in enforcement and for courts.⁹⁴ Much of the discourse on infringement takes place in popular media and claims are often settled out of court, owing to their civil or commercial underpinnings.

In this landscape, it seems functional to get ahead and identify the rules that might assist in the adjudication of such claims before Indian courts, and explore how theories such as the scenes a faire, merger and de minimis doctrines might apply to assess the extent of infringement. The author also proposes the import of standards set in other forms of intellectual property such as design law, which might serve as more congruent in terms of the production of the work. Additionally, the Indian scenario also requires the consideration of music that might fall within the ambit of ‘traditional cultural expression’ and consider its bearing on community attribution rights. Finally, it is suggested that the treatment of musical work might be distinguishable from other ‘work’ under the copyright framework owing to its inherently derivative nature. ‘Originality’ may not lie in the uninspired creation of an author but in their ability to create something new by utilising the tools of music previously wielded by other artists.

⁹² Voynovskaya, *supra* note 61.

⁹³ The Copyright (Amendment) Act, 2012, Cls. 8, 9.

⁹⁴ Harini Ganesh, *The Need for Originality: Music Infringement in India*, Vol. 11, J. MARSHALL REV. INTELL. PROP. L., 183 (2011).