



## Traditional Music through the Lens of Copyright

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India is a country rich in cultural heritage and has in its repertoire a vast pool of folk songs. Music composers not alone from India, even from the West are now looking at and using the folk songs of India in their compositions. In the quest to compose music that is pleasing to the ear, present day composers are now using traditional music in their compositions. The holder/community who has composed the traditional music is neither given any credit nor are they compensated. India does not have in place an effective legal system to protect traditional music. The absence of an effective legal protection for traditional music is a ruse for the composers who appropriate the music of the traditional community. Though some countries consider traditional music as common heritage, many countries including India are yet to evolve any legislation for ensuring that the traditional music is not used without acknowledging the stake holders. The work is intended to inform the readers of the importance of traditional music and its rampant use without permission. The article canvasses for a formal legal clothing for traditional music which will ensure an adequate recompense for the holders of the traditional music.

**Keywords:** Traditional Music, Copyright, Borrowing, Public Domain

Traditional music is a basket of songs that come from a group or community, the authorship of which is not known or linked to a particular person. The song is usually sung within the particular community. The copyright law in its present form is not suitable for protecting the traditional music due to the peculiar features of that music. These songs have a peculiar rhythm and style which is pleasing to the ear and is imitated by the composers of the modern day. The lack of protection for traditional music has resulted in rampant use of traditional music in the songs of today. The rationale behind protection of intellectual property requires any form of creativity which is original to the author to be protected. More often traditional music is not granted a protection due to the absence of an identifiable author. This category of music also does not fit in with the requirements like fixation. The significance of this study stems from the widespread use of traditional music by modern day composers without compensating the traditional community.

Due to lack of sufficient protection, the work of minorities, more specifically traditional community, are constantly being exploited by wealthy composers.<sup>1</sup> A typical example of exploitation is that of Ratan Kahar, a folk singer based in Birbhum. The folk song

of Kahar had the main hook which was ‘Boroloker biti lo/lomba lomba chul/ emon chule lagiye debo laal genda phool’.<sup>2</sup> The single of rapper Badshah, Genda Phool, used the folk song of Ratan Kahar and got over 40 million hits in YouTube. Genda Phool did not credit Ratan Kahar nor was he given any royalty. Team Badshah responded to the allegations stating that the song was part of Bangla folk culture and belongs to the community and so not entitled to copyright.<sup>3</sup> He also claims Kahar as not being credited in any of the previous works which had used the folk song. Ratan Kahar is now living in utter poverty, not even able to agitate his cause. The importance and necessity for protection of traditional music is evident from the helplessness and plight of folk song composers like Kahar, who are not able to even sue the infringers due to lack of financial strength.

### Characteristics of Folk Music

A definition of folk music was attempted by the Annual Conference of the International Folk Music Council. The definition states that orally transmitted music which is dependent on continuity, variation and selection is called folk music.<sup>4</sup> Folk music is not traceable to a single composer and depends on evolution. The folk character of folk music is achieved through the constant changes made by the community. Though the origin of folk music is

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unknown, it is absorbed into the community and is reworked by the community. Like traditional knowledge, the author of folk music is the community and it is considered as traditional cultural expression.<sup>4</sup>

Traditional folk music while retaining the characters of traditional music is shaped by continuity, variation and selection and owes its beginning to a local community. Traditional music continually reworks on the available material. The folk artist continuously reworks on traditional music and is not satisfied with repetition.<sup>5</sup>

Continuity preserves tradition while variation springs from individual creativity and selection from the interests of the community.<sup>4</sup> Thus traditional folk music fits well into the category of traditional knowledge as folklore. Being traditional knowledge, traditional folk music is entitled to be protected. Evolution of folk music is not dependent on one person and is developed unconsciously through generations. The distinctive character of folk music is attained in the process of oral transmission from generation to generation. Even folk music borrows from pre-existing material and is influenced by extraneous factors.

### **Borrowing from Folk Music**

Music composers of the present day have identified that folk songs are pleasing to the ear and are incorporating the essence of folk songs in their music. Not alone in India, even in the West, many genre of music evolved from folk music. Jazz and rock music evolved from communal music. Jazz combines African American, Afro-Caribbean and European cultures, while rock music evolved from the Blues.<sup>5</sup> This traditional evolution of music based on existing work lends credence to the theory of borrowing.<sup>6</sup>

Borrowing played a prominent role in folk music. Haydn used folk music and expressed human emotions through his music.<sup>7</sup> Haydn was influenced by folk music in his childhood, his father being a folk musician and was surrounded by folk music from various countries like France, Spain and Portugal.<sup>8</sup> In music culture, borrowing is considered as a mark of respect for the masters of the past. George Frederic Handel borrowed from Bach, Mozart from Haydn and so on.<sup>9</sup> Beethoven arranged Scottish, Irish and Welsh folk songs as part of a project which George Thomson had originated. The folk song settings were so tailored by Beethoven so as to create an effective song. Thomson endorsed the genius of Beethoven on the fly

leaf of the volume as “original and beautiful are these arrangements by this inimitable genius Beethoven”.<sup>10</sup> Modern copyright law considers originality based on the individual internal genius and does not favour borrowing.

An example of use of folk music is that of Michael Sanchez and Eric Mouquet who created an album called Deep Forest, fusing music from Ghana, the Solomon Islands and African pygmies. They fused this music with techno house rhythm. The lining of the album states that the chants of the Deep Forest transmit the oral tradition of the primitive societies through the universal language of music. But the album does not give due credit to the Solomon Islands from which the music “Sweet Lullaby” featured in the album was sampled.<sup>11</sup>

Rorogwela was an unaccompanied vocal song released in a selection by the UNESCO Musical Sources recorded by Hugo Zemp. Michael Sanchez and Eric Mouquet sampled the song under the title Sweet Lullaby and the vocal in Rorogwela was sung to a dance beat from a drum machine. Synthesizer accompaniments and digital samples from Central African Water splashing games and vocal yodels were also used.<sup>12</sup> The composers of Deep Forest in their liner notes to ‘Boheme’ another album, acknowledge that native melodies are their raw material, an opportunity to cross and blend. This blending is reflected in the song Sweet Lullaby and is acknowledged in the liner.

The Black Brothers, a band from Irian Jaya released a song named Jalikoe which hit music charts. The song was a music theft of the Sanguma song Yalikoe from Papua New Guinea. Yalikoe was a traditional song from Maprik, performed by men to give them confidence before going for hunting.<sup>13</sup> These examples show that the use of traditional music in the present day compositions is unbridled due to the absence of an effective form of protection. The most striking aspect of this musical theft is that no recompense was given to the traditional community.

### **Protecting Folk Music**

Folk music is a category of traditional music<sup>14</sup> and at one point of time was considered as from the jungle. Folk music was used historically to deliver cultural experiences and was passed down from generation to generation.<sup>15</sup> Traditional music was considered by the community as having great power from healing the sick to games and even to create rain

or lightning. This power necessitated the regulated use of music as not for profit.<sup>16</sup> The absence of any form of protection for music in the early days can be logically considered as being attributed to this power. Even during the period when copyright protection was granted to literary work, music was not brought within the fold of protection. Music was brought within the definition of 'books' in the Statute of Anne only in 1842.<sup>16</sup>

Music is the most common form of expression of the traditional community. Music is used to convey information as well as for entertainment. Folk songs are influenced by the routine life and rituals and is sung used in a social setting like marriage, festivals, games etc. These songs also preserve information of the past and convey the culture of that time. Though intellectual property laws were not in force, the customary laws of the traditional community provided protection to folk songs. There were strict rules as to who can play certain instruments. The rules also mandated as to when each instrument was to be played. Some musical rites could be performed only by certain category of people. Thus there was a strict protection mode in place within the community, in which violations were spiritually punished by ancestors.<sup>17</sup> Folk songs were protected by social norms and beliefs.<sup>18</sup> The customary laws considered music as belonging to the community and cannot be transferred unilaterally by any member.

But with the movement of people across countries, it has become difficult to preserve traditions and associated folk songs. An example is 'Chutney' music, which is an Indian Caribbean musical genre. They draw from Indian folk songs especially those sung at weddings and also have its influence from other places as well.<sup>19</sup>

### **Difficulty in Protecting Traditional Folk Music by Copyright**

The question as to whether traditional folk music is entitled to copyright protection is a subject matter of great debate. To obtain copyright protection, traditional folk music must satisfy the requirements of Copyright Law. Copyright requires the following conditions to be satisfied:

#### **(a) An identified creator of the work**

Traditional folk music is transmitted to the community and is not always considered as belonging to the community in its entirety. Often traditional folk music is treated as part of the cultural heritage.

The author of the initial musical work is unidentifiable as the work is constantly evolved through variations by members of the community.

#### **(b) Fixation of the work**

The fixation requirement for copyright protection is impractical for folklore. Most traditional music cannot be fixed as it is ephemeral.<sup>20</sup> Constant changes in the traditional culture affects traditional songs making it impossible to satisfy the requirement of fixation. Deep Forest and Jan Garbarek, the Norwegian Saxophonist who sampled the original Rorogwela, as it transmitted through oral tradition could defend the allegations due to lack of fixation of the work.

#### **(c) Originality**

Another hurdle is to assess the originality of the musical work. A work is considered as original when it is independently created by the author. Folk music uses different social setting and sources which are based on shared knowledge.<sup>21</sup> Basically, copyright intends to protect the expression of the personality of the author. Thus an identifiable author who had expended his creativity is a sine qua non for copyright protection. Originality in the copyright term is always linked to an author. Traditional folk music is the outcome of the creative effort of a community and so there can be no identifiable author to whom originality can be ascribed. Thus existing copyright laws are not suitable for works of collective ownership or unidentifiable ownership.

### **Folk Music as Public Domain Material**

Folk culture is not merely the mechanical mixing and joining of tunes and lyrics: it is a set of values reflected in a set of processes where the music is refreshed, emphasizing variation and selection but with little thought to individual rights.<sup>22</sup>

There have been differing opinions as to whether folk music should be considered as public domain material or not. Popular music and folk songs were also used by composers as the starting point for their compositions. Beethoven in his 'Pastoral' Symphony No. 6 in F, Op. 68, borrowed folk music elements from Austrian cultures.<sup>9</sup> The freedom to borrow in the pre-copyright era helped composers to have a connection with the culture of the time and with the people.

Justice Mukul Mudgal of the Delhi High Court has aptly remarked about the importance of the traditional reservoir of Indian classical music as "For example the bhajan 'Raghupati Raghav Raja Ram' which is a

part of the Indian history of independence was originally composed and sung by Pt. Vishnudigambar Paluskar at Mahatma Gandhi's meetings. The melody of 'Raghupathi Raghav' did figure in the soundtrack of the film 'Purab Aur Paschim'. That does not give any right to the producer of 'Purab and Paschim' soundtrack to claim copyright against others who may record or sing 'Raghupati Raghav Raja Ram'. Similarly a well-known traditional Khayal composition in Indian classical music in Raag Kalyan 'Main Vaari Vaari Jaon' has been sung in the film 'Dil Se'. Whatever be the legality and efficacy of such a version, the adaptation of such a traditional composition by a contemporary composer/performer does not in law give him any rights capable of being asserted against other performers who may sing/record the said traditional composition. Similarly the well-known Meera Bhajan "Payojee Maine Ram Ratan Dhan Payo" was first recorded by the well-known classical musician, Shri D.V. Paluskar. It has subsequently been rendered and recorded by current performers. Owners and/or right holders of such versions cannot lay any claim to exclusive rights over their version recording or indeed legitimately claim to be composer of such traditional melodies.

Thus by taking recourse to the traditional reservoir of Indian classical ragas and traditional folk music, compositions based thereon results in sound recording which more often than not refer to the original source in their sound recording. In such a situation, the current composer cannot claim exclusive rights to such a sound recording, which are assertable against any other performer/sound recording based on such traditional repertoire. Thus no enforceable rights can be acquired by any contemporary musician in rendering/recording traditional compositions. Consequently, the traditional repertoire of Indian music which may not now enjoy copyright protection due to passage of time and being in the public domain, cannot be appropriated by any individual by virtue of a later and current sound recording by excluding other performers and/or composers. The tradition of Indian classical and folk music is a valuable public heritage common to all adherents and cannot be purloined by a contemporary performer/composer by denying to others the benefit of the same.<sup>23</sup>

### **Musical Work in Indian Copyright Law**

Pop and Jazz music has borrowed from Indian classical music and attempts to sound their work as

though it is original with no credits to the Indian music.<sup>24</sup> The traditional Indian classical music is now part of world music and is borrowed by musicians across the globe.

Indian classical music revolves around two concepts, namely, Raga and Tala. The unique style of is maintained due to this system. Raga can be equated to melody and is a combination of notes. The different notes have a specific order and the notes inter se have a relation in between. This unity between the notes brings the soul of the music. There will be a co-ordination between the notes thus making music living and giving it a soul. The rhythmic cycle of the song is known as Tala in Indian music.

Indian classical music explores particular moods and is an amalgam of religious and mythological references.<sup>24</sup> Indian musicians combine the past with the creativity of the present.<sup>25</sup> Compositions in the classical music of South India and carnatic music of North India are intricately weaved with divinity. In the early centuries, music had a great role in the religious life and vice versa. Music was a personal mode of religious expression.<sup>26</sup> It is believed that gods created music for their enjoyment and gave down to humans for their enlightenment.<sup>27</sup> This religious clothing to music was one of the reasons for the absence of any form of protection for the traditional music. The contemporary distinctions between religion and politics necessitated music to be embedded in other social relations.

As early as in the late fifties Indian music was drawn heavily by the West. Beatles made the sound of Sitar, the Indian musical instrument, a regular feature of the band music of the West. The popular bands of the West during that time used Indian music as a general texture of their works. Though the bands like Rolling Stones, Traffic, Yard birds and musicians like Incredible String Band used Indian music, it was Beatles who experimented most with the Indian music.<sup>24</sup> The line between the different styles of music became thin with these experimentations. The pop music of the West frequently started using the features of classical music like, use of drones,<sup>1</sup> sitar, additive rhythmic ideas, conversations between instruments.<sup>24</sup> Beatles started using Indian elements in their music for the first time when the sitar was used for the song 'Norwegian Wood'.<sup>28</sup>

In Western music, a work is epitomized by the performance, but Indian music concentrates on underlying musical principles. In Indian musicology, theory is drawn from intellectual traditions like

philosophy, logic etc. and the all-pervading sound is refined in a number of stages into a sound which has aesthetic value.<sup>29</sup> The distilling is initiated by the human desire for self expression. This self expression resonates the Hegelian philosophy, which elucidates the need for copyright protection. Indian music is an effort at human expression.<sup>27</sup>

The Indian musical system is able to maintain its unique identity and originality due to the Raga and Tala system. Ragas functioned as objects of general aesthetic appreciation, as objects of technical specialization, and as tools of devotional practice.<sup>30</sup> Each rendition has its own raga and shruthi which gives original expression to a composition.

Music has a vocabulary and a dialect of its own. Originality in a musical composition stems from creeping into the traditional setting and modifying the grammar or idiom in an original manner. Melody and rhythm are the breath of Indian music which attempts to refine the melodic aspect coupled with the pattern of rhythm, unlike the Western which emphasizes on the role of harmony.<sup>31</sup> The originality of Indian musical compositions lies in the minute distinctions between notes and the glides between notes.<sup>32</sup> The melodic refinement is achieved through this bend of notes. Melodic template is the backbone of Indian classical music. The framework for composition for Indian music lies in the concept of raga<sup>33</sup> from which the musician or composer makes variations. The traditional Indian system of music has generic rules which have consistency with the possibility of variations within the framework of the generic rules.

While viewing the originality of a work which bases on a traditional music, the originality can be claimed only in those personal additions made by the composer.<sup>34</sup> New arrangements and additions of traditional music are entitled to copyright protection. If the additions are sufficient to qualify for copyright protection, the composer is entitled to copyright for the work. But while deciding infringement, that element of the folk music which has been taken will have to be sieved out from the additions.

The Madras High Court in *Sulamangalam R. Jayalakshmi v Meta Musicals*<sup>35</sup>, considered whether a composition and tune for a devotional music would amount to copyright for carnatic music. Sulamangalam sisters composed music and tune and sung the devotional songs Kandha Sashti Kavacham and Kandha Guru Kavacham. In the infringement suit they contended that the defendants had copied both

music and made audio cassettes. The contention of the defendants was that devotional songs dedicated in favour of Almighty cannot have an exclusive ownership. They also alleged that ragas, aradhanas and carnatic music are not the property of any individual and hence no exclusivity could be claimed in respect of the composition and tune of Kandha Sashti Kavacham and Kandha Guru Kavacham. The Court held that the claim of copyright to the music and tune of the musical work cannot be considered as copyright for carnatic music. The Court further held that a composer who has given tune to a song is the owner of the copyright in the musical work.

The use of folk music by the composers without any acknowledgment is evident from the litigation in *The Mathrubhumi Printing and Publishing Co. Ltd v Hombale Films*.<sup>36</sup> The plaintiff alleged that the copyright in the song 'Navarasam' composed by Thaikoodam Bridge was infringed by the song 'Varaha Roopam' featured in the movie Kantara. The plaintiff asserted to be the assignee of the song Navarasam.

Thaikoodam bridge is a multi-genre music band who collectively composes and performs music of the genre known as heavy metal, Indian folk, rock, reggae, Indian film pop and Indian pop. The music is steeped heavily into Kerala traditional folklore, sopana sangeetham and kathakali padam.

The plaintiff alleged that when Kantara film was released, the discerning audience alerted the band that part of the background score and one of the songs synchronized in the sound track of the film as its promotional song Varaha Roopam was an infringed version of the song Navarasam composed and arranged by the band. The plaintiff claimed that the defendant had infringed the copyright of the plaintiff in Navarasam by deploying the soundtrack of the film Kantara in the opening at time stamp – 00:07:10:12 to 00:09:32:11 and also in the end at time stamp 02:24:17:15 to 02:28:43:18. In order to substantiate their contention, plaintiff relied on newspaper articles wherein the composer of Varaha Roopam admitted of having been inspired by Navarasam.

The movie Kantara revolves on the story of a village community inhabiting the woods of Kaadubettu in Karnataka, a southern state of India. Kantara is a mysterious forest and the title of the movie also has a tagline "dhanthakathe", which translates to legend. The whole movie is set in a village background and is weaved with native culture

and ethos. The song is set in a divine mood and speaks about the Bhoota Kola culture. The issue that was to be determined was whether the copyright of the plaintiff in Navarasam was infringed by the defendants and deployed in the sound track of the movie Kantara.

According to the plaintiff, Navarasam depicts the unique cultural expression, ethos and genre of folklore music of Kerala in the realm of Kathakali and Sopana Sangeetham along with the traditional instrument called Chenda Melam. The plaintiff alleges that the musical work of the opening solo piece of violin has been exactly replicated by the defendants and performed with the instrument Nadaswaram. The opening chord and pitch of both the songs are identical and establishes that there has been willful copying of the plaintiff's works. Identical beats, percussive sounds and chord progression on the electric guitar follow the opening solo sequence. The vocal part of the song is in exactly the same style and raga of the plaintiff's work. The format, notations, template, progressions and the melody has been copied blatantly by defendants. The plaintiff also alleged that the music composer of the song Varaha Roopam admitted of having applied the tune and style of the plaintiff's work Navarasam and used the song as a reference. The plaintiff further contends that the composer of Varaha Roopam has also admitted that he was inspired by the use of rock music style, tempo and melody. He said that he had taken inspiration from the song Navarasam, but had maintained a different style, tempo and melody.

According to the singer of Varaharoopam, the song is based on three Ragas, Thodu, Mukhari and Kanakaangi. The singer also says that each line of the song is sung in a different raga, unlike other songs were at least two to three lines are in the same raga. The composer of the song Varaharoopam also says that the vibrant sound invokes the divinity surrounding the ritual dance and was intended to give a native touch. Taking cue from the folk songs of Tulu Nadu, the composer used a combination of flute and koragaradolu for the background music. The music also has a blend of many tribal instruments producing screaming sounds. The defendant also contended that the music has a blend of many tribal instruments producing screaming sounds. A new concept called throat singing was also employed to bring in the devoutness. The song is a concoction of carnatic, classical, folk and rock music.

The District Court restrained Hombale Films from distributing, exhibiting or releasing the cinematograph film Kantara with the synchronized song Varaha Roopam without inserting due acknowledgment of authorship of the composer Thaikoodam Bridge and the ownership of the plaintiff.

The plaintiff themselves having admitted that they had drawn from the folklore of Kerala, their claim should be restricted only to the contributions made by the composer. Both the songs having used the same genre of folk music, the similarity in the songs can be attributed to the common source. The defendant appealed<sup>37</sup> before the High Court of Kerala and the Order of the District Court was stayed, but subsequently the appeal was withdrawn.

### Conclusion

With the widespread use of traditional music in the music industry, it is necessary to have a legal clothing for folklore including traditional music so that any original adaptation which uses traditional music has to satisfy required standards and provisions. The absence of a legal protection for traditional music and folklore results in making these works public domain works, left free for all. The rights of the community who evolved the traditional music are violated in such instances.

Several countries like, Algeria, Senegal, Kenya, Mali have regulated use of the creations of folklore, within the framework of copyright laws. The Copyright Act of Tunisia recognizes the importance of folklore. Any exploitation of folklore requires authorization of the Ministry responsible for culture and a fee has to be paid to the welfare fund of the Copyright Protection Agency.<sup>38</sup> Though copyright subsists in works inspired by folklore,<sup>39</sup> authorization from the Ministry for Culture is required for the assignment of copyright in those works.<sup>38</sup> The Act defines folklore as any artistic heritage bequeathed by preceding generations and bound up with customs and traditions and any aspect of folk creation.

Some countries have legislated granting a national heritage status to folklore. These legislations will bring traditional music within the fold of national heritage. Use of such traditional music is restricted by the national legislations. The Copyright Act of Senegal has protected its folklore as a national heritage and permission should be obtained from the Authority for fixation or use of the folklore.<sup>40</sup>

Traditional folk music has all the characteristics of traditional knowledge, orality, transmission through generations, sharing process between the members of the community/group. A *sui generis* legislation for protection of traditional music can be a viable option to ensure that the folklore is left open to the public with provision for sharing the benefits with the community as is being done for traditional knowledge.

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