Blurred Idea – Expression Divide in Musical Works

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Abstract
The raison d'etre for copyright protection is to balance the conflicting interests of the public and the private. The public wants access to the work, while the private needs to be compensated for the time, skill and labour expended for the work. The balancing of the interests requires keeping a pool free for all to exploit. Copyright law ensures this pool by keeping ideas free for all to exploit. Copyright does not protect ideas, but only expression of ideas. The difficulty in preserving this balance is to draw the line between idea and expression. In music the divide is more blurred due to the availability of limited notes and ideas. The basic concept of idea is explained by studying the theories of Plato, Locke and other philosophers. Further ahead the researcher identifies the difficulties in drawing the dividing line between idea and expression and also analyses the need for sieving out the protectable from unprotectable elements in music. Differentiating between idea and expression is pivotal in copyright law as only expression of an idea is entitled to copyright protection. This study attempts to discuss the difficulties encountered by music due to the idea expression blur.
Keywords: Copyright, Music, Idea, Expression, Protectable elements, Non Protectable elements

Introduction

Copyright does not protect ideas, but only the original expression of the ideas. [1] While the Copyright Act of United States specifically excludes ideas from the realm of copyright protection,[2] the Indian Copyright Act does not specifically exclude ideas from protection. Though many philosophers have emphasized the concept of idea, absence of a precise definition of idea in copyright law has paved way for differing interpretations. Ideas were considered by United States courts as having no value to none other than the author.[3]

Any form of intellectual property rights necessitates a balance between the conflicting interests of the public and the private. One of the means by which copyright law ensures this balance is through the concept of idea versus expression. Judge Hand has laid down that the line between idea and expression is not precise.[4] One cannot define any infallible principle to decide if one has overstepped the idea threshold.[5]

Creativity is the capacity to generate ideas that are new and valuable.[6] If the general idea which underlies the basis of the work has alone been taken there will be no infringement.[7] If anything more than a general idea is taken, the question whether there is an infringement or not will depend on the nature and quality of the work taken.

Philosophical Theories of Idea

According to Plato, an idea is independent of an actual manifestation.[8] The Platonic theory suggests that only ideas have permanence and objects of the material world are constantly changing.[9] Ideas are seen not by physical sight, but by intellectual vision. Plato considers the physical world as a reflection of the absolute world of ideas. [10] He considered man's knowledge as innate.[11] This theory can help identify the border line between idea and expression in copyright. Socrates too visioned ideas as absolute reality, always remaining constant.[12] Ideas in the copyright form, being absolute reality has to be left unprotected so as to ensure

consistency. Expressions in the copyright terminology are imitations of ideas, which keeps changing. This helps maintain the equilibrium between creativity and the common pool.

The idea expression dichotomy can be found in the philosophy of Locke and Hegel. Locke considers ideas as the operation of the mind. The Lockean concept builds on the understanding that sensations and operations of the mind are the source for all ideas.[13] He derived his theory from the concept that knowledge evolved from experience and not from the innate. The human mind always relies on past experiences and pre-existing works for weaving ideas. Thus there can be no original idea, but only an original expression of an idea.

According to Hegel, property is an expression of one's self or personality.[14] The expression of the personality has to be sieved out from those which are not the personality of the individual.

The TRIPS Agreement was the first international treaty prescribing the dichotomy between idea and expression. The Agreement reads as follows: "Copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such." [15] This distinction between idea and expression helps to ensure equilibrium.

Creativity is often ignited by the works of predecessors. Formative years influence a composer and they draw from public sources and create their own style. Authors derive inspiration from their surroundings, culture, language and symbols.[16] The popular musician and Nobel Prize winner, Bob Dylan had confided as having stood on the shoulders of other musicians. The influence of country and western music was acknowledged by Bob Dylan in an interview to New York Times. Later Dylan fell into the rock n roll music of Chuck Berry and Little Richard. Early childhood of Dylan, in the Greenwich village exposed him to folk music. Drawing inspiration from the folk music, he transformed them into a sound and creativity of his own.[17] Eric Clapton in his autobiography has recognized B.B King, Muddy Waters and Chuck Berry as an inspiration for his electric musical style as a blues fundamentalist after having travelled through the different genres like blues, jazz, country, reggae and rock.[18]

The new sounds of heavy metal, a genre of rock and roll music, were developed by Led Zeppelin in the seventies. The superstars of British band were influenced and supported by the American blues.[19] The early years of Led Zeppelin albums were appropriated from old blues by Jimmy Page. A mix of blues with heavy metals led to a new movement which in the words of Stephan Davis were atomic blues. Tracing the saga of Led Zeppelin, he was influenced by delicate versions of 1929, which was reconfigured with metals.

The confessions of Bob Dylan and Eric Clapton are an eye opener to the fact that music always has the tendency to draw from others.

Idea/Expression Dichotomy

The earliest of the concept of idea expression dichotomy in the British courts can be found in *Hollinrake v Truswell*.[20] Aptly explained the theory states "copyright does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed."

Justice Yeats in his dissenting opinion stated one of the most known conclusions regarding the idea/expression: "Ideas are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to let fly: for, till he thinks proper to emancipate them, they are under his own dominion."[21] British courts have also opined that ideas should be in public domain and free for all to exploit.

Baker v Selden [22] was the first decision in the US courts which applied the principle. Selden alleged copyright infringement against Baker for infringing copyright in his book. The book of Selden was a system of book keeping with forms, consisting of illustrating the system and showing how it is to be used and carried out in practice. The system was a peculiar arrangement of columns and headings. The defendant also used a similar plan, but made a different arrangement of the columns, and used different headings. The Court held that the book is entitled to a copyright protection, but the system which it is intended to illustrate is not protected by copyright. The decision in Baker clearly demarcated protectable expression from un-protectable idea. Copyright accords protection not to the work in its entirety, but only to those elements which are protectable.

The distinction between idea and expression is aptly described by the US Court in *Holmes v Hurst*[23] wherein it was observed that "The subject of property is the order of words in the author's composition; not the words themselves." Lord Mansfield described that words are private property and should be free for private appropriation as air and sunlight. But intellectual ideas communicated in a set of words is a mode of expression which is protected and the line between the two is often blurred.

Idea expression theory in music

Idea –expression dichotomy as applied to other categories of works cannot be applied to musical work due to the peculiar nature of the work. The restrictive nature of copyright law with regard to music gives less room for composers to bring out original musical expressions. Courts are often confronted with the onerous task of distinguishing between idea and expression in a musical infringement case. More often the language of music is not familiar to judges and lawyers who are not trained in music. This makes the task of identifying and distinguishing protectable from un-protectable elements in music difficult. Musical work always originate from something.[24] The theory of operation of the mind lends credence to the concept of borrowing in musical works.

Copyright protection for musical works requires a more stringent analysis. A wide spectrum of public domain elements for musical works will foster creative expressions.

A generalized application of the idea expression dichotomy is not feasible for different forms of work. The elusive nature of music makes the application of the dichotomy to music at par with other forms of work, difficult. Unlike literary works which can be expressed in words, musical works are expressed by notes which are subject to the rules of the composition. Melody, rhythm and harmony are the most basic elements of a musical composition.[25] Melody is the "the relationship between musical tones of various pitch and duration." [26] Harmony is the blending of tones.[27]

Dividing line between idea and expression is often blurred in music copyright. Expression in a literary work is more easily found in the words and the manner of expression of the words, but musical work uses many musical intricacies for its expression. Many of the musical elements would fall within the domain of idea and a trained musicologist alone will be able to discern the differences. Absence of a clear defining line between idea and expression limits creativity in music. In infringement analysis courts are often confronted with ascertaining whether an expression is an idea.

The finite choices and musical elements restrict and make the divide more difficult. Limited choices of building blocks of music coupled with the rules of composition restrict the music composer. Other than the rules of composition, cultural and social rules also restrict a composer.[28] Hence copyright protection for musical works cannot be treated at par with other copyrightable works. Resolving the idea expression divide in music will help bring certainty in the realm of protection to music.

A classic example of broad protection in music is the famous Blurred Lines case. There are only limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions, especially in popular music.[29]

Blurred Lines case

The Ninth Circuit in *Williams v Gaye* [30] found that musical compositions are not confined to a narrow range of expression.

In 1976, Marvin Gaye recorded the song "Got To Give It Up" and the Gayes inherited the copyrights in Marvin Gaye's musical compositions. Pharrell Williams and Robin Thicke wrote and recorded "Blurred Lines." Clifford Harris, Jr., separately wrote and recorded a rap verse for "Blurred Lines" that was added to the track later. Thicke, Williams, and Harris co-own the musical composition copyright in "Blurred Lines." The Gayes made an infringement demand on Williams and Thicke after hearing "Blurred Lines."

Finell as expert witness for Gayes opined that there is a "constellation" of eight similarities between "Got To Give It Up" and "Blurred Lines," consisting of the signature phrase, hooks, hooks with backup vocals, "Theme X," backup hooks, bass melodies, keyboard parts, and unusual percussion choices.

The court filtered out unprotectable similarities and also identified the differences based on the expert evidence. The Court while evaluating substantial similarity discussed broad and thin copyright protection. If a work encompasses a concept that has a wide range of expression, the protection will be broad and another work will infringe only when the other work is substantially similar. While a narrow range of expression commands a thin protection and infringement requires virtually identical work. The Circuit Court held that "Got To Give It Up" was entitled to broad copyright protection because music has a large array of elements and musical compositions are not confined to a narrow range of expression. The Circuit Court set too liberal a standard for providing copyright protection to components of a musical composition. While finding that musical composition has a broad expression, the Court diluted the similarity requirement to one of substantial similarity and not virtual identity. The panel held that "Got To Give It Up" was entitled to broad copyright protection because musical compositions are not confined to a narrow range of expression.

The decision in Blurred Lines gave a jolt to copyright infringement suits in the field of music. The low barrier to copyright is not suited to an art form like music, in which the composers borrow heavily from prior works.[31]

Stairway to Heaven shift

At the heart of the copyright infringement claim in *Michael Skidmore v. Led Zeppelin*, [32] was that the opening notes of Stairway to Heaven infringed Taurus, a song written by guitarist Randy Wolfe and performed by his band Spirit.

Stairway to Heaven was a great rock song of the English band Led Zeppelin. Guitarist Randy Wolfe claimed that Led Zeppelin copied portions of Taurus, a song written by Wolfe and performed by his band Spirit. The jury found that the two songs are not similar. Skidmore alleged that Stairway to Heaven infringed the copyright in Taurus. Skidmore claims that the opening notes of Stairway to Heaven are substantially similar to the eight-measure passage at the beginning of the Taurus.

Authors borrow from predecessors' works to create new ones, so giving exclusive rights to the first author who incorporated an idea, concept, or common element would frustrate the purpose of the copyright law and curtail the creation of new works.

Circuit Judge Witmore concurring with the majority held that Skidmore can claim protection for the original selection and arrangement of those elements, but the scope of that protection depends on the "range of possible expression." There are relatively few ways to express a combination of five basic elements in just four measures, especially given the constraints of particular musical conventions and styles. Once Randy Wolfe settled on using a descending chromatic scale in A minor, there were a limited number of chord progressions that could reasonably accompany that bass line (while still sounding pleasant to the ear). It was found that in light of the narrow range of creative choices available here, Skidmore "is left with only a 'thin' copyright, which protects against only virtually identical copying."

A limited set of a useful three-note sequence and other common musical elements are not protectable. While recognizing that the original selection and arrangement of unprotected elements can be protectable, the en banc Ninth Circuit in Led Zeppelin cautioned that a protectable selection and arrangement of musical elements requires more than just picking and choosing a number of unprotectable elements shared by two works that are otherwise dissimilar. Rather, a selection and arrangement copyright protects the particular way in which the artistic elements form a coherent pattern, synthesis, or design.

Gray v. Perry: The Dark Horse Case

At the heart of the issue in the Dark Horse case[33] was whether a eight note ostinato of Dark Horse infringed that of Joyful Noise. The District Judge overturned the jury verdict finding that Katy Perry's song, "Dark Horse," infringed the copyright of a Christian rap song, "Joyful Noise" by the artist, Marcus Gray. Both Joyful

Noise and Dark Horse use an eight note pattern, but differ in the last two notes. Other than some stylistic embellishment in Joyful Noise, a "sliding" between different notes, both ostinatos rely on a uniform rhythm. Each note is of equal duration in time as well.
The expert witness of the plaintiff stated that there was no one single element which was similar when viewed in isolation. The expert felt that it was the combination that was similar. The defendant's expert testified that the tune "Mary Had a Little Lamb" also use the same pitch as that shared by Joyful Noise and Dark Horse.
The Court noted that none of the individual points of similarity constituted copyrightable original expression nor did the combination of elements constitute original expression. The combination was found to merit only a thin copyright protection and found that the objective distinctions between the ostinatos made the works not virtually identical.
The panel concluded that the ostinatos of Joyful Noise consisted entirely of commonplace musical elements and the similarities between them did not arise out of an original combination of these elements. The Ninth Circuit affirmed the judgment in favour of Kat Perry.

Ed Sheeran case

The Sheeran case [34] commenced with the claimants, Ed Sheeran who were writers of the song "Shape of You" ("Shape") seeking declaration that they had not infringed the copyright in the song " Oh Why", written by Sami Chokri and Ross O'Donoghue.

The defendants claimed that the eight-bar post-chorus section of Shape in which the phrase "Oh I" sung, three times, to the tune of the first four notes of the rising minor pentatonic scale commencing on C#, which they call as "hook" is copied from the eight-bar chorus of Oh Why, in which the phrase "Oh why" is repeated to the tune of the first four notes of the rising minor pentatonic scale, commencing on F#.

After a detailed comparison of the two works, it was found that there were obvious similarities and important differences between the two works. The Court laid emphasis on the effect of music to the ear and tested dissimilarities by what the ear naturally hears.
Based on expert musicologist evidence and assessment of Shape, the Court found that the "unifying feature" of the entire song is the first four notes of the minor pentatonic scale. The expert for the claimants pointed out numerous examples where the melody follows the same contour as in Shape. The claimants pleaded that originality could not be claimed as there were countless songs in the pop, rock, folk and blues genres where the melody is drawn exclusively from the minor pentatonic scale, and moves predominantly between the tonic and the dominant. The vowel sounds "Oh I" and "Oh why" though sound materially the same, there is nothing original and is used in repetition, in popular music.
The Court found that all these features were commonplace and no right could be claimed. The use of a vocal chant to fill a pre-or post-chorus section is often found in this style of music. The use of multiple quavers in a single bar is also not an indication of copying. The use of octave harmonies was a technique Mr. Sheeran had used before.
The Court also found that mere similarity is not indicative of copying. A finding of copying depends on the simplicity of the melodies, the differences between them, and the fact that they are each set to the same repeated four-chord sequence (I-V-VIIV) which is commonplace in pop music.
The Court while holding that there was no infringement by the claimants, focused on the mood of the song rather than making a note to note comparison. Analyzing the musical elements, it was found that the points of similarity stressed were common building blocks in music found across genres and the same or similar elements were used in Shape and in other Ed Sheeran songs. The Court also assessed the two songs based on the mood created by the two and the role played by the phrase in the two songs. The obvious commonplace musical elements coupled with the difference in the mood created by the songs led the Court to the conclusion that Sheeran had not copied Chokri.

Conclusion

Music copyright requires a different treatment from other types of works. The idea expression divide is blurred in music when comparted to other types of work. The appropriate level of abstraction required in music infringement analysis to demarcate the delicate line between idea and expression is often difficult for judges. This analysis becomes more difficult in music infringement as judges are not trained in the art of music. A fact finder may not easily stumble upon the dividing line and would mostly require the assistance of musical experts in arriving at a finding. A sui generis legislation for music copyright laying down a non protectable elements of ideas can help overcome the problem.

End Notes

1. Indian Copyright Act, Sec. 13 (a), "copyright shall subsist throughout India in the following classes of works, that is to say,— (a) original literary, dramatic, musical and artistic works;"
2. Margaret Boden, 'Creativity' in Berys Gaut and Dominic McIver Lopes (eds), (2005). The Routledge Companion to Aesthetics, 477
3. G.A.J. Rogers, 'Locke, Plato and Platonism' in Douglas Hedley and Sarah Hutton (eds), (Springer 2010). Platonism at the Origins of Modernity: Studies on Platonism and Early Modern Philosophy, 193.
4. Meyer Bernard Barr, (1932). Studies in Social and Legal Theories - An Historical Account of the Social, Ethical, Political and Legal Doctrines of the Foremost Ancient and Medieval Philosophers, 28
5. Justin Hughes, (1988). 'The Philosophy of Intellectual Property' Georgetown Law Journal, 77(2) : 287
6. Leslie A. Kurtz, (1993). Speaking to the Ghost: Idea and Expression in Copyright, 47 U. Miami L. Rev, 1248
7. Music Interviews: Led Zeppelin's Blues Roots, NPR (Feb. 29, 2008, 9:00 AM), https://www.npr.org/ (interview with Stephen Davis, author of Hammer of the Gods: The Led Zeppelin Saga (2008)).
8. Andres Guadamuz, (March 29, 2017). *Is It Time to Examine the Concept of Originality in Musical Works?,* Jotwell (reviewing Emma Steel, (2015). *Original Sin: Reconciling Originality in Copyright with Music as an Evolutionary Art Form,* 37 **Eur. Intell. Prop. Rev.** 66
9. Lewis Sorokin, (2022). Out of Tune: Recomposing the Link between Music and Copyright, 14 Drexel L. Rev. 745 p 768
10. *Marcus Gray PKA Flame v. Katheryn Elizabeth Hudson PKA Katy Perry*, Case No. 20-55401 (9th Cir. Mar. 10, 2022)