Remix and Copyright Law

Veerendra Tulzapurkar†
High Court, Bombay 20D, Examiner Press Building, Dalal Street, Fort, Mumbai

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The article is an attempt to make a systematic analysis of the much discussed issue of ‘remix’ of old songs. It explains, in detail, how remix is done and the economics behind it. The provisions of the Copyright Act, 1957, which make it possible to make a remix from an old song, are also explained. It further analyses and comments on the decisions of the courts on this issue. While interpreting and commenting on the relevant provisions of the Copyright Act, 1957, it suggests the provisions in the Act by which objectionable remix of an old song can be prevented.

Keywords: Copyright Act, remix of an old song, economics of remix, infringement, moral rights

Remix is a mix, i.e., mixture and is not original. It is done by making a new sound recording using an old song containing the original lyrical work with or without some changes incorporated therein. The old song may be sung with the old musical composition or may incorporate a few changes therein. The song, as altered, is then recorded in a cassette or a compact disc.

The original sound recording consists of a literary work, the poem, written by a lyricist, made into a song by asking an artist to sing it with the help of a musical composer who composes music. This song sung with music composed by the composer and recorded on cassettes and/or compact discs is called an album. When the albums are sold, the songs become popular. Gradually, the singer and the composer become old and often stop producing new numbers, but the melody of the original work remains attractive enough to be exploited by a resourceful entrepreneur. Though the song is over, the melody lingers. This lingering melody, after a few years, is capitalized by adding some new masala, i.e., a few words popular in the present day context, and some additional beats which are more attractive. The entrepreneur gets hold of a singer, who is relatively new, not very much known and not very expensive. He then arranges for a sound recording studio at which, this new singer sings the same old song with or without a few additional words. A fresh set of musicians play musical instruments using the old musical composition. At times, some new instruments are used and the song is recorded. This new sound recording is called a remix.

To illustrate the point in the Indian context, take the example of ‘Kanta laga……’- a remix version made from a melodious old song composed by one of India’s highly respected music director, Naushad. In the film, the song is sung by a woman who is waiting for her lover to return.

The remix of this old song has become highly popular. "Look, what have they done to my song”, lamented Naushad, when he heard and saw the ‘Kanta Laga…’- remix version. The video remix shows, according to Naushad, ‘near nude woman dancing’. He lamented that it was such a melodious song and they have completely ruined it. He is further reported to have said, "I would rather not have the royalty money than have my compositions treated with such disrespect".

In reply, a producer of a remix music cassette is reported to have said, "Look, people are unnecessarily creating a ruckus".

Thus, we are caught between the melody and the malady! It is in the background of the ‘mix’ of these reactions that we have to analyse the legal aspects of ‘remix’ in the context of the copyright law. How is the entrepreneur able to do this? Where does he get the right to use the original lyrical work or the original musical work? Is it lawful for the entrepreneur to exploit the old work in this manner? Why does the entrepreneur do this? Of course, the answer to the last question is not difficult to fathom.

†Email: vvt@bom3.vsnl.net.in
The entrepreneur does not have to deal with prima donna singers who want fat cheques every time they hit a high note. He engages a new singer who does not demand high fees. Further, he does not have to pay any amount to any new composer as the composer of the old song has done the work for him, but, of course, he has to arrange for recording the new version at a studio. The new remix is recorded on cassettes and compact discs. The new version is not the old wine in a new bottle, but is a stronger wine in a new bottle. The entrepreneur has made it stronger by adding some masala to the old sound recording. Thus, the answer to the question as to why the entrepreneur does this, lies in the economics of the remix business.

The entrepreneur, if he is very enterprising, comes out with a video film containing remix sound recording and adds sexually explicit visuals. What he has done is to manipulate an old song, give it a bit of modern oomph. He then sits back and waits for the cash register to start ringing.

How and What Does the Entrepreneur Do?
Before embarking on the exploitation of this gold mine, all that the entrepreneur has to do is to send a small royalty based on retail price of every cassette sold, to the owner of the sound recording from which he has selected the song for his remix.

He has further to give a notice to this owner of his intention to make a remix. Having done that, his actions of making a new sound recording, i.e., remix, are not frowned upon by the copyright law. This is, however, subject to certain conditions to be found in Section 52 1 (j) of the Copyright Act, 1957. The entrepreneur does not have to plead or request for any permission to use the original lyrical or musical work. Nor does he have to send any threat to the original owner for permission to use the old lyrical and musical work.

Legal Provisions
The relevant legal provisions of the Copyright Act, 1957 are reproduced as:

Section 13-Works in which copyright subsists: (1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,
(a) original literary, dramatic, musical and artistic works;
(b) cinematograph films; and
(c) sound recording.

Section 14-Meaning of copyright (1) For the purpose of this Act, ‘copyright’ means the exclusive right, subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:
(a) In the case of literary, dramatic or musical work, not being a computer program, to
(i) reproduce the work in any material form including the storing of it in any medium by electronic means;
(ii) issue copies of the work to the public not being copies already in circulation;
(iii) perform the work in public, or communicate it to the public;
(iv) make any cinematograph film or sound recording in respect of the work;
(v) make any translation of the work;
(vi) make any adaptation of the work;
(vii) do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

Section 14(e)-in the case of a sound recording-
(i) to make any other sound recording embodying it;
(ii) to sell or give on hire, or offer for sale or hire, any copy of the sound recording, regardless of whether such copy has been sold or given on hire on earlier occasions;
(iii) to communicate the sound recording to the public.

Section 51-When copyright infringed: Copyright in a work shall be deemed to be infringed
(a) when any person, without the licence granted by the owner of the copyright or the Registrar of copyrights under this act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act
(i) does anything, the exclusive right to do which is by this act conferred upon the owner of the copyright, or
(ii) permits for profit any place to be used for the communication of the work to the
public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

Section 52-The following acts shall not constitute an infringement of copyright, namely:

(j) the making of sound recordings in respect of any literary, dramatic or musical work, if

(i) sound recordings of that work have been made by or with the licence or consent of the owner of the right in the work;

(ii) the person making the sound recordings has given a notice of his intention to make the sound recordings, has provided copies of all covers or labels with which the sound recordings are to be sold, and has paid in the prescribed manner to the owner of rights in the work royalties in respect of all such sound recordings to be made by him, at the rate fixed by the Copyright Board in this behalf:

Provided that

(i) no alterations shall be made which have not been made previously by or with the consent of the owner of rights, or which are not reasonably necessary for the adaptation of the work for the purpose of making the sound recordings;

(ii) the sound recordings shall not be issued in any form of packaging or with any label which is likely to mislead or confuse the public as to their identity;

(iii) no such sound recording shall be made until the expiration of two calendar years after the end of the year in which the first sound recording of the work was made; and

(iv) the person making such sound recordings shall allow the owner of rights or his duly authorised agent or representative to inspect all records and books of account relating to such sound recording:

Provided further that if on a complaint brought before the Copyright Board to the effect that the owner of rights has not been paid in full for any sound recordings purporting to be made in pursuance of this clause, the Copyright Board is, prima facie satisfied that the complaint is genuine, it may pass an order ex parte directing the person making the sound recording to cease from making further copies and, after holding such inquiry as it considers necessary, make such further order as it may deem fit, including an order for payment of royalty;

From the aforesaid provisions, it is clear that, but for the provisions of Section 52(1) (j) of the Copyright Act, the making of remixes by an entrepreneur would amount to an infringement of the copyright of the owner of the copyright in the sound recording as he is making another sound recording which is the exclusive right of the owner of the copyright in the original sound recording.

Section 52(1) (j) of the Copyright Act provides that the making of a sound recording of any literary or musical work shall not amount to infringement if there is already a sound recording made of the original literary or musical work and the entrepreneur has given a notice of his intention to make a sound recording and has paid to the owner of the rights the royalty at the rate fixed by the Copyright Board. The entrepreneur has to take the precautions provided in that Section, such as, not making alterations without the previous consent of the owner of rights, or, which are not reasonably necessary for the adaptation of the work for the purpose of making his remix, that the sound recordings are not sold with any labels or packaging which are likely to mislead or confuse the public as to their identity, that, the remix is not made until the expiration of two calendar years after the end of the year in which the original sound recording of the work was made, and, that, the entrepreneur allows the owner of the original work to inspect all records and books of account relating to the remix.

Once the entrepreneur has taken all precautions and has satisfied the conditions laid down in the aforesaid Sections of the Copyright Act, his act of making a remix will not amount to an infringement of the copyright. The question whether the entrepreneur has to take any consent from the owner of the copyright in the original sound recording came up for consideration and was decided in the case of Gramophone Co vs Super Cassettes. In that case, the plaintiffs had made an audio cassette titled ‘Ganapati aarti ashtavinayak geete’. The defendants sent a letter to the plaintiffs intending to make a cassette
containing a new sound recording consisting of the original literary work and musical work and sent a licence fee of Rs2230 for 5000 cassettes. The plaintiffs returned the cheque clearly showing their intention that they did not want Super Cassettes to come out with its sound recording, but the defendants went ahead and brought out their own sound recording. The plaintiffs filed a suit contending that the act of the defendants amounted to infringement of their copyright. The defendants pleaded a defence under Section 52(1) (j) of the Copyright Act. The Delhi High Court, after considering all the provisions, held that the plaintiffs did not permit the defendants to make a version recording of their cassette and the defendants did not automatically become entitled under Section 52(1) (j) to make a new sound recording. It was held that the plaintiffs’ consent was required to be obtained by the defendants for making a sound recording and compliance of Section 52(1) (j) was not enough to avoid the liability for infringement. The learned Judge held that the defendants had infringed the plaintiffs’ copyright. With respect, it may be noted that no reasons are to be found for arriving at the conclusion that the plaintiffs’ consent was necessary.

Quite contrasting is the decision of the Karnataka High Court in the case of Gramophone Co vs Mars Recording\(^{10}\). In that case, in a suit filed for infringement, the Trial Court granted an injunction, but the Appeal against the order of the trial court was dismissed by the Karnataka High Court. The Karnataka High Court held that once the provisions of Section 52(1) (j) were complied with by the defendants, they became entitled to make a new sound recording and their act did not amount to infringement. No separate consent or licence was required to be obtained from the plaintiffs. This decision of the Karnataka High Court was challenged in the Supreme Court. The Supreme Court\(^{11}\), however, remanded the matter back as, according to the Supreme Court, in the absence of proper pleadings, the issue could not be answered.

On the question of interpretation of the provisions of Section 52(1) (j) of the Copyright Act, it appears that no separate licence or permission is required to be obtained and compliance with the provisions of Section 52(1) (j) will be a complete protection against any charge of infringement of copyright by making a new sound recording. It is to be noted that the said provision is to be found in the Section which deals with acts which do not amount to infringement. Section 52(1) (j) does not provide for seeking any consent from the owner of the copyright. If the conditions are satisfied, the person making the second sound recording cannot be said to have infringed the copyright in the literary work or the musical work contained in the first sound recording. If a licence is obtained from the owner of the copyright in the literary work or the musical work forming part of the original sound recording, then there was no need for incorporating the said provision, viz. Section 52(1) (j) of the Copyright Act since even in the absence of such provision, the act of making a new sound recording would not have been an infringement inasmuch as the consent is already obtained. It is only when such consent is not obtained, that the exclusive right of the owner of the copyright is said to be violated by making the second sound recording. Section 52(1) (j) comes into operation only when such consent is not obtained. If the consent is obtained, there is no question of any infringement. Section 52(1) (j) provides that the act of making a second sound recording will not amount to an infringement if the conditions mentioned therein are satisfied. It is, therefore, clear that no separate consent is required to be obtained from the owner of the copyright in the literary work or musical work by a person who intends to make a second sound recording and if he complies with the conditions provided for in Section 52(1) (j), his act will not amount to any infringement. The provisions of Section 52(1) (j) are in the nature of a statutory licence which is granted to the person making the second sound recording if he complies with the conditions laid down therein.

The rights of authors of the literary and musical work are thus eroded in as much as they once having consented to the making of the first sound recording do not have any right to prevent another sound recording being made. However, their moral rights are not in any way affected.

If this be the case, then does it mean that the composers of the original songs have no right to make any grievance and that they are required to accept what they think is mutilation of their works?

Unfortunately, the only grievance that can be made by such persons is when the conditions of Section 52(1) (j) are not satisfied. The second sound recording cannot be made unless a period of 2 years has elapsed from the making of the first sound recording. If it is shown that the alterations made in the new sound
recording, i.e., remix, are not reasonably necessary for the adaptation of the work for the purpose of making the sound recording, then the defence under Section 52(1) (j) will not be available. The owner of the first sound recording can also make a grievance if the label or packaging of the remix is likely to mislead or confuse the public as to their identity, and, lastly, if the right to inspect all records and books of account relating to the remix is denied, then he can make a grievance and contend that there is an infringement of his rights. Except in the aforesaid circumstances, such composers cannot have any grievance, and, they have to live with the remix. The producers of the remix justify their action on the ground that the making of remixes is a way to ensure that timeless great music does not get lost, and, the new singers get a chance to show their talents.

The voice of a new singer is initially less attractive and becomes more attractive by reason of the old music accompanied with which he sings and he thereupon becomes a popular singer.

Irrespective of the justification given by the producers of remixes, the law as it stands today, protects their actions if they remain within the four corners of the provisions of Section 52(1) (j) of the Copyright Act.

In this context, it is also necessary to consider the moral rights which are granted to the author by Section 57 of the Copyright Act. Section 57 provides:

Author's special right
(1) Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right:
(a) to claim authorship of the work; and
(b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation:
Provided that the author shall not have any right to restrain or claim damages in respect of any adaptation of a computer program to which clause (a) of sub section (1) of Section 52 applies.

Even if the conditions of Section 52(1) (j) are complied with, there may be some distortion or mutilation of the original literary work in the making of the remix. If such distortion or mutilation is proved to be prejudicial to the honour or reputation of the author, the author can complain. For example, while making a remix, a few words are added to the old literary work and even if the conditions of Section 52(1) (j) justify that the said alterations are reasonably necessary for adaptation of the work for the purpose of making the sound recording, the author can still make a grievance of violation of his rights under Section 57 if he is able to show that the change, though necessary for adaptation of the work for the purpose of making the new sound recording, has resulted in causing prejudice to his honour or reputation. For example, if a beat is changed and to suit that change, a new word is added, the sound of which matches the beat and if the meaning of that word or the meaning of the literary work by reason of the addition of that word changes materially so as to cause any prejudice to the honour or reputation of the lyricist, then certainly the author of the literary work can complain about the remix and can make a claim by way of damages or can seek a restraint order against the sale of such cassettes containing the remix in which his original literary work is distorted or mutilated so as to cause prejudice to his honour or reputation.

The technological advances, particularly, in the field of recording of music, have made remix easy. The changes in the original sound recording can now be easily made with digital recording. The beats can be easily changed and a new sound with different instrument can be easily added. However, it is necessary to ascertain whether such changes are reasonably necessary or have the effect of crossing the limit set by Section 52(1) (j). If changes are beyond the limits indicated by that provision, then there is no protection available. And still it will not be a new work, to enable the maker to claim copyright on his own. A more important question arises when such new sound recording is not confined to the audio cassettes or audio compact discs only, but has visual effects added to it. The question is whether Section 52(1) (j) defence is available to a person who makes video cassettes or video compact discs incorporating the original literary or musical work. It is now common practice that producers of new remixes make video cassettes containing original literary work and musical work.
The general complaint about remix is that in the remix, visuals are added which depict ‘near nude woman dancing’\(^\text{13}\). The old wine is thus made stronger by explicit sexual visuals added to the sound recording in the remixes. The old melody that was lingering is depicted in lingerie!

The question is whether the producer of such a video album without obtaining the express licence from the owner of the copyright in the literary or the musical work can use such literary or musical work in his remix which is not a mere sound recording, but is a video cassette. The producers of such a remix cannot rely on Section 52(1) (j) to escape infringement. Section 52(1) (j) is confined to the making of sound recording. It does not deal with making of cinematograph film. Under the Copyright Act, cinematograph films and sound recordings are treated as two separate independent works. Video film is covered by the definition of ‘cinematograph form’. Thus, when the producer of a remix in the form of a video cassette makes his video cassette containing an original literary or musical work, what he does is not to make another sound recording, but to make a cinematograph film. Section 52(1) (j) grants a statutory licence for using literary or musical work only for making a sound recording. The act of the producer of making a video cassette containing a remix by using the original musical or literary work without permission of the owner of copyright in the respective work will amount to infringement as Section 52(1) (j) has no application to making of a video film. It is humbly submitted that, irrespective of whether sexually explicit visuals accompany the sound recording in a video cassette or whether the sound recording is accompanied by visuals of Gods and Goddesses, making of such video cassettes without the licence or permission of the owner of the literary or musical work, will amount to infringement of the copyright of the owner of the literary work or musical work. Assuming that the defence under Section 52(1) (j) can be raised even in respect of video cassettes since it incorporates the sound recording, still moral rights recognized by Section 57 of the Copyright Act will enable composers of the original songs to seek a restraint order from the Court against sale of such video cassettes if they can show that their work is distorted or mutilated or modified in such a way as to cause prejudice to their honour or reputation.

Making of any video cassette incorporating the literary or musical work without the licence of the owner of copyright in such literary or musical work, by itself, amounts to an infringement of copyright, and, additionally, as stated earlier, the sale of such video cassette containing the mutilation or alteration causing prejudice to the author of the musical or literary work will certainly be frowned upon by the Courts, even if the consent of the owner of literary or musical work to incorporate the same in the remix is obtained.

The question would still remain open as to whether visuals are such as to cause prejudice to the honour or reputation of the author. Whether such visuals are objectionable or not will depend on the perception of the viewer and in the days of rip-off entertainment provided by Janet Jackson and Justin Timberlake, it is difficult to give any definite answer.

References

1 Stir over India’s raunchy remixes by Chadha, Monica, BBC correspondent in Mumbai, [http://news.bbc.co.uk/gopr/fr/-/hi/south_asia/3128719.stm](http://news.bbc.co.uk/gopr/fr/-/hi/south_asia/3128719.stm)

2 Sen Soumik, ‘Remix and match’, 17 May 2003, [www.bsstrategist.com](http://www.bsstrategist.com)

3 See note 1

4 Section 2(o) of the Copyright Act, 1957, defines literary work: literary work includes computer programs, tables and compilations including computer data bases

5 Section 2(p) of the Copyright Act, 1957, defines musical work: musical work means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music

6 Section 2(f) of the Copyright Act, 1957, defines cinematograph film: cinematograph film means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and ‘cinematograph’ shall be construed as including any work produced by any process analogous to cinematography including video films

7 Section 2(xx) of the Copyright Act, 1957, defines sound recording: sound recording means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced

8 Section 2(y) of the Copyright Act, 1957, defines work: work means any of the following works, namely: ‘(a)-a literary, dramatic, musical or artistic work; (b)-a cinematograph film; (c)-a sound recording’

9 (1999) PTC 2

10 In M F A No. 5491/98, dated 31st August 1999 (unreported)

11 In Special Leave to Appeal (Civil) No. 2120/2000 (unreported)


13 See note 1