

Intellectual Property and Music: An Unanswered Question

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Introduction:

Music is an integral part of any civilized society and its culture. But beyond this sociological perception, it is a subject which requires immense amount of attention from the legal scholars as the commercial interest and subjective value is insurmountable in this era of digitalized global arena. The exclusivity of Music is protected by an unquestionably important sector of law called Intellectual Property. Intellectual property refers to creations of the mind such as inventions, literary and artistic works, designs, and symbols, names and images used in commerce.¹ Through this right the creator gets an exclusive right over the use of his/her creation for a certain period of time. The essence of this concept has derived from the article 27 (2) of the Universal Declaration of Human Rights (UDHR) 1948 and article 15(1) (c) of International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 which provides that “*Everyone has the right to the protection of the moral and material interests resulting from scientific, literary or artistic production of which he is the author*”. The term “*literary or artistic production*” mentioned herein has been elucidated in article 2 (1) of Berne Convention for the Protection of Literary and Artistic Works, 1886 (referred as Berne Convention hereinafter) as:

“The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as... musical compositions with or without words...”

Though Intellectual Property Rights includes patents, copyright, industrial design rights, trademarks, plant variety rights, trade dress, geographical indications but musical compositions basically fall under the purview of Copyright Law. As Bangladesh is a signatory to Berne Convention it has enacted Copyright Act in 2000 which covers the issues of copyright of different artistic creations including music copyright.

International legal instruments and how they work:

Bangladesh has signed Berne Convention on May 4, 1999 and as result it has incorporated the provision mentioned therein in Copyright Act, 2000. The convention mainly lies on 3 principles; these are – (a) National Treatment (b) Automatic Protection (c) Independence of Protection.² The first principle, national treatment embodies the notion that works originating from a state shall also be given the same protection in other member states. The second principle, “automatic protection” provides that Protection must not be conditional upon compliance with any

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¹What is Intellectual Property? (2017), available at <http://www.wipo.int/about-ip/en/> (Last accessed on 27th October 2017)

²World Intellectual Property Organization, available at http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (Last accessed on 27th October 2017)

formality. And lastly, the third principle “*Independence of Protection*” denotes that protection must be given to the subject-matter irrespective of the fact that whether the right has been recognized or not in the origin country. For example, an Indian citizen can seek protection in Bangladesh even though his/her origin country is India.

On the other hand, The WTO Agreement on Trade-Related Aspects of Intellectual Property Right is referred as Berne and Paris-plus agreement as it provides domestic enforcement mechanism for Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention which has been denoted in Articles 2.1 and 9.1 of TRIPS Agreement respectively. The TRIPS Agreement remains the most significant legal instrument till date in terms of enforcement of IPR actualizing the provisions regarding Copyright law in Article 9.

Copyright Act, 2000: A glimpse

Copyright Act, 2000 (as amended in 2005) is in force in Bangladesh from November 1, 2000 and supplemented by the Copyright Rules in 2006. The law provides in article 24, the exclusive ownership of the literary or artistic works for sixty years (60) from the beginning of the calendar year next following the year in which the author dies. Section 14 of the said act provides the owner exclusive rights of controlling (a) reproduction of the creation in any form he deems to be fit (b) circulation of the copies of his/her work (c) presentation, demonstration or playing to the public, (d) distribution of copies by sale (e) Sale, (f) transfer of ownership, (g) commercial rental to the public.³ These exclusive rights are given to the owner to ensure the proper utilization of the owner’s right and protection under the Copyright Act.

Situation in Bangladesh:

In the light of the laws and regulations discussed above, the reality that appears apparent is, beyond question, penurious. Bangladesh according to the 2017 Report of International Property Rights Index, in terms of Intellectual Property protection, is 126th out of 127 countries. It requires no amount of research to understand the fact that Bangladesh is in dire need of improvement regarding protection and enforcement of IPRs and it is evident that music industry is at peril now due to lack of needed mechanisms.

The prime reasons behind this beggared description situation are several including (a) Piracy of Music, (b) Loopholes in the Copyright Law (c) Lack of awareness among the artists (d) Disruption in proper distribution of royalty, shares among the artists

Firstly, piracy of music can be referred as the main culprit behind the scene. Shockingly, piracy rate at Bangladesh is 96%.⁴ Moreover, Music piracy in Bangladesh aggregates value of \$180

³Siraj, S., & Allam, M., The Problem of Copyright Compliance in the Music Industry of Bangladesh: An analysis, *University Of Asia-Pacific Journal of Law*, available at <http://uap-bd.edu/lhr/wp-content/uploads/2017/05/4-1.pdf> (Last accessed on 27th October 2017)

⁴Shams Bin Quafer *Music Copyright in Bangladesh: A Way Forward*, *Intellect.com.bd.*, available at <http://www.intellect.com.bd/details/30/music-copyright-in-bangladesh-a-way-forward> (Last accessed on 27th October 2017)

Million.⁵ Only 5 to 10 percent of the total music market consists of legitimate sale and unsurprisingly Bangladesh's piracy rate stands at the top.⁶ Piracy at this rate, incurs huge amount of loss upon the music producer and distributors which consequently affects the artists and prevent way for further proliferation of their works.

Secondly, the Copyright Act, 2000 itself is an archaic piece of law. We are living in an era of cloud computing and digitalized online services, whereas music files and related contents can be instantaneously shared through cloud data-sharing services like Drop-box and Google Drive consequently violating principles of "prohibition of anti-circumvention" and "Digital Rights Management" (DRM). Bangladesh is yet to sign WIPO Copyright Treaty, which is particularly enacted to address the copyright issues posed by advancement of technology and take technological measures to control access and copy of copyrighted material. Moreover, there is no provision for prohibition of deep-linking, meta-tagging or p-2-p transmission of copyright materials in the said act.⁷ Besides, this abundance of loopholes, the law in question doesn't delineate any certain rules or guidelines in terms right to equitable royalty for the artists creating contents related to music. Despite this obstacle, the good news is that a draft is already under process and the draft will include redefinitions of economic rights, moral rights, related rights, editorial, the public domain, folklore and folk culture and digital work under Traditional Cultural Expression (TCE). But still many of the questions will remain unanswered. Thirdly, though the artists are supposed to be acquainted with issues of copyright and intellectual property rights, the real scenario is depressing as almost majority of the portion doesn't have sound knowledge about their rights and ownership over their creations causing misappropriation of their creative talents. Lastly, before the emergence of Internet the artists used to go to deal with the record labels for distribution whereas the artists used to take profit on selling. But the point to be noted that, there was no agreements or contracts regarding the copyright of those contents. Eventually stripping off the artist, from enjoying the royalty of his own creation. But now, with emergence of technology the situation is more complicated now. As almost many artists are before handedly less acquainted with IP Laws and their rights, now when there is no copyright claim from their side, the rate of exploitation is beyond the limit tolerance. The plight has been further intensified with the introduction of "Caller Tunes" where Telecom Corporations use the songs of many singers without paying any amount as there are no concrete mentions of such scopes in the Copyright Act.

Recommendations that may be considered:

The first and the foremost step needed from the Govt., is to be completely honest and determined to ensure a safe haven for the artists, where their talents will be evaluated and any dispute regarding the copyrights and relevant claims can be sorted out efficiently through the proper implementation of the existing and, if necessary bring as many changes as needed to adapt the

⁵*Losses to Bangladesh Music Industry - Havocscope*. (2017). *Havocscope*. available at <http://www.havocscope.com/losses-to-bangladesh-music-industry/> (Last accessed on 27th November, 2017)

⁶ Ibid

⁷Dr. Mohammad Towhidul Islam (2017). *TRIPS Agreement and Bangladesh*. *The Daily Star*. available at <http://www.thedailystar.net/law-our-rights/trips-agreement-and-bangladesh-210949> (Last accessed on 27th October 2017)

law with pace of current digital world. With that said, it is good news for us that a draft is already pending in the Law ministry, where several new provisions have been introduced. The draft will include redefinitions of economic rights, moral rights, related rights, editorial, the public domain, folklore and folk culture and digital work. The draft defines ‘folk knowledge’ as folk skills, information and culture handed over from generation to generation through oral, written or other means. It also recognizes “folk culture” and protects Bangladeshi ethnic minority culture. In addition, the draft addresses digital content makers as ‘creators’.⁸ In the light of new provisions, some of the crucial points have been missed out. Several suggestions regarding the development of Copyright regime in Bangladesh have been stated. A strong Anti-piracy cell should be formed, which track down pirated-CD and content distributor both online (e.g. websites, Facebook pages, YouTube) and offline (e.g. local markets, malls) and take legal actions. Although currently there is an Intellectual Property Rights (IPR) Task Force, which has conducted several raids but there is room for ample amount of improvement.⁹ All the record labels should ensure the presence of Agreements regarding Copyright with the artists before distributing, producing contents of the artists. Collective Management Organization (CMO) should be emphasized, which is a mechanism to work as a parent organization for collecting the royalties on behalf of the member artists and distribute among them later on. So, in this way, the exploitation of the record labels, producers will not be entertained. CMOs are already allowed in Bangladesh but the knowledge about this mechanism is not prevalent so copyright Office should play more active role here. Online payment: Services like iTunes are depended on online payment and in this era of digitalization, introduction of these services should be Government's main priority in order to provide the musicians, singers a means of subsistence to survive. With the introduction of Xoom+ which is a domestic online payment service, this sounds more feasible.

And in the very end, we, the citizens of Bangladesh equipped with such knowledge, need to play active role in terms spreading the concept of Intellectual property to ensure the survival of our unique musical culture.

⁸Jayanta Saha, *Copyright office finalises new draft of law -bdnews24.com*. (2017). Bdnews24.com. available at <https://bdnews24.com/bangladesh/2017/08/26/copyright-office-finalises-new-draft-of-law> (Last accessed on 27th October 2017)

⁹Ishtiaq Husain, *Bangladesh launches drive against pirated software of Microsoft, Dhaka Tribune*. (2017). available at <http://archive.dhakatribune.com/business/2015/sep/13/bangladesh-launches-drive-against-pirated-software-microsoft> (Last accessed on 27th October 2017)