

IP Hotline

August 28, 2008

"ZARA ZARA TOUCH ME" OF RACE CAUGHT IN LEGAL TANGLE: SONY BMG TAIWAN CLAIMS DAMAGES FOR COPYRIGHT INFRINGEMENT

Accusation of plagiarism is not a new phenomenon in Bollywood. The most recent controversy has been stirred up against music director Pritam Chakraborty.

Sony BMG Taiwan ("Sony") has issued a legal notice to Tips Industries ("Tips") alleging that the music composition of the song *Zara Zara Touch Me* ("ZZTM") from the Hindi Film *Race*, is a copy of the music composition of Wang Lee Hom's song *Deep in the Bamboo Grove* ("DBG") from his album *Shangri-La* released in 2004. The rights in DBG vest in Sony, it being the producer. Alleging infringement, Sony has sought damages to the tune of NT\$ 10 million^[1] (USD 314,890) from Tips. ZZTM is composed by the music director Pritam Chakraborty ("Pritam"), who was hired by Tips

SIMILAR RECENT CONTROVERSIES

Such allegations have been hurled at many music composers in the recent past. In most cases the controversy has died down at the stage of legal notice, without being litigated upon. Some which have reached the court have become landmark judgments in favour of the authors.

In September 2002, an Indian music production company Saregama India Limited ("Saregama") sued Interscope Records, its parent company Universal Music Group, artist Truth Hurts and producer Dr. Dre for their song "Addictive". Saregama is the copyright holder of the song *Thoda Resham Lagta Hai* composed by Bappi Lahiri and sung by Lata Mangeshkar, used in the 1981 movie *Jyoti*. Saregama was successful in proving before the US District Court for the Southern District of Texas, Houston Division, that the defendants had unauthorizedly used a sample of the Hindi song in their song Addictive. "Sampling" is the use of digitally extracting recorded passages to incorporate into new recordings, a practice that has become popular with the advance of technology.

In May 2004, Bangladesh based rock band *Mies* successfully obtained an interim injunction against the producers of Hindi film *Murder*. The Calcutta High Court restrained the defendants from using the song *Jana Jane Jana* composed by Anu Malik. The plaintiffs had accused the producers of infringement of their rights in their Bengali song *Phiraiya Dao Amar Prem*.

More recently in April 2008, musician Ram Sampat sued filmmaker Rakesh Roshan for infringing the copyright in his music piece "The Thump" used by the defendant in his movie *Krazzy 4* in two songs. The defendant claimed to be innocent, having obtained an NOC (No Objection Certificate) from Sony Ericsson, who in reality had no rights over the piece. They had been licensees, in a contract that had expired. The right holder Sampat had not even been informed of this arrangement. The parties finally reached an out of court settlement with Sampat receiving Rs. 2 crore from the defendants.

Interestingly, in the present case, Lee Hom was reportedly *not unhappy* about it since in his words, "to a composer, to be copied means acknowledgement, because only the good things will get copied." Apparently many of his songs have been remade before and he does not mind giving consent to use his songs. However, here it is Sony BMG Taiwan that is the copyright owner.

LAW AND ENFORCEMENT

Section 13 of the Copyright Act, 1957 ("Act") acknowledges the subsistence of copyright in **original** musical works. The level of originality in an alleged infringing musical work is in most cases subjective. It has been accepted in the jurisprudence of copyright, that only a minimal degree of creativity is sufficient to classify a work as original, in order to be eligible for copyright protection.

While expert witnesses usually testify in courts to prove infringement, in the abovementioned *Krazzy 4* case, the sitting Judge, Justice D.G. Karnik had found the copying so obvious that he declared: *"to my untrained ear, the music (in the two works) appeared to be similar"*.

In India, a film producer usually enters into a contract with the composer to create musical composition for a song of which the rights vest in the producer. The contract contains a representation by the composer that the music created by him shall be original and shall not infringe the rights in any existing music. It further may have an indemnity clause in favour of the producer in case of breach of such representation. However, individual composers may not have the capacity to pay the huge amount of money that infringement damages may run into. Also, in the Indian context, recovery of damages could be a time consuming process. Thus the producer, if sued for infringement, would have to ultimately bear the damages. Hence, producers have now started obtaining insurance to cover such liabilities.

It is advisable that the owners of the rights in the musical works act speedily to obtain any interim reliefs such as

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injunction to restrain infringement pending the suit. In case of delay, the court would examine the balance of convenience and may refuse injunction and only grant order to maintain accounts against the defendants.

It is evident that in the past few years, music composers and owners have begun to pro-actively take legal recourse against the alleged infringements. They no longer ignore instances of their tunes being lifted. As can be seen from the above discussion, the approach of the Courts also has been encouraging for them.

CREATING ORIGINALITY IN THE PUBLIC DOMAIN

As more and more music is created, the originality in music proportionally decreases. The total numbers of musical notes generally being limited in number, there is a high probability of resemblance, assuming a similar style and rhythm is used. In the process of composing, probably every music composer tends to churn out a few music pieces that resemble existing ones before he comes out with an original song. But blatant copying can be no excuse. Even if one feels tempted to 'lift' a piece, the correct way of doing it is to take consent from its creator. The creator deserves the credit to it, as well as his share of royalty.

- Gowree Gokhale & Aditi Nadkarni

[1] 1 NT\$ (Taiwan dollar) = 0.031489 U.S. dollars as of August 26,2008

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