

**THE COMMERCIAL EXPLOITATION OF COVER VERSIONS
AND COPYRIGHT LEGALITIES: A COMPREHENSIVE
ANALYSIS OF SECTION 31C OF THE COPYRIGHT ACT, 1957
WITHIN THE FRAMEWORK OF CONTEMPORARY INDUSTRIAL
PRACTICES**

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Abstract

The Copyright Act of 1957, specifically under Section 31C, establishes the framework for statutory licensing of cover versions, subject to certain conditions. However, the legal delineation of a cover version, as elucidated in Section 31C, pertains to a 'sound recording,' yet lacks a comprehensive definition within the Act to determine the extent of alterations permissible in an original sound recording to qualify as a 'cover version.' Notwithstanding the stipulations outlined in the proviso of Section 31C, many of which are deemed superfluous within contemporary industry practices, the Act's treatment of cover versions remains equivocal. Of noteworthy consideration is the substantial favour with which prominent record labels have embraced the commercial exploitation of cover versions. This approach stems from the conviction that such commercial ventures augment the market for both the original sound recording and its corresponding cover version, thus catalyzing a 'revival' of the original sound recording's appeal among listeners. Irrespective of these commendable endeavours, the Act's efficacy in addressing the practicalities surrounding cover versions remains constrained, particularly due to the former Section 52(1)(j) of the Copyright Act of 1957, which formerly provided an exception to infringement concerning cover versions or version recordings, as inferred tacitly by legislative intent. This legislative oddity causes distressing consequences for the commercial exploitation of both cover versions and the original sound recording. Therefore, a comprehensive inquiry into the precise legal positioning of cover versions, especially regarding their classification as

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adaptations or original creations worthy of the transformative work designation, presents a compelling avenue of exploration. In tandem, this study necessitates a critical evaluation of the redundancy within Section 31C, considering its alignment with contemporary industry norms and practices.

Keywords: *cover version, copyright, transformative, originality, fair dealing*

INTRODUCTION

The Indian Copyright Act of 1957 (hereinafter 'Act') outlines the statutory licensing procedures for the creation of cover versions in Sec.31C, and the Copyright Rules of 2013 (hereinafter 'Rules') explains in detail such procedures in Chapter VII, specifically Rules 23-28. A close examination of these legal provisions in the Act and Rules reveals that they have become obsolete in the context of creating and communicating cover songs in today's times. This obsolescence is not a recent development; it has persisted for more than a decade, yet it has received little attention.

In the past, 'cover songs' were exempted from being copyright violations under the doctrine of 'fair dealing' within Sec.52(1)(j) of the Copyright Act. This section allowed the defence that a cover version was fair and non-infringing, provided they adhered to the conditions set out in Section 52(1)(j). This was the situation before Sec.31C was introduced in the Copyright Act. Although Sec.52(1)(j) has since been removed and replaced with the Statutory License provision in Sec.31C, some aspects of Sec.52(1)(j) continue to influence the law.

While Sec.31C was added as part of the 2012 amendment, it has struggled to keep up with the advancements in technology for creating, transmitting, communicating and storing musical works and sound recordings, many of which were already prevalent in 2012.

The redundancy of this provision becomes apparent when considering the prerequisites required for obtaining a statutory license for a cover version. To fully understand the intricacies of this provision, it's essential to first understand the concept of 'cover version.'

Definition of 'cover version'

While there isn't an accepted definition for the term 'cover version,' there have been efforts to define it, although these attempts have not fully encompassed the entire concept. In the legal context within India, a cover version is delineated as an audio recording of a literary, dramatic, or musical composition, subject to the condition that such sound recordings have been produced with the explicit prior authorization or license from the original owner of the

copyright associated with the respective work.¹ Generally, cover versions can vary from faithful reproductions to versions that introduce significant artistic changes while retaining the original lyrics and melody.²

In one of the earliest suits related to record labels, the Hon'ble High Court of Delhi expressed an opinion about cover versions wherein the court held³ that:

"(5) What is a version recording? A version recording, we are told, is a sound recording made of an already published song by using another voice or voices and with different musicians and arrangers. Version recording is thus neither copying nor reproduction of the original recording".

In another decision by the High Court of Karnataka⁴ it was observed that;

"... a "version recording", which is a fresh recording using a different set of performers, musicians artists and facilities. It would be a "sound-alike" recording or a close imitation, of the original sound recording and would not be an infringement of the copyright."

In the above cases, even though the courts used the term 'Version recording,' it effectively referred to a 'cover version.' This is because both the judiciary and the music industry had previously used the terms 'version recording' and 'cover version' interchangeably. This can be verified by examining the order issued by the High Court of Delhi in cases⁵ and interim applications⁶ related to the cover version.

During the Parliamentary discussions on the 2012 amendment,⁷ while analyzing the need to remove the cover version from 'fair dealing' and repeal Sec.52(1)(j) thereby inserting Sec.31C under 'Chapter VI- Licenses', it was mentioned that "*version recordings' were being made without paying proper royalties and without the maintenance of proper accounts"*

To further substantiate the same, the elucidation of the cover version/version recording by the Hon'ble High Court of Delhi⁸ is worth noting, wherein the court observed that:

¹ Copyright Act, 1957 (Act 14 of 1957), s. 31 C.

² Nawneet Vibhaw and Abishek Venkataraman, "Recording that Different Version -An Indian Raga" 12 *Journal of Intellectual Property Rights* 480-7 (2007).

³ *Gramophone Co. Of India Ltd. v. Super Cassette Industries Ltd.*, 1995 (33) DRJ 333.

⁴ *M/S. Mars Recording Private v. M/S, Saregama India Limited*, Regular First Appeal No.125 OF 2009.

⁵ *Super Cassette Industries v. Bathla Cassette Industries Pvt. Ltd.*, 107 (2003) DLT 91.

⁶ *Gramophone Company Of India v. Super Cassette Industries Ltd*, I.A No. 2382/2005, C.S.(OS) No. 399/2005; I.A. No. 7050/1999, C.S.(OS) No. 1625/1999.

⁷ Government of India, "Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010" (Department - Related Parliamentary Standing Committee on Human Resource Development, 2010)

⁸ *Star Indian Pvt. Ltd. v. Piyush Agarwal*, CS(OS) No.2722/2012.

“A sound recording includes a subsequent original sound recording made from the musical and literary work and which is called a version recording i.e a sound recording made after a first sound recording is made by use of the musical work and literary work/lyrics. The principles qua version recording (now called cover version) were contained in Section 52(1)(j) of the unamended Act which has now been deleted, and the equivalent provision of which is now Section 31C of the present Act.”

Therefore, a cover version can be defined as a new recording or performance of a song that was previously recorded by another artist. The extent of 'newness' i.e. 'originality' in the context of copyright in such versions is a subject of discussion. The Hon'ble High Court of Delhi also made an interesting observation while discussing the right to the copyright under Sec.13(1)(c) for cover versions;⁹

"After the first sound recording is made, then, if and after permissions are taken from the authors of the musical work and the lyrics writer which formed the basis of the first sound recording, another band of orchestra with the singer (i.e. another set of performers) can by their performances based on the existing musical work and the lyrics, cause to come into being a new sound recording. This second/subsequent sound recording is called a version recording/cover version. This new/second sound recording itself is a subject matter of copyright by Section 13(1)(c) of the Act and there exist the entitlements based on such sound recording to exercise rights as provided in Section 14(e) of the Act."

Here, the court has clearly explained what could primarily amount to a 'cover version vis-a-vis version recording'. Though the court has referred to the involvement of a new band of the orchestra with a new set of singers for the creation of the new/subsequent sound recording i.e cover version, the presence of any alteration that can be possibly made to the original sound recording, if necessary, was not discussed. The court had made a further interesting observation in *Star Indian Pvt. Ltd. V. Piyush Agarwal*¹⁰ that:

“...on utilization of original musical work and the lyrics from which the first sound recording is made, various independent/subsequent sound recordings can be made, and each of which subsequent sound recording would be original sound recording for being the subject matter of the copyright under Section 13(1)(c) of the Act. Of course, at the cost of repetition, no sound recording can be created from the original musical work or the lyrics unless a license is taken,

⁹ *Ibid.*

¹⁰ *Supra* note 8.

whether contractual or statutory under the Act, from the authors of the musical work and the literary work/lyrics.”

Here, the court has recognized cover versions as ‘original’ sound recording works to attract copyright protection under Sec.13(1)(c) of the Act. However, a careful reading of Sec.31C depicts that cover versions are not 'original' works but mere adaptations. Furthermore, the Parliamentary intent of identifying a 'cover version' as not an original work could be understood from earlier treating it as an exemption under 'fair dealing' in Sec.52 and later re-placing it into Sec.31C.

Along with the above interpretations, it is also pertinent to look into the perception of the cover version by the legislature under Sec.31C. Analysis of some of the important provisos relating to the cover version under Sec.31C is detailed below.

ANALYSIS OF SEC.31C- STATUTORY LICENSE FOR COVER VERSION

The legislation stipulates that an individual desiring to produce a cover version, encompassing a sound recording about a literary, dramatic, or musical composition, must obtain prior consent or license from the owner of the work. This necessitates serving a notice to the copyright owner of the respective works, concurrently forwarding a notice to the Registrar of Copyright, with a minimum lead time of 15 days before the commencement of the cover version production.¹¹

Any individual producing a cover version must also ensure the distribution of copies to all the record labels through which the sound recording will be sold. Moreover, there exists an obligation for the party involved to make an initial payment of royalty at a rate established by the Copyright Board.¹² Furthermore, the provision places an obligation on the creator of the cover version to pay a minimum royalty for 50,000 copies of the work each year.¹³ However, it's essential to acknowledge that this provision falls short in addressing the realities of digital storage and transfer of creative works even though the Parliament passed this amendment intending to safeguard the interests of the music industry in a digital environment.¹⁴

This provision was introduced in 2012 when digital storage and data transfer were already prevalent. Nevertheless, the legislature paid minimal attention to these aspects within the context of copyright law, as evident from various provisions of the Act, including the issue of whether online streaming platforms such as Wynk fall under the definition of 'internet

¹¹ Copyright Act, 1957 (Act 14 of 1957), s. 31 C(1).

¹² Copyright Act, 1957 (Act 14 of 1957), s. 31 C(2).

¹³ Copyright Act, 1957 (Act 14 of 1957), s. 31 C(4).

¹⁴ *Supra* note 7.

broadcasters' as discussed in a landmark judgment by the Hon'ble High Court of Delhi.¹⁵ Consequently, the requirement to maintain 50,000 physical copies is no longer relevant in the current digital era, and the requirement of paying royalties based on a fixed number of copies is equally outdated. The Act and the Rules remain static in adapting to recent technological advancements in music creation and distribution.

Additionally, a careful examination of Rule 24(3) and (4) of the Copyright Rules reveals that the legislative intent behind these provisions was to prevent unlicensed physical distribution of cover versions. This is evident in clause 3 of Rule 24, which prohibits creators from including labels on the cover that might mislead or confuse the public regarding the original song. However, the Act has not effectively addressed the digital sharing of cover songs, where the issue of labelling on cover songs doesn't arise. Instead, cover songs are typically communicated through streaming platforms like Spotify and YouTube, typically by tagging them as 'covers' due to the algorithms used by such platforms to categorize and present music.

Additionally, the stipulation specifies that a statutory license for the creation of a cover version can only be acquired after the lapse of a period of five years from the initial publication of the original song.¹⁶ However, the same is not the case within the Indian music industry. Cover songs are made even the very next day of the streaming of a new song which is a blatant violation of the Act. However, the question that needs to be asked is whether a creative industry needs to be restricted from creating new works, be it adaptive or transformative, especially a giant music industry like that of India. The activities regarding cover songs are happening beyond the scope of existing provisions of the Act.

It could be further read from the Act that a cover version can only be created in the same format as the original song unless that format is no longer commercially available.¹⁷ The provision also places restrictions on the creator of the cover version, prohibiting any alterations to the literary or musical work, without prior consent of the original owner or unless technically necessary for such creation. However, the question here is do all creators take prior permission from the original owner regarding alterations to the original song while creating cover songs?

Digital streaming and Prior permission under Sec.31C

The rise of numerous novel services and operational approaches highlights the joint endeavours of copyright holders and digital service providers, underscoring the robustness of the global copyright system. The harmonization of rights on an international scale, notably through the

¹⁵ *Tips Industries Ltd v. Wynk Music Ltd*, N.M(L) 197/2018 in C.S. I.P(L) 114/2018, 23 April 2019.

¹⁶ Copyright Act, 1957 (Act 14 of 1957), Proviso s. 31 C (3)

¹⁷ Copyright Act, 1957 (Act 14 of 1957), Proviso s. 31 C (1)

1996 WIPO Internet Treaties has played a crucial role in enabling the worldwide growth of digital music services. The legal and commercial assurance established at the international level has paved the way for the successful launch and accessibility of digital services in emerging markets, benefiting both providers and consumers.

The strategy employed by the creators of the Internet Treaties to establish a broad, technology-neutral communication to the public right¹⁸ and the right to make available¹⁹ has proven to be effective. These exclusive rights apply uniformly to various transmission methods, such as downloads, on-demand streaming, and other forms of interactive transmission. This ensures that copyright holders can engage in fair negotiations with digital services across different regions.

Despite various nuances which are still to be rectified about the digital transmission of copyrighted works, digital streaming is still one of the largest modes of consumption of musical and sound recording works today, due to the inexplicable technological advancement. There are various streaming and music distribution platforms such as YouTube, Spotify, Gaana, Hungama etc.

Though the Copyright Act, of 1957 doesn't provide separation for 'digital streaming' within its ambit, the same is considered an act of 'communication' falling under Sec.2(ff) of the Act, which recognizes the communication of musical and sound recording works digitally by music sharing platforms like YouTube, Spotify etc.

The passage of the Internet Treaties and the improved horizon of copyright systems across the globe were purported to have little uncertainty regarding the inclusion of interactive streaming services within the exclusive rights of right holders to communicate to the public or to make available. This clarity could also streamline the licensing process, delineating the entities authorized to license and specifying the rights that require clearance by obtaining the prior license for utilizing a copyrighted work. However, this may not be the practice always, especially about acquiring a license before the use of a copyrighted work.

Practically, the situation has changed from what it used to be a decade ago. YouTube hosts a vast number of cover songs, with approximately 12,000 fresh cover versions being added every day. Notably, "Rolling in the Deep" has attracted almost 40,000 cover renditions, "Pumped Up Kicks" has seen 11,000 interpretations, and "Somebody That I Used to Know" has inspired around 6,000 covers.²⁰ It's undoubtedly unfeasible to issue licenses individually for such a large

¹⁸ WIPO Copyright Treaty, 1996, Article 8.

¹⁹ WIPO Performances and Phonograms Treaty, 1996, Article 10, Article 14.

²⁰ Andy Baio, "The Tangled Issue of Cover Song Copyright on YouTube", *Wired UK*, May 3, 2012.

number of cover songs. Typically, in situations where prior permission has not been acquired when a cover song is posted on YouTube, its algorithm detects resemblances between the cover and the original composition. YouTube has distended Content ID's functionality beyond recognizing original recordings to include the detection of cover versions and live performances by analyzing the fundamental melodies. The technology within Content ID allows one to identify works present in an original sound recording or within a cover version by recognizing the underlying melody of a song, utilizing data supplied by the music publishers.²¹ In such instances, notifications are sent to the individual who uploaded the cover song, while simultaneously informing the original rights holder. Subsequent negotiations take place between these two parties.

Prior permission is required both for creating a cover version as well as for making any alterations to the original song to make the cover version. If modifications are permissible solely with the explicit authorization of the original proprietor, does the legislature contemplate exclusively the production of 'version recordings,' wherein an original song is precisely duplicated with distinct performers and instruments?²²

But, this is not the practical case with cover versions streamed across various digital platforms. For example, there are more than 30 cover versions of the popular song 'Pyaar Deewana Hota Hai' on YouTube, most of which have millions of views and as mentioned above, it doesn't appear to be practically possible to have a scrutiny of all these alterations made in different version to check whether the 'integrity' of the original song is maintained as required by Rule 24(1). These do not qualify as 'cover versions' without any 'alterations'. These cover versions represent intense structural changes of the original song. This is the instance of just one song. The ambit is wide and beyond the scope of a normal layman's imagination since India currently ranks 15th among global recorded music industry markets as of 2018, and digital music consumption is on the rise.²³ In 2019, streaming accounted for 70% of the music industry's total revenue, and this figure is likely to have increased since then, especially after the Covid-19 pandemic. The accompanying image²⁴ illustrates the connection between online streaming and the Indian music industry.

²¹ *Ibid.*

²² *Supra* note 3.

²³ Dmitry Pastukhov, "Market Intelligence for the Music Industry" *Soundcharts*, June 30, 2022.

²⁴ The Indian Music Industry, "IMI-IFPI Digital Music Study 2019", (2019).

REVENUE

Total - INR 1,068 Cr.

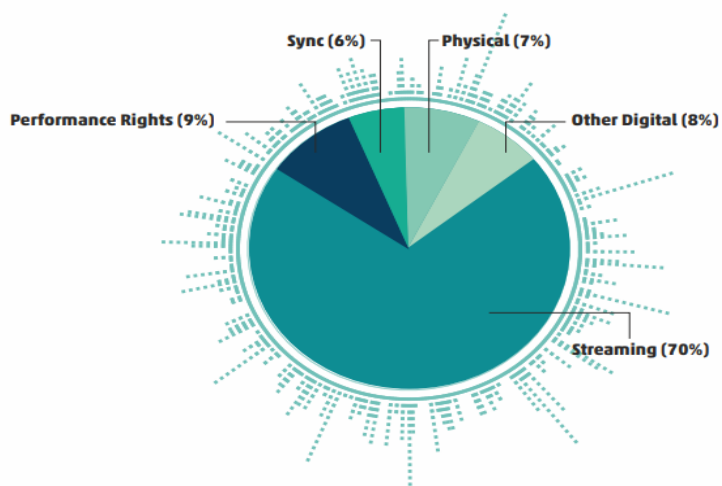
Physical - INR 73 Cr. (7%)

Streaming - INR 745 Cr. (70%)

Other digital - INR 88 Cr. (8%)

Perf - INR 101 Cr. (9%)

Sync - INR 62 Cr. (6%)



Though this is the overall streaming statistics, the same is inclusive of streaming of cover songs as well.

WHAT DOES THE LAW NEED TO ADDRESS?

Though Sec.31C provides for statutory licensing procedures for cover versions, the Act has failed to address what should constitute a cover version. While the Act and the Rules require the creator to strictly adhere to the 'integrity' of the original song and make no 'alterations' to it, the law has not established what should constitute the integrity of the song and what does 'alteration' really mean since 'alteration' of musical composition could be anything such as change in tune, melody, tempo, timbre and many others. Court of various jurisdictions including that of the USA,²⁵ UK,²⁶ EU²⁷ etc. have even made attempts to identify what could constitute the basic structure of a song to maintain 'originality' to stay distinguished from other works that claim similarity and thereby identify alterations or changes made to the original song to attract copyright infringement. The USA has even established a specified mechanical royalty rate that must be remunerated to the original copyright owner for generating a cover version. Starting from January 1, 2023, the Copyright Royalty Board has raised the statutory

²⁵ *Swirsky v. Carey*, (376 F.3d 841 (9th Cir. 2004)); *Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274, 280 (S.D.N.Y. 1991); *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999); *McKinley v. Raye*, 1998 U.S. Dist. LEXIS 3019, 1998 WL 119540, (N.D. Tex. March 10, 1998) (mem.); *Cottrill v. Spears*, 2003 U.S. Dist. LEXIS 8823, 2003 WL 21223846, (E.D. Pa. May 22, 2003); *Damiano v. Sony Music Entm't, Inc.*, 975 F. Supp. 623, 631 (D. N.J. 1996); *Sylvestre v. Oswald*, 1993 U.S. Dist. LEXIS 7002, 1993 WL 179101, (S.D.N.Y. May 18, 1993); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 543 (S.D.N.Y. 2000).

²⁶ *Robertson v. Lewis*, [1976] RPC 169.

²⁷ *Drynan v. Rostad*, 1994 Carswell Ont. 2217.

mechanical royalty rate "per unit" for physical media and digital downloads. The rate has increased from 9.10 cents per unit and 1.75 cents per minute (or part thereof) to 12 cents per unit and 2.31 cents per minute (or part thereof).²⁸

Moreover, there exist other analogous forms of artistic creations, such as samples and remixes, which enjoy substantial popularity among music enthusiasts. To date, neither the legislative nor the judicial branches of governance have undertaken any efforts to differentiate these forms of artistic expression, despite their resemblance in nature, they exhibit substantial variances in the perspective of a music creator.

The Copyright Act has also proved inadequate in regulating the digital streaming of musical compositions and sound recordings. The omission of 'digital/online streaming' from the purview of the Act and its accompanying Rules fails to meet the requirements and expectations of the music industry.

CONCLUSION

The industry is undergoing rapid transformations, adapting to emergent technologies. The Indian music sector holds substantial economic potential, characterized by its dynamism. Nevertheless, the dynamism inherent in this sector remains inadequately acknowledged by the existing Copyright law, thereby engendering discrepancies and infringements. The preceding discourse highlights the evident deficiency in the recognition and resolution of a range of issues within the Indian music industry by the Copyright law, particularly in light of the substantial digitalization observed after the COVID-19 pandemic.

Sec.31C of the law implies that an individual is solely authorized to effect alterations that enhance the quality of the original work through the application of technology. However, distinctions in terms of relative creativity remain subjective. The extant framework considers songwriting or lyrical content as the genesis of a new composition, without acknowledging antecedent melodies or musical styles. Given that every musical piece draws on preexisting elements to some degree, the notion of absolute ownership and authenticity is open to debate. Furthermore, various cover artists have released their renditions of songs before the 5th anniversary of the original song's initial release, contravening the provisions of the Act with minimal or no consequences. Moreover, the matter of securing permission from copyright holders before producing a cover version has consistently given rise to contentious and legally disputable conflicts.

²⁸ Copyright Royalty Board, Library of Congress, "Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)", *Federal Register*, Aug. 10, 2023.

Nevertheless, in the continuing discussion about inquiries into originality versus inspiration and the existence or lack of consent, the Indian Copyright Act has consistently achieved its fundamental purpose of comprehensively enabling the dissemination of literary, musical, and artistic creations. The Act is designed to safeguard the interests of both copyright proprietors and emerging artists. A judicious amendment to Section 31C, aligned with the current dynamics in the industry, holds the potential to instigate substantial legal and industrial transformations.