

# **MUSICAL WORKS : GUIDELINES FOR ANALYSIS OF COPYRIGHT INFRINGEMENTS IN RELSTION TO MUSICAL WORKS\***

*Jessadapohn Somboonpong\*\**

## **ABSTRACT**

This article intends to study musical works with a particular focus on musical notes in order to suggest some guidelines for copyright infringement analysis. One of the most complicate issues is “substantial similarity” in the concept of fair use since the unique nature of music makes the analysis more complicate than other copyright works. In other words, the analysis of musical disputes requires much more factors than legal knowledge. Therefore, the study of musical works should not only be based on legal analysis but musical knowledge should be applied to cases as well.

It is the author’s view that in order to make the copyright analysis easier to understand, the music should be separated into three fundamental parts. The first part is the “Melody Part”, which is the most outstanding and important part of the song. This part appears frequently in decisions of the courts. The next part is the “Harmony Part” that usually goes along with the melody part. The last but not least is the “Rhythm Part”. Moreover, in order to analyse cases along with the musical theory, the study will classify cases as “Melody Part Analysis”, “Harmony Part Analysis” and “Rhythm Part Analysis”. Furthermore, the author would like to discuss two musical techniques of the original work arrangement, transposition and variation.

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\*\* Graduate Student of Master of Laws Program in Business Laws (English Program), Faculty of Law, Thammasat University.

**Keywords :** Musical works, Copyright infringement, Musical notes

#### บทคัดย่อ

อุตสาหกรรมดนตรีเป็นอีกหนึ่งในธุรกิจที่มีความเจริญรุ่งเรืองเป็นอย่างมากในสังคมปัจจุบัน และการละเมิดลิขสิทธิ์ก็เป็นปัญหาสำคัญที่ส่งผลกระทบต่อการค้าดนตรีดังกล่าว ดังนั้นจึงมีความจำเป็นที่กฎหมายจะต้องเข้ามามีบทบาทในการให้ความคุ้มครองงานดนตรีกรรมในฐานะงานอันมีลิขสิทธิ์ เช่นเดียวกับงานอันมี ลิขสิทธิ์ประเภทอื่นๆ อย่างไรก็ตามเพื่อให้กฎหมาย สามารถอำนวยความสะดวกและคุ้มครองได้อย่างมีประสิทธิภาพ จึงต้องคำนึงถึงธรรมชาติของงานนั้นๆ ประกอบด้วยเนื่องจากงานที่แตกต่างกันย่อมต้องการความคุ้มครอง ที่แตกต่างกัน

ในกรณีของงานดนตรีกรรมซึ่งมีความเป็นเอกลักษณ์เฉพาะตัว กล่าวคือ โดยธรรมชาติของคนหนึ่งคนไม่มี หลักเกณฑ์ที่ตายตัวจึงทำให้การประพันธ์บทเพลงสามารถที่จะเปลี่ยนแปลงไปได้ตามยุคสมัยและค่านิยม ของผู้คนในสังคม ณ ช่วงเวลานั้นๆ บทเพลงที่เกิดขึ้นในช่วงเวลาที่ต่างกันจึงมีเอกลักษณ์ที่แตกต่างกันเมื่อบทเพลง มีความแตกต่างกันไปตามยุคสมัยกฎหมายจึงไม่อาจกำหนดกฎเกณฑ์ที่ตายตัวขึ้นมาเพื่อใช้บังคับกับทุกกรณีได้

การวินิจฉัยงานดนตรีกรรมจึงต้องทำการวินิจฉัยเป็นรายกรณีไป โดยพิจารณาตามข้อเท็จจริงที่เกิดขึ้น รวมถึงสภาพแวดล้อมทางสังคม ณ ช่วงเวลานั้นๆประกอบด้วยการวิเคราะห์งานดนตรีกรรมจึงเป็นเรื่องที่ สะท้อนก่อนและซับซ้อนเนื่องด้วยธรรมชาติของคนดังที่กล่าวมา ดังนั้นในการวินิจฉัยบทเพลงแต่ละบท เพลงจึงมีความจำเป็นที่จะต้องนำความรู้ทางทฤษฎีดนตรีเข้ามาอธิบายและชี้ให้เห็นถึงการละเมิดลิขสิทธิ์ใน บทเพลงนั้นๆ

บทความนี้จะแสดงให้เห็นถึงการวินิจฉัยการกระทำอันเป็นการละเมิดลิขสิทธิ์ในงานดนตรีกรรม โดยแบ่งบทเพลงออกเป็น 3 ส่วนเพื่อสะดวกต่อการวินิจฉัย คือ ส่วนของทำนองหลัก (Melody Part) ส่วนของ ทำนองประสาน (Harmony Part) และส่วนของกลุ่มของจังหวะ (Rhythm Part) และจากการแบ่งบทเพลงออกเป็น ส่วนๆ ในการวินิจฉัยนี้เองนำไปสู่ประเด็นปัญหาของการใช้คำศัพท์บางคำในบทบัญญัติกฎหมาย โดยในทาง บริบทของคนตรี คำนั้นๆอาจมีความหมายที่แตกต่างออกไปจากความหมายโดยทั่วไป ซึ่งอาจนำไปสู่ความเข้าใจที่ คลาดเคลื่อนในการตีความได้ นอกจากนี้บทความยังกล่าวถึง วิธีการดัดแปลงบทเพลงโดยการใช้ความรู้และ เทคนิคทางดนตรีโดยนำความรู้ทางทฤษฎีดนตรีมาใช้ในการอธิบายเพื่อให้เกิดความเข้าใจมากยิ่งขึ้นและสุดท้ายบทความนี้ได้แสดงความคิดเห็นเป็นข้อเสนอแนะในการปรับปรุงกฎหมายดังกล่าวด้วย

**คำสำคัญ:** งานดนตรีกรรม, การละเมิดลิขสิทธิ์, โน้ตดนตรี

## Introduction

Nowadays, music industry becomes one of the most popular and prospering businesses in the world. BBC news reports that artists like Sam Smith, Ed Sheeran and Paloma Faith helped the British music industry contribute £4.1bn to the United Kingdom economy in 2014.<sup>1</sup> There is no doubt that musical disputes mostly arise around a large amount of money. Absolutely, whenever the disputes arise in the society, law is required to step in and provide clear standards for settling the disputes efficiently. In that manner, copyright law plays a significant role. However, copyright law does not provide specific guidelines to analyse the infringement in musical works. Hence, it is difficult to predict the outcome of musical work infringement cases.

Under intellectual property law, copyright is the law that deals with the creation of mind. Generally, musical composition is a process, as to which the composer creates his work with his own idea together with his labor to produce a song, which represent the melody, harmony and rhythm along together. Even though musical notes are used in a system of western notation style, which musicians all over the world can clearly understand. However, for lay listeners it seems to be such a complicate matter. This problem makes the analysis of musical work more complicate than other copyright works. For instance, in some cases to identify the similarity of the note structure is not a simply way as a note-for-note analysis. Nonetheless, the position of musical notes in a song look not exactly the same, but when carefully considered musical notes along with musical theories they trigger some suspicious matters.

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<sup>1</sup>Mark Savage, “*British music industry boosts economy by £4.1bn*”, Nov. 5, 2015 available at <http://www.bbc.com/news/entertainment-arts-34722928> (last visited Mar. 7, 2016).

## 1. The Overview of Copyright Law in relation to Musical Works

Copyright Act B.E. 2537 (1994) of Thailand provides the protection for musical work and gives the definition of musical work as “a work with respect to a song which is composed for playing or singing whether with rhythm and lyrics or only rhythm, including arranged and transcribed musical note or musical diagram”. Moreover, it provides the exclusive right for the owner of copyright to reproduction or adaptation, giving benefits accruing from the copyright to other persons, and licensing some rights with certain conditions. However, musical cases deal with musical notation are not arise much in Thailand, therefore the study in this article will based on the cases in the United States to analyse and create a guideline for Thai copyright law.

In the United States, the first copyright legislation enacted by congress was the Copyright Act of 1790, which protects only maps, charts, and books. It provided protection upon the owner for fourteen years, with a renewal for an additional period of fourteen years. Then the Act of 1831 includes the protection of musical works for the first time, and extended the privilege of printing, reprinting, publishing, and vending the copyrighted work to a term of twenty-eight years with a right of renewal for a second term of twenty-eight years in favor of the author or his family.<sup>2</sup> In the early to mid-nineteenth century, Europe was the center of many famous Western musical achievements such as Beethoven, Schubert, Schumann, Chopin, and so on, who produced numerous masterworks. From that situation, European works dominated the United States musical scene. However, by the end of the nineteenth century, the United States classical and popular music began to develop. At this time the domestic composers had generated a respectable work, which largely derivative from European models, and began to invoke copyright law to protect their compositions. Therefore, the use of copyright in the

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<sup>2</sup> “*International copyright and musical compositions*”. 3 DePaul L. Rev. (1954).

United States to enforce rights in music has increased throughout the twentieth century and into the new millennium.<sup>3</sup>

Furthermore, the concept of “fair use” must be concerned in this study as well. Actually, fair use is the right to use a copyright work under certain conditions without the copyright owner’s permission. It allows one to use and build upon prior works in a manner that does not unfairly deprive prior copyright owners of the right to control and benefit from their works<sup>4</sup>. The proper amount of the similarity in a song that the composer has the right to claim for fair use is one of the most interesting topic to be discussed.

In the United States, the fair use defense is stipulated in section 107 of the Copyright Act. The statute provides that fair use of a work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright. However, to determine whether such use is fair use or not, one must consider the four factors of fair use, which is the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole and the effect of the use upon the potential market for or value of the copyright work. Furthermore, other important matters to be considered are whether the use is commercial or noncommercial and whether the use is transformative or not.

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<sup>3</sup> Margit Livingston and Joseph Urbinato, *Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike*, 15 Vanderbilt J. Of Ent. And Tech. Law. 227, (2013).

<sup>4</sup> “Copyright and Fair Use”, Harvard University, available at <http://ogc.harvard.edu/pages/copyright-and-fair-use> (last visited Mar. 7, 2016).

## 2. The Analysis of Cases in relation to Musical Works

In order to analyse cases, the study will classify cases as melody part analysis, harmony part analysis and rhythm part analysis. First, *Marks v. Leo Feist, Inc.*, **290 F. 959 (2d Cir. 1923)**, shows the example of rhythm part analysis. According to this case, even if two song have certain similar melody parts, but it just a musical technique such as using some part of chromatic scale, then it could not be considered as a copyrightable part. Furthermore, even if there have some similarities of rhythm in the two songs, however the court mentions that the playing of this two compositions would not confuse one with the other.

Secondly, *Jewel Music Pub. Co. v. Leo Feist, Inc.*, **62 F. Supp. 596 (S.D.N.Y. 1945)**, is the example of the analysis in harmony part. In this case both songs were in the same time signatures and key signatures. Even though, they also had similar harmonic structures, however the court considered that this is so common for this style of songs. Therefore, according to the harmony part the court found that the harmonic structure in both songs is basically the same. However, it is a common harmony structure, it just goes the way that the harmony actually follows the melody.

The third case, *Hein v. Harris*, **175 F. 875 (C.C.S.D.N.Y. 1910)**, **aff'd 183 Fed. 107 (2d Cir. 1923)**, is the case that showing the analysis in melody part by using the transposition technique. However, in the process of transposition there have no originality at all and the owner of the transposed song can not claim for copyright protection. Moreover, this creation of such work shall be considered as a copyright infringement.

The last case, *Fred Fisher, Inc. v. Dillingham* **298 F. 145 (S.D.N.Y. 1924)**, demonstrates the harmony analysis that copying any substantial component part of accompaniment pattern could be considered as an infringement. This case showing that in some instances, the harmony part could be claimed for the originality of the song and it could be the copyrightable part as well.

### **3. Criteria of Copyright Infringements in relation to Musical Works**

In some cases, the defendant only put in superfluous notes, passing notes, some parts of the scales, or some accidental signs into the song just for making the song dissimilar. To make the analysis more efficient, considering the song by separating into several parts might be the better way to understand. Thus, this article will create criteria by using music theories along with legal analysis.

Actually, musical similarity can appear in any part of the songs, lyrics, melody, harmony even rhythm. Since some scholars claim that the substantial similarity must be notice by lay listeners, therefore there are some method to testify the similarity such as the audience test. However, others claim that musical cases must have the expert testimony to analyse the similarity of songs since music is a complicate science, therefore the audience test is not enough. Moreover, in case of lay listeners, sometimes they notice only the lyrics no matter it was composed in which language, most of them can notice that the lyrics of two songs are similar. Therefore, the lyrics is less complicate than other parts of the song.

Unlike the lyrics, other parts of the song such as melody, harmony including rhythm is more complicate for lay listeners to identify the similarity. Thus, the study in this article will not mentioned anything about the lyrics even though it still considered as the subject matter of musical work. Assume that, without the lyrics, lay listeners listen to one song at the first time and then play the same song again but with the key changed from Major to minor, which make the sound sadder. Since the feeling of the song absolutely changed, it might have some effects on some lay listeners' ears and they might think that it is not the same song they have listened previously. For this instant, musical theories are required to use for explain.

Therefore, to analyse the similarity of each song, it requires much more specific factors such as musical theories to be applied. However, there are some conflicts between the nature of law and music. Generally, law requires clear standard to analysis cases while

it is not exactly the same nature as music, which is one of the most flexible sciences. The music's unique nature makes it difficult to draw a distinction between the ideas and expression.<sup>5</sup> To resolve the problem mentioned above, a guideline is needed.

### **3.1 Transposition**

Transposition is a technique that use to change the key of songs. Music in a Major key can be simply transposed to any other Major key, as well as music in a minor key can be transposed to any other minor key. However, changing from minor key to Major key requires much more changes rather than simple transposition. Generally, when a song has been transposed, the sound would be higher or lower. However, the important point is that except the key signature everything in transposed song still remain the same as the original one. Therefore, transposing must be considered as an infringement of copyright work.

### **3.2 Variation**

Variation is a basic technique in order to developing music. Not only the melody part that could be changes, variations could be applied with all parts of songs. There are various forms of chords and accompaniments for building the improvisation. In other word, a theme song is repeated in an altered form. Therefore, the nature of variations is to remind of the original song in every variation forms. If the variation were applied with significant part or the heart of a song, then it should be considered as an infringement against musical work.

## **4. Conclusion and Recommendations**

### **4.1 Conclusion**

From studying Thai copyright law along with the United States copyright law, the United Kingdom copyright law including international rules in relation to musical works, it can be concluded that generally copyright law has the purposes of protecting the creator of a work against infringements, guaranteeing commercial

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<sup>5</sup> Jeffrey Cadwell, *Expert Testimony, Scenes a Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 Santa Clara L. Rev. 137 (2005).



exploitation and stimulating new ideas. Therefore, copyright law authorizes the creator certain rights to make use of his own work. However, there are some exceptions and limitations to copyright defined by law. Generally, exceptions and limitations to copyright are subject to the three-step test initially set out in the Berne Convention and other international agreements. The Berne Convention provides that an exception or limitation to copyright is permissible only if

(1) it covers only special cases

(2) it does not conflict with the normal exploitation of the work; and

(3) it does not unreasonably prejudice the legitimate interests of the author.

Thus, within that standard, exceptions and limitations vary from country to country in scope and amount.

While most countries specifically identify the exceptions and limitations to copyright that they have created, the United Kingdom and the United States have created each well known exception in their statutes. The principle of “fair dealing” in the United Kingdom covers a substantial scope of uses where prior permission is not needed. The criteria for what is considered to be fair dealing are listed in the law. In the United States, the four factors in the concept of “fair use” assessed by a court to determine fair use are set in the statute and case law.

Therefore, in order to study the copyright infringement, it is necessary to study the exceptions as well. One of the most complicate issues is that whether or not the use of a work is considered as substantial proportion to the whole original work. Moreover, the unique nature of musical works makes the analysis of substantial similarity in musical works become delicate matter.

Since the analysis of substantial similarity is about the quality not quantity, musical knowledge plays in significant role to point out some clues. Assume that if one wants to analyse whether there was any infringement in literary works or not, the analysis of literary work requires the language knowledge to describe the similarity of the two works. Compared to literary works, musical work analysis is the process of examining the two pieces of music

in order to determine the actual similarity to find out that the similarity occurs because of infringements of another's song or whether the similarity occurs because both pieces of music have been written within the tonal system<sup>6</sup>. The analysis should go through melodic similarity, similarity of chord progressions and the overall pattern similarity.

Nowadays in the prospering entertainment business era, music industries need seriously copyright protection indeed. In order to provide proper protection, the law should set up some guidelines for the copyright infringements analysis. The analysis guidelines not only benefit lawyers to predict the outcome of cases but also remind those composers and songwriters for their use of another's music as well.

#### 4.2 Recommendations

(1) According to section 4 of Thai Copyright Act B.E. 2537 (1994), a "musical work" is defined as: *"a work with respect to a song which is composed for playing or singing whether with **rhythm** and lyrics or only rhythm, including arranged and transcribed musical note or musical diagram."* However, with all due respect the author do not agree with the using of the term "**rhythm**" because besides the lyrics there are many elements in songs. For example, in one song there could be many musical parts such as a melody part, harmony part and rhythm part. Moreover, in the musical context rhythm refers to the organization of musical sound events that determines how sounds are produced over time.

The author would like to mention the use of the term "music" in the current copyright law of the United Kingdom, the Copyright, Designs and Patents Act 1988 (the 1988 Act). The Act contained the definition as follows: *"Musical works are works consisting of **music**, exclusive of any word or action intended to be sung, spoken or performed with the **music**."* According to this Act, musical works means the musical elements with any words or action that are intended to be sung spoken or performed with particular music.

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<sup>6</sup> The arrangement of all the tones and chords of a composition in relation to a tonic.

Therefore, instead of using the term “rhythm”, the term “music” might be better to describe the other parts of the song which are not the lyrics.

(2) As mentioned in (1), the analysis of “music” part should be separated into at least three basic parts in order to determine the actual similarity from melodic similarity to similarity of chord progressions and the overall pattern similarity. Therefore, the analysis should consider as melody part analysis, harmony part analysis and rhythm part analysis. Generally, melody part is the most memorable part of the song. Hence, in many cases the court points that melody part is copyrightable and could be claimed for its originality. However, in some cases harmony part and rhythm part could be protected under copyright as well.

(3) In case that there were some tricks that used to alter the original song by using musical knowledge, such work should not be claimed for its originality and also infringe the original copyrighted work. Though there were many musical techniques to do so. This article would like to point out some tricks that used as reflected in study cases in the United States and the United Kingdom. From the study, the author would like to introduce two musical techniques by which if one uses to alter another’s song, the outcome tends to be like the same song as the original one. Of course, such act would be considered as an infringement.

The first technique is “transposition” that is used to change the key signature of the song. The operates in the following way, beside the tone of the whole song which could be higher or lower, the rest are still the same as the original one. Therefore, this is the reason why the author would like to suggest that if one use this technique to alter another’s song, one should not claim for copyright protection and should be considered as infringing the original copyrighted work.

The second technique is “variation”. This technique is used to change the song into various styles. Generally, variation is a basic technique in order to develop music. Not only the melody part that could be changed, variations could be applied with all parts of songs. There are various forms of chords and accompaniments for building

the improvisation. In other words, a theme song is repeated in an altered form. Therefore, the nature of variations is to remind of the original song in every variation form. If the variation were applied with significant part or the heart of a song, then it should be considered as an infringement against the original theme song.

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