



**MUSICAL WORKS : GUIDELINES FOR ANALYSIS OF
COPYRIGHT INFRINGEMENTS IN RELATION TO
MUSICAL NOTES**

BY

MISS JESSADAPOHN SOMBOONPONG

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS
IN BUSINESS LAWS (ENGLISH PROGRAM)
FACULTY OF LAW THAMMASAT UNIVERSITY
ACADEMIC YEAR 2015
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THESIS

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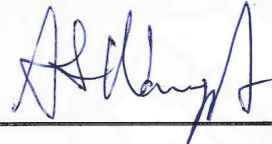
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MUSICAL WORKS : GUIDELINES FOR ANALYSIS OF COPYRIGHT
INFRINGEMENTS IN RELATION TO MUSICAL NOTES

was approved as partial fulfillment of the requirements for
the degree of Master of Laws in Business Laws (English Program)

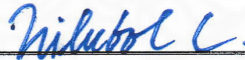
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Thesis Title	MUSICAL WORKS : GUIDELINES FOR ANALYSIS OF COPYRIGHT INFRINGEMENTS IN RELATION TO MUSICAL NOTES
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Academic Years	2015

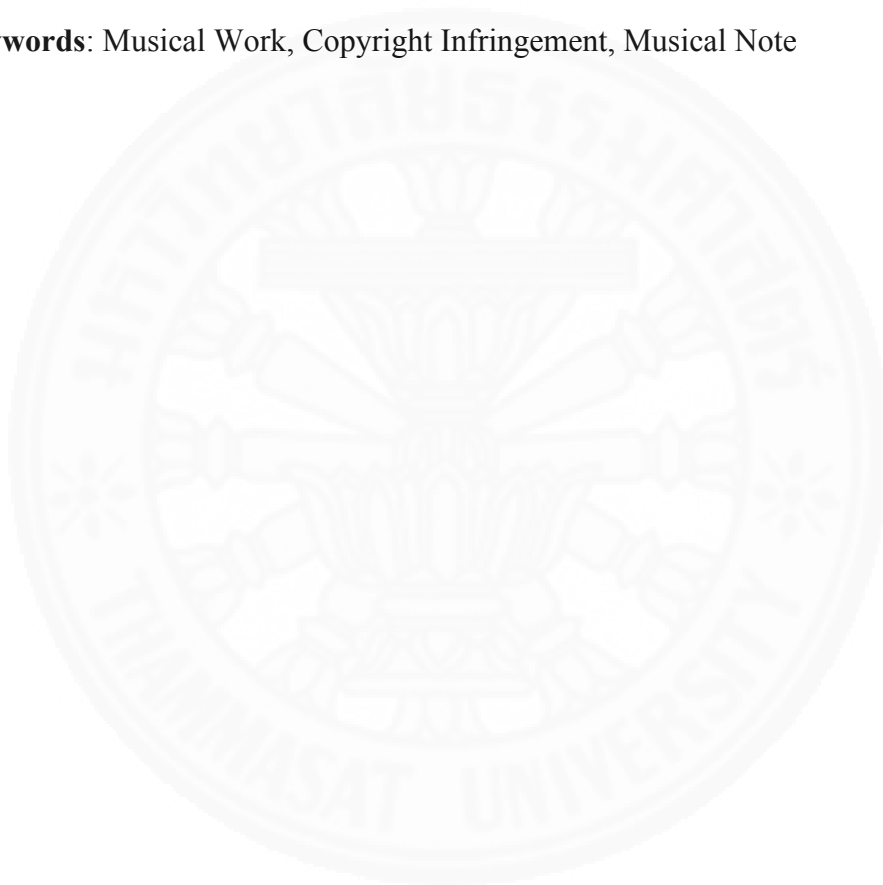
ABSTRACT

This thesis intends to study musical works focus on musical notes in order to suggest some guidelines for copyright infringement analysis. One of the most complicate issue is about the “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 base 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 the decision of the court. The next part is the “Harmony part” that usually go along with the melody part. The last but not least is the “Rhythm part”. Moreover, in order to analyse cases along with musical theory, the study will classify cases as the “Melody Part Analysis”, the “Harmony Part Analysis” and the “Rhythm Part Analysis”. Furthermore, the author would like to discuss about two musical techniques of the original work arrangement, transposition and variation.

Keywords: Musical Work, Copyright Infringement, Musical Note



ACKNOWLEDGEMENTS

The achievement of this thesis would not have been possible without the great support of many people.

First of all, I would like to express the deep gratitude and appreciation to Assistant Professor Dr. Nilubol Lertnuwat and Associate Professor Dr. Pinai Nanakorn for their valuable advices, comments and guidance throughout the process.

At the beginning of this thesis, I was concern whether my topic could be studied as a legal thesis or not because it contains theories and the analysis that quite relevant to musical field rather than legal field. I tried so hard to find musical work relevant articles in order to support my idea before I decided to discuss with my advisors. My extremely impression was the time that Associate Professor Dr. Pinai Nanakorn told me that “You can study on this topic, it will be your great and happiest moment when you work on what you love” Moreover, the door to Associate Professor Dr. Pinai Nanakorn office has always been open whenever I ran into a trouble or had a question about my thesis or writing.

The sincere gratitude I owe is the gratitude to Professor Dr. Amnat Wongbandit, and Judge Nopporn Bhotirungsiyakorn for taking of their valuable time as my thesis committee and their valuable advice and guidance for the completion of the thesis. It was a great honor for me that one of the Supreme Court judges, Judge Nopporn Bhotirungsiyakorn, gave attention to my thesis and encouraged me to continue further study on this field.

Moreover, I would like to acknowledge to Dr. Junavit Chalidabhongse as my first Intellectual Property professor when I studied my Bachelor Degree at Thammasat University. It was the first time that I studied the musical works cases and I found that the US court decisions on musical disputes are very interesting. The court gives many admirable reasons by integrating legal concept along with musical theories so impressively. Furthermore, Dr. Junavit Chalidapong always gives me valuable advices even when I studied Master Degree in Intellectual Property class, he also gave me the opportunity to discuss with him about the topic of this thesis and he gave me many valuable suggestions.

In addition, I am gratefully to thank to my piano teachers Mr. Nopadol Atsavakovith and Miss Pornwipa Pongprasart, my violin teacher Mr. Thongchai Maddee and also Yamaha Music School Ratanatibeth, for introducing me to music since I was 4 years old and provides me with many opportunities to enjoy wonderful music and make me became a music lover as I am today.

I am gratefully indebted to Mr.Vitchatorn Vongkulbhisal for his helpful comments on this thesis. He always listens to me and helps me solve many problems regarding legal and music issues including my writing through the whole process of this thesis.

I also wish to express my acknowledgement with love to my family, mom and dad who always support me in every way. Thank you for your unconditional love and kindness, without you I would never have enjoyed so many precious opportunities.

A special thanks goes to Thammasat University Symphony Orchestra (TUSO), that brought me to meet all of the lovely and wonderful musicians and gave me the opportunity to be in part of this fabulous orchestra. Last but not least, I would like to thank you all of my friends including many people who supports me in various ways.

Miss Jessadapohn Somboonpong
Thammasat University
Year 2015

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CHAPTER 1

INTRODUCTION

1.1 Background and Problems

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 2014.¹ 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 score, which represent the melody, harmony and rhythm along together. Even though scores 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 copyrightable 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 scores look not exactly the same, but when carefully considered scores along with musical theories they trigger some suspicious matters.

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

¹Mark 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).

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 thesis 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.² 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 Sates 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 United States to enforce rights in music has increased throughout the twentieth century and into the new millennium.³

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

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

³ 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).

from their works.⁴ 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.

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 thesis will create criteria by using music theories and then discuss and apply cases into the criteria to analyse whether songs are similar or not.

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.

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

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 thesis 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 feels sadder. Since the feeling of the song absolutely change, it might have effect 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.

In conclusion, 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.⁵ To resolve the problem mentioned above, a guideline is needed.

1.2 Hypothesis

In order to analyse each song, sometimes applying only legal knowledge is not enough to decide whether the songs are similar or not. Therefore, applying the musical knowledge, from western music theories, could point out some clues and this could be used as a guideline to analyse the similarity of musical works.

1.3 Objective of Study

The objective of this thesis is to study the analysis of musical work infringements in relation to musical notes, by reviewing interesting cases that occurred in other countries

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

and applying legal knowledge along with musical knowledge in order to suggest some analysis guideline to Thai copyright law.

1.4 Scope of Study

This thesis will study based on interesting cases in the United States and the United Kingdom, by focusing on Copyright Act B.E. 2537 (1994) of Thailand, Copyright Act of 1976 of the United States, Copyright Act of 1976 of the United Kingdom including The Berne Convention and TRIPS Agreement in order to analyse musical work infringements in relation to musical notes by applying musical theories and create a guideline for analyse copyright infringements.

1.5 Research Methodology

Since the common law system relies upon precedents to establish a standard of which laws are interpreted and enforced. The study in this thesis will be based on cases and document research of both domestic and non-domestic materials, including the articles from scholars and electronic databases as well.

CHAPTER 2

AN OVERVIEW OF COPYRIGHT LAWS AND MUSICAL WORKS

2.1 Introduction

Copyright law is a balancing of benefit between copyright owners and the society. On one hand, the copyright owners who invest their labor, time and perhaps money to create their own works should be compensated for their effort. On the other hands, it should be possible for public to access such creative works since if there were no creations, how could the society develop then. Therefore, the protection of copyright, unlike ownership, may not last forever, it remains only for a certain period of time.

Thought music has been existed before copyright, however the main assets of music industry come from the creation of human's mind, which is the matter that would be protected under copyright law. Since music businesses incomes arise from the copyright exploitation, therefore without copyright the songwriters, music publisher and music business people could not own and gain any things from their songs. However, copyright law does not give rights to gain income automatically. It allows copyright owners to generate income by granting license to a person who want to use his copyrighted work. It means that all income from copyright exploitation arise under contracts. If there were no protection against the infringement, then how could music industries survive in the society. Assume that one has created a new song with all of his effort, invested all of his labor, time and maybe his money. Unfortunately, someone stole his idea by copying his work and gained a lot of benefit. According to this situation without the copyright law there were no protection of idea, then why should one put an effort on creating something new and this may cause some serious effects to the society.

Hence, music industries need copyright protection indeed, but the process of analysing musical disputes is a very complicated issue because of the unique of music's nature. However, there are many ways to identify the similarities between two songs. For example, listeners could identify the similarity though their ears, this is possible if two songs are striking similar. However, assume that the infringer used some musical knowledge in order to adapt his song from the original one, then how can lay listeners

noticed that. If so, it would be unfair to the owners of the original song. Therefore, looking at musical notes and applied musical knowledge to identify the similarity in songs would be an easier way to explain whether there was any copyright infringement or not.

2.2 The General Characteristics of Copyright

2.2.1 Exclusive Right

Generally, copyright is the law that excludes others from exploitations over copyrighted work, it gives the copyright owner exclusivity in copying. Copyright grants certain exclusive rights to the owner of copyrighted work. These exclusive rights are different from the rights given to a person who owns a copy of the work. For example, when a person purchases a book, they received an ownership in a copy of a copyrighted work. Therefore, book owner has an authority to resell the book or even destroy it since they own the book. However, the book's owner did not receive any copyright rights when they purchased the book. All copyright rights are held by the copyright owner, therefore only the copyright owner has an authority to transfer the exclusive rights of the copyrighted work. This distinction allows a copyright owner to sell copies of a work, or even the original work itself, without forfeiting his rights under the copyright law. Some examples of exclusive rights granted by copyright law are as followings:

- the right to reproduce the copyrighted work
- the right to distribute copies of the work to the public
- the right to perform the copyrighted work publicly
- the right to display the copyrighted work publicly

However, these exclusive rights are specifically limited by the concept of "Fair Use" or "Fair Dealing" and several other specific limitations stipulated in the law.

This characteristic appear in section 4 of Thai Copyright Act B.E. 2537 (1994) that “*“copyright” means the exclusive right to do any act according to this Act with respect to the work created by the author.*” According to this section, the law uses the word “exclusive right” in order to emphasize that the right is granted exclusively for the

copyright owner. Moreover, in section 15 of the same Act mentions about the limit of the exclusive right that:

- “...the owner of copyright has the exclusive rights of*
- (1) reproduction or adaptation,*
 - (2) communication to public,*
 - (3) letting of the original or the copies of a computer program, an audiovisual work, a cinematographic work and sound recordings,*
 - (4) giving benefits accruing from the copyright to other persons,*
 - (5) licensing the rights mentioned in (1), (2) or (3) with or without conditions...”*

Nevertheless, the main point of the copyright owner’s exclusive right is not only about what the copyright owner can do with his own work, but the law also prohibit others from acting over copyrighted work which is considered as an infringement against the exclusive right. However, this exclusive right has certain exceptions which will be discussed further.

2.2.2 Property Right

When a work was created, copyright secured automatically upon creation. It no need to be new in order be a copyrighted work but it must be the original one. As long as it is the fruits from the labor of the creator’s mind then it could be protected under copyright law, it not matters that such work has high or low market value. However, copyrighted work actually has value itself because it can be transfer with the whole work or only certain part, otherwise the owner can license his exclusive right to others with or without conditions. Thus copyright is considered as the property right. According to Thailand Civil and Commercial Code section 138 stipulates that *“Property includes things as well as incorporeal objects, susceptible of having a value and of being appropriated.”* Therefore, copyright is considered as the property right. Moreover, it has certain economic right which authorize the owner to claim for some economic benefits such as royalty or licensing.⁶

⁶ Dhajjai Subhapholsiri, **Explanation of Copyright Law** (1996).

2.2.3 Public Domain

Copyright law gives protections over a work not only for the copyright owner's sake, but also maintaining society benefit by settling certain period for copyright protection. Since giving unlimited protection for a work might prevent others to create more creative work and it might effect on the development of the society. In other word, copyright is a balancing right of the copyright owner and the society. Therefore, when a work become a work in public domain then no one can no longer claim for copyright protection even the owner of such work. This is different from other rights such as ownership which has no limitation of time.

According to Thai Copyright Act B.E. 2537 (1994), copyright generally subsists for the life of the author and continues to subsist for fifty years after the death of the author. However, in case of a work of joint authorship, copyright subsists for the joint-authors and continues to subsist for fifty years as from the death of the last surviving joint-author. If the author or all joint-authors die prior to the publication of the work, copyright subsists for fifty years as from the first publication of the work. In the case of the author being a juristic person, copyright subsists for fifty years as from the authorship, however if the work is published during such period, the copyright continues to subsist for fifty years as from the first publication.⁷ Copyright in a work which is created by a pseudonymous or anonymous author subsists for fifty years as from the authorship, if the work is published during such period, copyright subsists for fifty years as from the first publication.⁸

However, term of protection depends on what kind of a work. For example, Copyright in a photographic work, audiovisual work, cinematographic work, sound recordings or audio and video broadcasting work subsists for fifty years as from the authorship, however if the work is published during such period, copyright subsists for fifty years as from the first publication.⁹ While, copyright in a work of applied art subsists for

⁷ Thai Copyright Act B.E.2537 (1994) Section 19

⁸ Thai Copyright Act B.E.2537 (1994) Section 20

⁹ Thai Copyright Act B.E.2537 (1994) Section 21

twenty-five years as from the authorship, but if the work is published during such period, copyright subsists for fifty years as from the first publication.¹⁰

Furthermore, in case of a work was created in the course of employment, instruction or control subsists for fifty years as from the authorship. In case that the work is published during such period, copyright subsists for fifty years as from the first publication. However, the publication of a copyright work after the expiry of the term of copyright protection shall not cause a new the copyright in such work and it will become a work in public domain.

2.2.4 Multiple Right

Copyright is not a single right, but a package of rights which could be divided up in order to license to others. The copyright owner can have multiple rights over his one work. For example, when one created a copyright work then he can have rights to reproduce, adapt, and communicate to public over such work. Moreover, he also has the authority to transfer his right or license to whoever he wants.

2.2.5 Independence of Ownership

Copyright is not the same thing as ownership. It actually separates from ownership which has been stated in section 1336 of Thailand Civil and Commercial Code that “*Within the limits of law, the owner of property has the right to use and dispose of it and acquires its fruits; he has the right to follow and recover it from any person not entitled to detain it, and has the right to prevent unlawful interference with it.*” Therefore, even though one has an ownership over a property, but he has no exclusive right over it since such right still belongs to the copyright owner. For example, if one created a copyright work and then sell it, the person who buy that work actually has an ownership but not copyright. He can use and dispose of it, but he cannot reproduce it since he has no exclusive right to do so.

2.3 The Nature of Copyright Infringements in relation to Musical Works

Generally speaking, copyright law gives an exclusive right to the copyright owner in order to prevent exploitation from others. It has omitted any act of infringement whether

¹⁰ Thai Copyright Act B.E.2537 (1994) Section 22

it be unauthorized or unlicensed copying, reproducing including performing with the whole work or even certain parts of the copyrighted work.¹¹

For the beginning, it is necessary to clarify that musical works are distinct from sound recordings. Some people may confuse about these two copyright infringements. Musical works mean the composition, not any particular performance of recording of it. Therefore, a sound recording and the music played in the sound recording are separate types of copyright work.¹²

The example of musical work infringement is that if one purchases a sheet of music at a music store or buy it through online shop, he actually has the right to play it in his home, or even for a group of friends because it is a purely home consumption which consider as a fair use. However, if the fact has been changed that in state of using as home consumption, he uses it in his place of business for profit, then it is no longer a private use, but a public one. There are many cases holding that playing copyrighted music in a place of business such as a restaurant, or the use of a copy of music played by a musician on an instrument in a theatre or dance hall, where admission is charged, constitutes an infringement. Therefore, any public performance for profit has repeatedly been held to infringe the copyright. Even in case that a hotel uses a radio to provide music for its guests, it still not permits to broadcast copyrighted music without a license from the copyright proprietor.¹³

Of course, finding public performance infringements as the fact mentioned above, is not that complicate. But in order to analyse musical work infringement cases when one was claimed that his song is composed by copied or adapted from another is more complex. Therefore, using only legal knowledge is not enough. To compare a musical note structure in cases requires some specific matter as musical theories to be described. For example, the transposing of a copyrighted musical composition into another key was considered as an infringement. Since it uses some musical knowledge to adapt the original song but the result is exactly the same as the original one. Moreover, in case of doing an arrangement

¹¹ Infringement of Musical Copyright, 4 J. Marshall L. Quarterly 511 (1938-1939).

¹² Gerald Dworkin and Richard D. Taylor, *Blackstone's Guide to the Copyright, Designs & Patents Act 1988* (2002).

¹³ *Id.*

or adaptation without the consent of the copyright owner, then it would be considered as an infringement. However, adaptations or arrangements of musical compositions, either in public domain or in which there is a subsisting copyright with the consent of the copyright owner could be copyrighted as a new work.¹⁴

2.4 Striking Similarity

When fact appears in the case that the similarities between two works are so striking, a court may conclude that there was an infringement. In other words, the defendant may not be able to creating a work on his own without copying the plaintiff work because these two works were too much striking similar. Moreover, the defendant cannot claim that this situation is a coincidence either because the similarities was so striking.

In *Wilkie v. Santly Brothers, Inc.*, 13 F. Supp.136 (S.D.N.Y. 1935). the Second Circuit found the striking similarity in this case that

*“[A] comparison of the note structures shows almost complete identity in the first eight bars of the introduction, and the first fifteen and the last ten bars of the chorus, or over three-quarters of the most significant parts of the two songs. [In addition,] the cadences appear at exactly the same places in both pieces, and where the direction of the melody changes in the fifteenth bar of the chorus of [the complaining work], it likewise changes at the same point in [the accused work] and in identically the same way. Even similarity in a short phrase, if the phrase is idiosyncratic enough, may be considered striking but not if the phrase is commonplace or banal”*¹⁵

In this case the court numerous musical similarities between two songs. Not only eight bars of melody part in chorus are similar, the first statement of the theme in both songs ends with a distinctive dominant-tonic progression¹⁶ which colored by an augmented

¹⁴ *Id.*

¹⁵ Jeffery G. Sherman, *Musical Copyright Infringement: The Requirement of Substantial Similarity*, 22 Copyright L. Symp. 81, (1972).

¹⁶ The most fundamental harmonic gesture in western music actually consists of chords whose roots move up a 4th or down a 5th, for example II to V, III to VI, I to IV. However, the most important of these possible combinations is the V to I progression (or V to I in minor). The V chord (the dominant) moves up a 4th or down a 5th to the I or I chord (the

fifth formed between the bass and vocal line.¹⁷ Therefore, the court concluded that there was an infringement in this case.



tonic). This is called dominant to tonic motion. For more detail “*Harmonic Progression*” available at http://www.jkornfeld.net/harmonic_progressions_long.pdf (last visited Sept. 10, 2015).

¹⁷ “*Wilkie v. Santly Brothers 13 F. Supp. 136 (S.D.N.Y. 1935)*”, *Music Copyright Infringement Resource*, available at http://mcir.usc.edu/cases/1930-1939/Pages/wilkies_antly.html (last visited Sept. 10, 2015).

Figure 1 Partial score of complaining work "Confessing" (1)¹⁸

Confessing

By Eud Wilkie □

I'm Con - fess - ing yes Con -

fess - ing, I'm in love with you.

You can't hile it so con - file it

¹⁸ "Confessing", Music Copyright Infringement Resource, *available at* <http://mcir.usc.edu/cases/1930-1939/Documents/confessingscore.pdf> (last visited Mar. 7, 2015).

Figure 2 Partial score of complaining work "Confessing" (2)¹⁹

The image displays a partial musical score for the work "Confessing" (2). It consists of three systems of music, each with a vocal line and a piano accompaniment. The key signature is B-flat major (two flats) and the time signature is 4/4. The first system (measures 12-16) features the lyrics "that you love me too _____ Just like the". The second system (measures 17-20) features the lyrics "flow - ers need the sun _____". The third system (measures 20-23) features the lyrics "shine, _____ and the rain - drops". The piano accompaniment includes chords and melodic lines in both the right and left hands.

¹⁹ *Id.*

Figure 3 : Partial score of complaining work "Confessing" (3)²⁰

The image displays a partial musical score for a piece titled "Confessing" (3). The score is presented in three systems, each consisting of a vocal line and a piano accompaniment. The key signature is B-flat major (two flats), and the time signature is 4/4. The first system (measures 25-28) features the vocal line with the lyrics "too, I'm con - fess - ing,". The piano accompaniment consists of chords in the right hand and a bass line in the left hand. The second system (measures 29-32) has the vocal line with lyrics "yes con - fess - ing I'm in love with". The piano accompaniment continues with similar harmonic support. The third system (measures 33-34) shows the vocal line with the word "you." and a fermata. The piano accompaniment includes a dynamic marking of *ff* (fortissimo) and an accent (^) over the final chord. A large, faint watermark of a circular emblem is visible in the background of the score.

²⁰ *Id.*

Figure 4: Partial score of defending work "Starlight"²¹

Starlight

by Bernice Petkere

Star - light, star - light, first star I've seen to night.

Help me find the one I love _____

Star - light, star - light, who knows, you might,

Copyright 1931 by Santly Bros. Inc., New York

²¹ "Starlight", Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1930-1939/Documents/starlight.pdf> (last visited Mar. 7, 2015).

2.5 Substantial Similarity

Generally, in order to determine copyright infringement, the court applies the substantial similarity test. To determine whether musical works are substantially similar or not, the court most often look to elements of the composition and examine similar portions of works whether such portion gives rise to infringement of an entire work or not. Moreover, some courts examine the total concept and feel of a work as a whole to decide the infringement claims.²²

Jollie v. Jacques 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7,437), was one of the very first music copyright cases reported. The dispute in this case based on a claim that the second musical work was similar to the first musical work. In other words, it was a substantial copy of the plaintiff's original work. In explaining the protection afforded to musical works under copyright in this case is that

“The appropriation of the whole or of any substantial part of it without the license of the author is a piracy. How far the appropriation might be carried in the arrangement and composition of a new piece of music, without an infringement, is a question that must be left to the facts in each particular case. If the new air be substantially the same as the old, it is no doubt a piracy; and the adaptation of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty. The new arrangement and adaptation must not be allowed to incorporate such parts and portions of it as may seriously interfere with the right of the author; otherwise the copyright would be worthless.”

According to this case, the legal framework employed the case is the substantially similar metric. Therefore, copyright may be infringed if there were any unlawful act against copyright works in substantial part of the work. However, the question of substantiality has been considered as one of the most complicate issues to settle. It has been taken by courts referring to the quality of what has been taken rather than its quantity in proportion to the

²² John R. Zoesch III, *Discontented Blues: Jazz Arrangements and the Case for Improvements in Copyright Law*, 55 Cath. U. L. Rev. 867, (2006).

whole work.²³ In *Ladbroke (Football) Ltd v William Hill (Football) Ltd*. [1964] 1 All ER 465, Lord Pearce said

“Whether a part is substantial must be decided by its quality rather than its quantity. The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected.”

According to this case, the court has mentioned about the substantial significance of the taken part. Therefore, copying even a small amount could be considered as copyright infringement if that part is important comparing to proportion of the whole work. However, the question is how could one identify that how much for the similarity that could be a substantial amount. Even in literary works, which most of the people quite familiar with, sometime it difficult to indicate the substantial amount.

In *Hawkes & Sons (London) Ltd v Paramount Film Service Ltd*. [1934] 1 Ch. 593 (C.A.), a news reel contained 28 bars comprising the main melody of well-known march “Colonel Bogey” played in background of a news clip. Even though this portion lasted only 20 seconds, whereas the full march lasted for some four minutes. However, since the recognizable nature of the song there was no doubt that anyone who knew the song would be able to identify it in the clip. Therefore, the news reel was held to infringe the copyright in the march. This show that to analyse substantiality cannot be concern only quantity, it required much more factors.

2.6 Musical Theories and Copyright Laws in relation to Musical Works

2.6.1 Introduction

According to the unique nature of music, musical expression needs special factors for court to decide the infringement disputes. Generally, People absorb and appreciate most of the other creative works, such as plays, novels, visual art, and architectural works, through their eyes. However, music attracts them through their ears rather than eyes.

²³ David I Bainbridge, *Intellectual Property* (1996).

Therefore, the nature musical work is not simply as other works and its analysis is more complex as well. This is the reason why musical work infringement is difficult to decide.

However, the impact of the justification on the standard for infringement in musical cases must be concerned. In case of the infringement standard is too broad, it will make the creators too afraid to express their ideas because of the broadly standard of infringement that make liability find frequently. On the other hand, assume that an infringement standard is too narrow then liability could be rarely found. In this case creators will be reluctant to publish new works since they fear that others can steal their work and diminish their economic rewards without any liability to the infringers.²⁴ Then it might contrast to the propose of copyright law which aims to encourage people to create new works for society and protect the fruits of their labors. Thus, the law must provide an infringement standard which properly rewards creators and deters infringers.²⁵

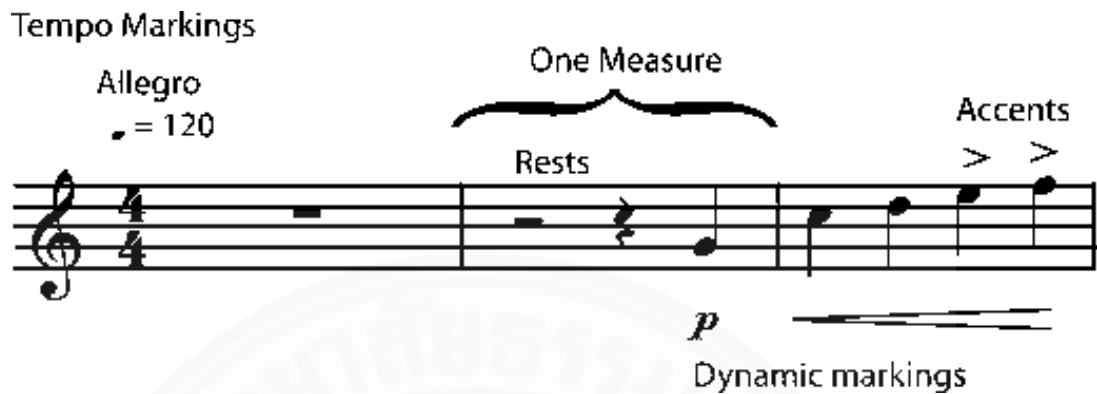
In conclusion, musical expression needs special factors for court to decide infringement disputes. Therefore, the standard for copyright infringement in musical cases might different forms other of expressions. It requires much more specific factors to analyse such as musical theories.

2.6.2 The Music Theoretical Study of “Musical Similarity”

2.6.2.1 Introduction to Musical Theories

²⁴ Margit Livingston and Joseph Urbinato, *Supra* note 3

²⁵ *Id.*

Figure 5 Staff and symbols²⁶

Many different kinds of symbols can appear on, above and even below the staff. A “musical note” stands for a sound, on the other hand, a “rest” represents a silence. Other symbols on the staff, like the clef symbol, the key signature, and the time signature, tell the important information about the notes and measures. “tempo markings” indicate how fast it goes. While as dynamic markings tell how loud it should be. The “accents” give directions for how to perform particular notes.

In order to understand musical similarity, it requires some basic backgrounds on musical knowledge. The most important symbols on the staff are the clef symbol, key signature and time signature, appear at the beginning of the staff

I. Clef Symbol

At the beginning stage of reading musical notes, the first must-know thing is “clef symbol”. Since only looking at the “staff” without any clef, even there were notes on it no one can identify the name of such notes. Therefore, in order to identify the names of notes

²⁶ Earmaster available at <http://www.earmaster.com/music-theory-online/ch01/chapter-1-1.html#m10941> (accessed 11 June 2016).

on a staff, it depends on music clef. Actually there are many different clefs that have been used, but this thesis will mention only two basic clefs.

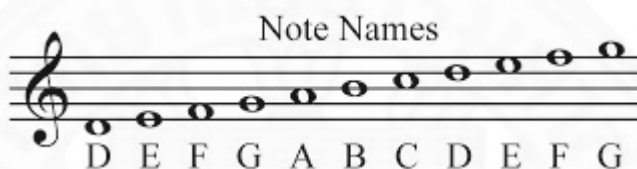
Figure 6 Staff



The first music clef is the “G clef”. It has been called G clef since the beginning of its spirals is start around the second line from the bottom. This spiral shows that whenever notes are on this line, second line, they are G.

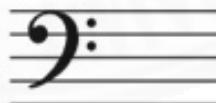
Figure 7 G clef on staff



Figure 8 G clef and pitch G²⁷Figure 9 Name of G clef notes on staff²⁸

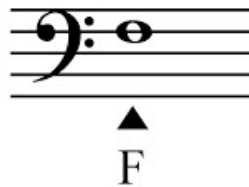
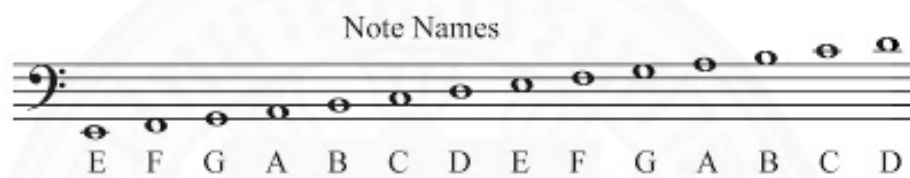
The second clef is the “F clef”. The reason for calling it like this because the dot above the fourth line from the bottom of the staff showing the pitch F. Furthermore, it also known as the “Bass clef”.

Figure 10 F clef on staff

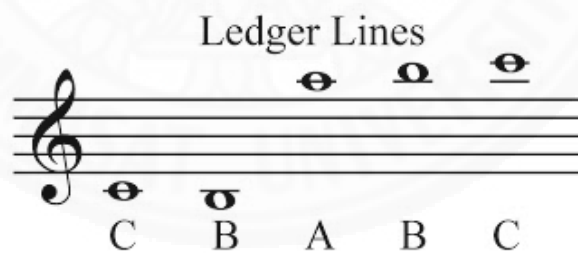


²⁷ “*The Staff, Treble Clef and Bass Clef*”, Music Theory, available at <http://musictheoryblog.blogspot.com/2006/12/staff.html> (last visited Mar. 7, 2015).

²⁸ *Id.*

Figure 11 F clef and pitch F on staff²⁹Figure 12 Names of F clef notes on staff³⁰

Furthermore, in order to extend the range of the staff, one can add “Ledger Lines” for more notes above or below the staff.

Figure 13 G clef notes with ledger lines on staff and their names³¹

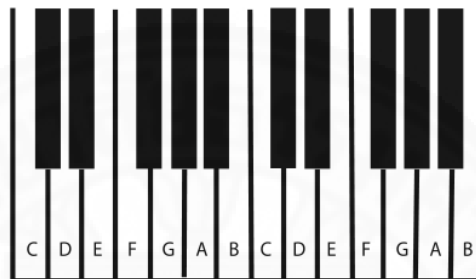
²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

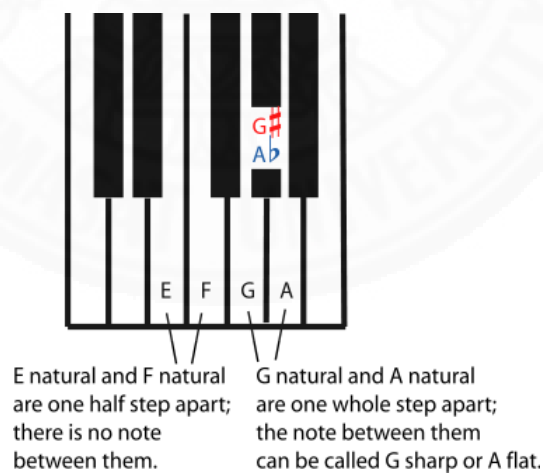
The “pitch” of a note is how high or low it sounds. These seven letters name all the natural notes as appear on a keyboard, that's all the white keys. When you go through the eighth natural note, it's called an “octave”, from C to C, then you start the next octave on another C again and repeat the letter name again.

Figure 14 Name of natural notes on white keys of the keyboard.³²



However, in Western music there are twelve notes in each octave that are in common use. The other five notes appear on the black keys.

Figure 15 Pitch G sharp and A flat on black keys of the keyboard³³



³² *Supra* note 24.

³³ *Id.*

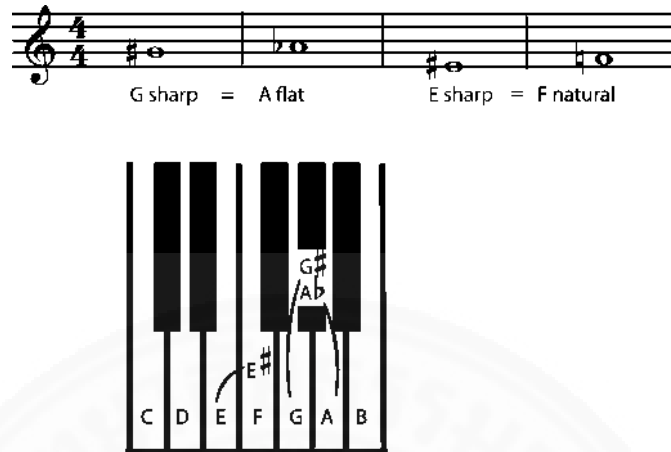
A “sharp” symbol means the note that is one half step higher than the natural note. A “flat” symbol means the note that is one half step lower than the natural note. Some of the natural notes are only one half step apart, but most of them are a whole step apart. When they are a whole step apart, the note in between them can only be named using a flat or a sharp.

Figure 16 Pitch D sharp, D natural and D flat in B flat Major³⁴

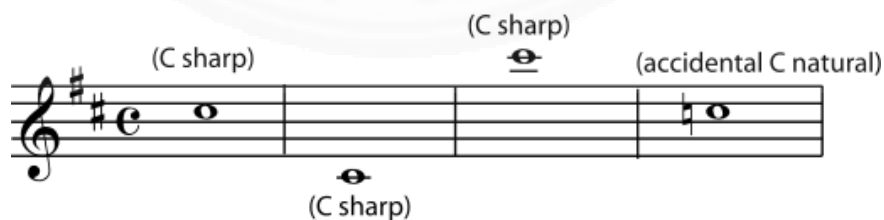
The image displays three musical symbols: a sharp symbol (#), a natural symbol (♮), and a flat symbol (♭). Below these symbols is a musical staff in 4/4 time, key signature of two flats (B flat major). The staff shows three measures: the first measure contains a D sharp note (D#), the second measure contains a D natural note (D), and the third measure contains a D flat note (D♭). The key signature is indicated as '2 flats (B flat major)'.

Notice that, using flats and sharps, any pitch can be given more than one note name. For example, the G sharp and the A flat are played on the same key on the keyboard; they sound the same. You can also name and write the F natural as "E sharp"; F natural is the note that is a half step higher than E natural, which is the definition of E sharp. Notes that have different names but sound the same are called enharmonic notes. G sharp and A flat sound the same. E sharp and F natural sound the same.

³⁴ *Id.*

Figure 17 Pitch G sharp , A flat, E sharp and F natural on staff and the keyboard³⁵

Sharp and flat signs can be used in two ways: they can be part of a key signature, or they can mark accidentals. For example, if most of the C in a piece of music are going to be sharp, then a sharp sign is put in the "C" space at the beginning of the staff, in the key signature. If only a few of the C's are going to be sharp, then those C's are marked individually with a sharp sign right in front of them. Pitches that are not in the key signature are called "accidentals". For example, when a sharp sign appears in the C space in the key signature, all C are sharp unless marked as accidentals.

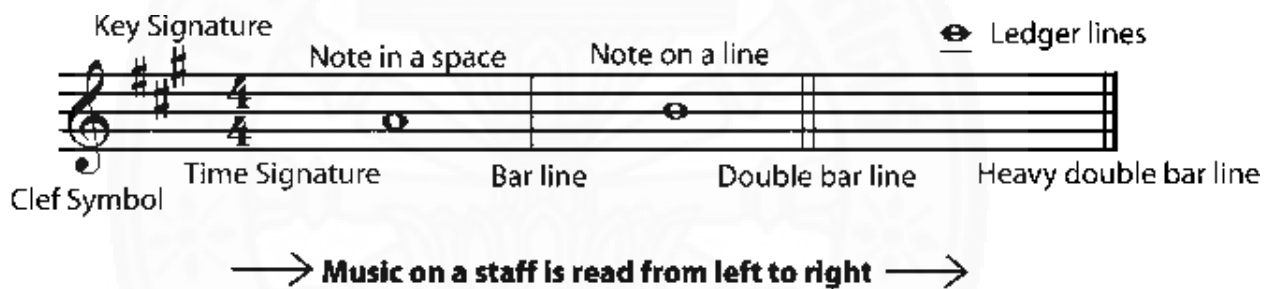
Figure 18 Pitch C sharp and accidental C natural on staff³⁶

³⁵ *Id.*

³⁶ *Id.*

Another symbol on the staff is a “bar line” which used to divide the staff into short sections called “measures” or “bars”. Moreover, there is a “double bar line”, either heavy or light. A double bar line refers to two thin vertical lines used to separate different sections of a musical passage. Double bar lines are used in some situation such as before a key change or a change of style. Furthermore, a bar line can be used with the repeat commands dal segno (D.S.)³⁷ or da capo (D.C.)³⁸.

Figure 19 Other symbols on staff³⁹



³⁷ The Italian music command “dal segno” (abbreviated D.S.) means “from the segno sign,” and is part of a system of complex musical repeats:

- D.S. al coda, meaning “from the segno to the coda.” This command means to start back at the segno, play until you encounter a coda sign, then skip to the next coda to continue.
- D.S. al fine, “from the sign to the word fine (the end of the music).”

This means to start back at the segno, and continue playing until you reach the final barline or a double-barline marked with the word fine. For more detail: “*dal segno*”, about, available at http://piano.about.com/od/musicaltermsa1/g/GL_dalSegno.htm (last visited Mar. 7, 2015).

³⁸ The Italian musical phrase “da capo” literally means “from the head” (or “beginning”), and is an indication to play from the start of the song or movement. Da capo is commonly seen abbreviated in the commands D.C. al coda and D.C. al fine. For more detail: “*da capo*”, about, available at http://piano.about.com/od/musicaltermsa1/g/GL_daCapo.htm (last visited Mar. 7, 2015).

³⁹ *Supra* note 24.

II. Key Signature

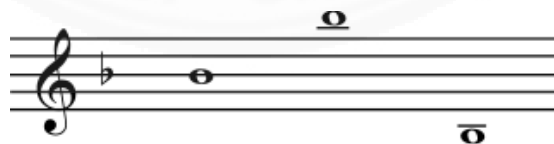
Figure 20 example of key signature on staff

On this staff:
Notes in top space are E flat
Notes on fourth line are D Natural
Treble Clef
Key signature has 2 flats

On this staff:
Notes in top space are G sharp
Notes on fourth line are F sharp
Bass Clef
Key signature has three sharps

The key signature comes right after the clef symbol on the staff. It may have either some sharp symbols on particular lines or spaces, or some flat symbols. If there are no flats or sharps listed after the clef symbol, then the key signature means that all notes are natural. Therefore, the clef tells the letter name of the note (C, D, E, etc.), while as the key tells whether the note is sharp, flat or natural. The key signature is a list of all the sharps and flats in the key that the music is in. When a sharp (or flat) appears on a line or space in the key signature, all the notes on that line or space are sharp (or flat), and all other notes with the same letter names in other octaves are also sharp (or flat). According to Figure 21, this key signature has a flat on the "B" line, so all of these B pitch are flat.

Figure 21 Key signature with a flat on B line⁴⁰

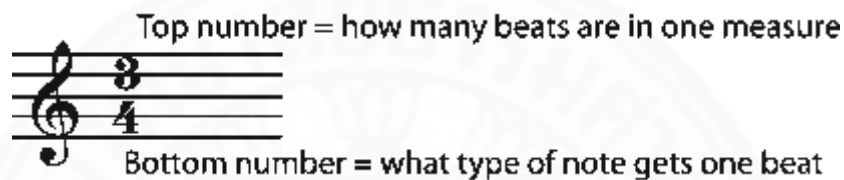


⁴⁰ *Id.*

III. Time Signature

The “time signature” appears at the beginning of a piece of music, after the clef symbol and key signature. Unlike the key signature, which is on every staff, the time signature will not appear again in the music unless the meter changes.

Figure 22 Explanation of the time signature⁴¹



According to Figure 22, the time signature means that there are three quarter notes (or any combination of notes that equals three quarter notes) in every measure. A piece with this time signature would be "in three four time" or just "in three four".

(1) Melody Part

Generally speaking, melody is linear succession of an individual sound note. This part is the most easily touch listeners’ ears. It can be said that melody is the part that was hummed when one trying to recall particular song.⁴² Since melody is the most distinctive and memorable part of songs, of course, it could be claimed by the author for its originality when the infringing disputes were arose.

⁴¹ *Id.*

⁴² “*Melody*”, Music Copyright Infringement Resource, *available at* <http://mcir.usc.edu/glossary/M-R/Pages/Melody.html> (last visited Mar. 7, 2015).

Figure 23 : Melody and harmony of “Yankee Doodle”⁴³

According to figure 13, it is a musical note of the song “Yankee Doodle”. It shows the melody part in the first bar to the fourth bar. Generally, most of the melody part will be G clef notes as this song. However, the melody part could be in F clef as well.

The fifth bar to the eighth bar showing the melody part with harmonic accompaniment. Actually, melody is often contrasted with harmony since melody is linear succession of an individual sound note, while harmony involves chords that comprising two or more simultaneously sound notes.

In popular music, the principal melody tends to be sung with lyrics. That make the melody part distinguished from the other musical elements, harmony and rhythm. However, the solo part could be considered as a melody, if it playing a single sound note rather than a succession of chords. For example, a pop song might begin with an introductory guitar solo before the singer begins.⁴⁴

In conclusion, melody is the most important feature of a musical work in order to evaluating the copyright infringement claims. Most of the opinions by courts in the area of music copyright infringement deal with this part. Therefore, melody is frequently considered as the most idiosyncratic element of the works. Accordingly, the more melodically similar two works are, the more likely a court will determine that the later created work infringes upon the earlier.⁴⁵

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

(2) Harmony Part

Harmony is the construction and succession of its chords. It was built by considering of the relationship of chords themselves to each other and the key. However, harmony and melody are the two musical parameters that deal with the domain of pitch. They are often understood through a “vertical” and “horizontal” domain. Melody is a horizontally linear of many single notes. Therefore, it was realized as the “horizontal” domain. Whereas harmony part has a group of notes that being played at the same time. Of course, harmony is considered as is the “vertical” domain.

The distinction between melody and harmony can sometimes affect the way that instruments are grouped. For example, instruments which usually capable of playing only one note at a time such as voice, trumpet, saxophone, these are primarily “melodic” in function. On the other hand, instruments that are capable of playing chords such as piano, guitar, synthesizer, these can be thought of as “chordal” instruments, however they are capable of playing single melodic lines as well.

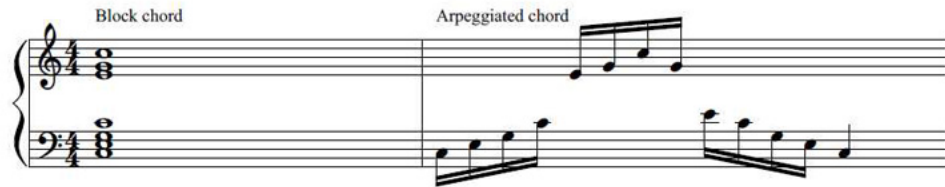
Although harmony is understood as the “vertical” dimension of music, harmony can be expressed through melodic means.

Generally, melodies usually imply an underlying harmony or succession of harmonies. However, harmony could be express in melodic means though the horizontalization. The simplest instance of the horizontalization of harmony is the arpeggio⁴⁶, where the individual notes of a chord are played in succession, rather than simultaneously.⁴⁷

⁴⁶ The word arpeggio (derived from the Italian arpa, “harp”) describes a manner of performing a chord. A chord is said to be “arpeggiated” when the notes belonging to the chord are performed sequentially rather than simultaneously. Arpeggios are also referred to as “broken chords.” For more detail: “*Arpeggio*”, Music Copyright Infringement Resource, available at <http://mcir.usc.edu/glossary/A-F/Pages/arpeggio.html> (last visited Mar. 7, 2015).

⁴⁷ “*Harmony*”, Music Copyright Infringement Resource, available at <http://mcir.usc.edu/glossary/G-L/Pages/harmony.html> (last visited Mar. 7, 2015).

Figure 24 : C major chord in block chord form and arpeggiated form



Source: USC Gould School of Law, accessed 7 March 2016,
 <<http://mcir.usc.edu/glossary/A-F/Pages/arpeggio.html>>

The arpeggio sounds of a separate note of each chord that was arranged in a linear. It can be use in both melody part and harmony part. Since an arpeggio made a chord to be more like melodies, therefore in some instances, it was used in order to express the melody part. Moreover, the use of the arpeggiation in melody part also express underlying harmonies as well. Of course, in the context of copyright, arpeggio may be considered as the domain of the “original” and copyrightable if it has been use as a remarkable melody part.

(3) Rhythm Part

Rhythm is one of the most fundamental components in musical works. Actually rhythm refers to the organization of musical sound events. It determines how sounds are produce over time and that made listeners appreciate the sounds as music rather than noise. However, rhythm does not refer to the speed (Tempo⁴⁸) at which these organized sounds (and silences) are played and heard.⁴⁹

⁴⁸ “Tempo” has a simpler connotation than “Rhythm”, it simply refers to musical speed not structure.

⁴⁹ *Supra* note 45.

2.6.2.2 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 songs 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 consider 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, his 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.

(1) *Marks v. Leo Feist, Inc.*⁵⁰

In this case there were only six bars of the complaining song that were copied by the defendant and used in the chorus of his work, whereas the whole work of the plaintiff has four hundred and fifty bars. The court gives the opinion that:

“...Musical signs available for combinations are about 13 in number. They are tones produced by striking in succession the white and black keys as they are found on the keyboard of the piano. It is called the chromatic scale. In a popular song, the composer must write a composition arranging combinations of these tones limited by the range of the ordinary voice and by the skill of the ordinary player. To be successful, it must be a combination of tones that can be played as well as sung by almost any one. Necessarily, within these limits, there will be found some similarity of tone succession. Even different results may be obtained by varying the accent and tempo. An acceptable affidavit in the record of an expert in music says that, as to the two compositions here in question, there is a similarity of tone succession with respect to 5 or 6 bars, but says the rhythm and accent are entirely different, and unless there be a similarity of rhythm in the two, no one who plays the two compositions as they are written, can confuse one with the other...”

Therefore, in this case the court found that the similarities between the two songs did not indicate substantial copying. According to the court's opinion explaining a number of truisms about popular music that the melodies of popular song are limited less by the thirteen pitches of the chromatic scale. Even though, both songs have a similarity of tone succession of chromatic scale with respect to five or six bars, but the rhythm and accent are entirely different. Furthermore, the court said that even if there be a similarity of rhythm in the two, however the playing of this two compositions would not confuse one with the other.

⁵⁰ 290 F. 959 (2d Cir. 1923).

According to this case, even if two song have certain similar melody parts but it is just musical technique such as using some part of chromatic scale, then it could not be considered as copyrightable part.



Figure 25 Score of complaining work "Wedding Dance Waltzes" (1)⁵¹

Wedding Dance No. 1

Paul Lincke

© 1950 by Apollo-Verlag, Berlin

⁵¹ *Wedding Dance Waltzes*, Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1920-1929/Documents/weddingdancewaltzscore.pdf> (last visited Mar. 7, 2015).

Figure 26 Score of complaining work "Wedding Dance Waltzes" (2)⁵²

The image displays a musical score for a piece titled "Wedding Dance Waltzes" (2). The score is presented in three systems, each consisting of a grand staff (treble and bass clefs). The key signature is two flats (B-flat and E-flat), and the time signature is 3/4. The first system (measures 19-23) features a melodic line in the treble clef with a long note in measure 19, followed by eighth-note patterns, and a bass line with chords. The second system (measures 24-28) shows a more active melodic line with eighth-note runs and slurs, and a bass line with chords. The third system (measures 29-32) concludes the piece with a final melodic phrase and a bass line ending on a sustained chord.

⁵² *Id.*

Figure 27 Partial score of defending work "Swanee River Moon"⁵³

Swanee River Moon
Words and Music by H. Pitman Clarke

Valse Moderato

Piano

Swan - ee Riv - er Moon, Swan - ee Riv - er Moon, Shin - ing on my
cab - in door, I'm for - ev - er dream - ing
while you're bright - ly beam - ing Ev - ry night I need you more, I'm
lone - ly; Shine out bright to

Copyright 1921, Leo Feist, New York

⁵³ "Swanee River Moon", Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1920-1929/Documents/swaneerivermoonscore.pdf> (last visited Mar. 7, 2015).

(2) *Jewel Music Pub. Co. v. Leo Feist, Inc.*⁵⁴

In *Jewel Music Publishing Co. v. Leo Feist, Inc.* both songs were in the same time signatures and key signatures. They also had similar harmonic structures, however the court consider that this is so common for this style of songs.

The court opinion showing an analysis of the first A part of the two songs. The analysis of the melody part is that the first two notes in the first bar are not similar but third and fourth are similar. For the second bar only the fourth note is identical. The third bar is identical with first bar and the fourth bar is identical with second bar. The fifth bar is identical except for a slight difference in syncopation. The first note is different in the sixth bar but the second and third notes are the same. The seventh and eighth bars has the melodies in both songs return again to C minor, the first notes in both seventh bars and the last of both eighth bars is also identical. The court said that "*...there is enough similarity throughout to warrant questioning,*" however, "*...such similarities are of constant occurrence in music, and that little inference is permissible...*"

For 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.

⁵⁴ 62 F. Supp. 596 (S.D.N.Y. 1945).

Figure 28 : Partial score of complaining work "Carnival in Cotton Town" (1)⁵⁵

Carnival In Cotton Town

By Louis Ricca

Ev - ry Lil' and ev - ry Joe... Throw a - way your rake and hoe...

Ev - ry bo - dy's go - in' down... to the car - ni - val in cot - ton town...

Duke it up in lat - est style...

Bring a - long your bright - est smile... You'll be there 'till

Copyright 1936 Jewel Music Publishing Co., Inc., New York

⁵⁵ “Carnival in Cotton Town”, Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1940-1949/Documents/carnivalincottontown.pdf> (last visited Mar. 7, 2015).

Figure 29 : Partial score of complaining work "Carnival in Cotton Town" (2)⁵⁶

dawn comes 'roun' at the ear-ni-val-in cot-ton town. There'll be
 su-gareed hams south-ern yams, a chick-en bar-be-que. For
 those who'd rath-er dance than eat. They're gon-na have a swing band too
 So! leave your troub-les on the shelf.

⁵⁶ *Id.*

Figure 30 : Partial score of complaining work "Carnival in Cotton Town" (3)⁵⁷

The image displays a partial musical score for the work "Carnival in Cotton Town" (3). It consists of two systems of music. The first system, starting at measure 21, features a vocal line with the lyrics "those who'd rath - er dance than eat — They're gon - na have a swing band too" and a piano accompaniment. The second system, starting at measure 24, features a vocal line with the lyrics "So! leave your troub - les on the shelf." and a piano accompaniment. The score is written in a key signature of two flats (B-flat and E-flat) and a common time signature (C). A large, faint watermark of a university seal is visible in the background.

⁵⁷ *Id.*

Figure 31 : Partial score of defending work "Drummer Boy" (1)⁵⁸

Drummer Boy

By Roger Edens

Moderately

There's a boy down on our street.

Plays the drums with such a beat. You can not con -

trol your feet when you hear the Drum-mer Boy.

Copyright 1940 Leo Feist

⁵⁸ “*Drummer Boy*”, Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1940-1949/Documents/carnivalincottontown.pdf> (last visited Mar. 7, 2015).

Figure 32 : Partial score of defending work "Drummer Boy" (2)⁵⁹

The image displays a partial musical score for the work "Drummer Boy" (2). It consists of three systems of music, each featuring a vocal line and a piano accompaniment. The key signature is B-flat major (two flats), and the time signature is 4/4. The lyrics are: "In the morn - ing when you wake, You can hear him take a break Soon the whole street starts to shake when they hear the Drum - mer Boy. Bing bang". The piano accompaniment includes chords and melodic lines in both the right and left hands. A large, faint watermark of a university seal is visible in the background.

-2-

⁵⁹ *Id.*

Figure 33 : Partial score of defending work "Drummer Boy" (3)⁶⁰

The image displays a partial musical score for the song "Drummer Boy" (3). It consists of three systems of music, each featuring a vocal line and a piano accompaniment. The key signature is B-flat major (two flats), and the time signature is 3/4. The first system (measures 18-20) has the lyrics: "Ding dang— He's so nim - ble on the cym - bal,". The second system (measures 21-23) has the lyrics: "Bing bong— Ding dong— When he plays 'em". The third system (measures 24-26) has the lyrics: "he just slays— 'em. All your troub - les fly a - way.—". The piano accompaniment includes chords and rhythmic patterns that support the vocal melody.

⁶⁰ *Id.*

(3) *Hein v. Harris*⁶¹

In *Hein v. Harris*, according to the original scores of both songs, it still difficult to identify the similarity. However, if using some musical technique as transposition, the outcome would be easier to analyse.

Figure 34 The original score of Maria Cahill's Arab Love Song and I Think I Hear a Woodpecker⁶²

The image displays four staves of musical notation. The first two staves show the original scores for 'Arab Love Song' and 'Woodpecker'. The 'Arab Love Song' staff is in a key signature of two flats (B-flat and E-flat) and common time. The 'Woodpecker' staff is in a key signature of one sharp (F-sharp) and common time. The third and fourth staves show transposed versions of the 'Arab Love Song' and 'Woodpecker' respectively, both in a key signature of one sharp (F-sharp) and common time. A small box containing the number '5' is positioned above the first measure of the third staff.

⁶¹ 175 F. 875 (C.C.S.D.N.Y. 1910), aff'd 183 Fed. 107 (2d Cir. 1923).

⁶² "Notation Software and Determination of Melodic Similarity", Music Copyright Infringement Resource, available at <http://mcir.usc.edu/newtechnologies/Pages/page2.html> (last visited Mar. 7, 2015).

Figure 35 The original score of Maria Cahill's Arab Love Song and the transposed version of I Think I Hear a Woodpecker (E-flat) with adjusted rhythm⁶³

The image displays two systems of musical notation. The first system features a vocal line on a single staff and a piano accompaniment on two staves (treble and bass clef). The second system follows a similar structure, with a vocal line and piano accompaniment. Above the first measure of the vocal line in the second system, there is a small box containing the number '5'. The music is written in E-flat major (two flats) and common time (C).

According to Figure 32, it shows that when transpose “I Think I Hear a Woodpecker” to E-flat and adjust its syncopated rhythm for a bit, then it would be more easily to notice the identity.

⁶³ *Id.*

Figure 36 Score of complaining work "Maria Cahill's Arab Love Song" (1)⁶⁴

Marie Cahill's Arab Love Song

Silvio Hein

Oh! wait for me in your home by the Pyr - a - mids,

We will hap - py be; for my love for you will

last as long, as the Nile flows to the sea, Oh!

Copyright 1908, Maria Cahill Music Co., New York

⁶⁴ *Maria Cahill's Arab Love Song*, Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1920-1929/Documents/arablovesongscore.pdf> (last visited Mar. 7, 2015).

Figure 37 Score of Complaining Work "Maria Cahill's Arab Love Song" (2)⁶⁵

9
wait for me in your home by the Pyr - a - mids Love me all you

12
can; Then I'll be your King, and you'll be Queen,

15
of my car - a - van,

⁶⁵ *Id.*

Figure 38 : Score of defending work "I Think I Hear a Woodpecker" (1)⁶⁶

I Think I Hear a Woodpecker Knocking At My Family Tree
Joseph Howard

Copyright 1909, Charles K. Harris

⁶⁶ "I Think I Hear a Woodpecker", Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1920-1929/Documents/woodpeckerscore.pdf> (last visited Mar. 7, 2015).

Figure 39 : Score of defending work "I Think I Hear a Woodpecker" (2)⁶⁷

The image displays a musical score for the piece "I Think I Hear a Woodpecker" (2). It consists of two systems of music. Each system includes a vocal line and a piano accompaniment. The key signature is one sharp (F#), and the time signature is 4/4. The first system starts at measure 10. The vocal line has the lyrics: "whole lot of things that ain't in his - to - ry. But when". The piano accompaniment features a steady bass line and chords in the right hand. The second system starts at measure 13. The vocal line has the lyrics: "he gets free with my an - ces - try He's knock - ing me...". The piano accompaniment continues with similar harmonic support. A large, faint watermark of a university seal is visible in the background of the score.

⁶⁷ *Id.*

(4) *Fred Fisher, Inc. v. Dillingham*⁶⁸ 298 F. 145 (S.D.N.Y. 1924).

In this case the plaintiff claims that the defendant was misappropriated the accompaniment pattern of the plaintiff's song and used it in the defendant's song. The court gives the opinion that:

"...The copyright to the composition "Dardanella" covered the piece as a whole; there were not several copyrights for each part of it. Nevertheless, the plagiarism of any substantial component part, either in melody or accompaniment, would be the proper subject of such a suit as this. To sustain it, however, more must appear than the mere similarity or even identity, of the supposed infringement with the part in question. In this lies one distinction between a patent and a copyright. One may infringe a patent by the innocent reproduction of the machine patented, but the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted. The plaintiff therefore concedes that it must show that Kern, the composer, used "Dardanella" as the source of his accompaniment..."

Therefore, 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.

⁶⁸ 298 F. 145 (S.D.N.Y. 1924).

Figure 40 : Partial score of complaining work "Dardanella" (1)⁶⁹

Dardanella

Felix Bernard & Johnny S. Black

Oh sweet Dar - da - nel - la, I love your ha - re - me - yes, —

I'm a luck - y fel - low to cap - ture such a prize, — Oh Al - lah

knows, my love for you — And he tells you to be true, — Dar - da -

⁶⁹ “*Dardanella*”, Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1920-1929/Documents/dardanellascore.pdf> (last visited Mar. 7, 2015).

Figure 41 : Partial score of complaining work "Dardanella" (2)⁷⁰

The image shows a partial musical score for the work "Dardanella" (2). It consists of three systems of music, each with a vocal line and a piano accompaniment. The first system (measures 12-16) features the lyrics: "nel - la, Oh hear my sigh, my O - ri - ent - al,". The second system (measures 17-20) features the lyrics: "Oh sweet Dar - da - nel - la, pre - pare the wed - ding wine, There'll be". The third system (measures 21-24) features the lyrics: "one girl in my har - em, when you're mine. We'll build a". The piano accompaniment includes chords and melodic lines in both hands, with some dynamics like *f* and *mf* indicated.

⁷⁰ *Id.*

Figure 42 : Partial score of complaining work "Dardanella" (3)⁷¹

The image displays a partial musical score for the work "Dardanella" (3). It consists of two systems of music, each featuring a vocal line and a piano accompaniment. The first system, starting at measure 23, shows the vocal line with the lyrics "tent Just like the chil - ren of the O - ri - ent." The piano accompaniment includes a right-hand part with chords and a left-hand part with a steady bass line. The second system, starting at measure 25, shows the vocal line with the lyrics "Oh sweet Dar - da - nel - la, my star of love". The piano accompaniment continues with similar harmonic and rhythmic patterns. A large, faint watermark of a university seal is visible in the background of the score.

⁷¹ *Id.*

Figure 43 : Partial score of defending work "Ka-lu-a" (1)⁷²

Ka-lu-a Jerome Kern

Refrain

When it's moon-light in Ka-lu-a, Night like

this is di-vine,

It was moon-light in Kal-u-a, When you

kiss-es met mine,

⁷² "Ka-lu-a", Music Copyright Infringement Resource, available at <http://mcir.usc.edu/cases/1920-1929/Documents/ka-lu-a-score.pdf> (last visited Mar. 7, 2015).

Figure 44 : Partial score of defending work "Ka-lu-a" (2)⁷³

The image displays a partial musical score for the work "Ka-lu-a" (2). It consists of four systems of music, each featuring a vocal line and a piano accompaniment. The score is written in a key signature of one sharp (F#) and a 2/4 time signature. The lyrics are as follows:

17 Al-though the rose and jas-mine bloom as fair,
21 And love is call-ing through the scent-ed air, ev-ry where
23 It is lone-ly in Kal-u-a Be-cause
25 you are not there.

The piano accompaniment includes a steady bass line in the left hand and a more melodic line in the right hand, often using chords and arpeggios. The vocal line is written in a soprano or alto clef and includes various musical notations such as slurs and dynamic markings like *mf*.

⁷³ *Id.*

2.7 Criteria of the Copyright Infringement in relation to Musical Works

2.7.1. Transpositions

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 will remain the same as the original. Therefore, transposing must be considered as an infringement of copyright work.

I. Example of transposition

Figure 45 The original song in A Major⁷⁴



The original song is in “A Major” with three sharps. In order to transpose down a “Major second”, the first step is writing down the key signature for “G major”⁷⁵ which has only one sharp. Next, transpose each note in turn and be careful of the accidentals.

⁷⁴ Victoria Williams, “Grade Five Music Theory - Lesson 8: Transposing”, My Music Theory, available <http://www.mymusictheory.com/for-students/grade-5/54-8-transposing> (last visited Jun. 15, 2016).

⁷⁵ G is a Major second lower than A

Figure 46 Key signature of G Major on staff⁷⁶Figure 47 The finished version of transposition from A major to G major⁷⁷

II. Transposing with help of a capo

A capo is a device used to change the key without changing the tuning by just attaching a capo around the guitar neck on a fret that one chooses and the pitch is raised. Therefore, if there are notes like "Capo 3" or "Capo 5", it means that you would attach a capo around the guitar neck on these frets.⁷⁸

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ "Transposition chart for capo", Guitar-Chord.Org, available at <http://www.guitar-chord.org/transposition-chart-for-capo.html> (last visited Jun. 15, 2016).

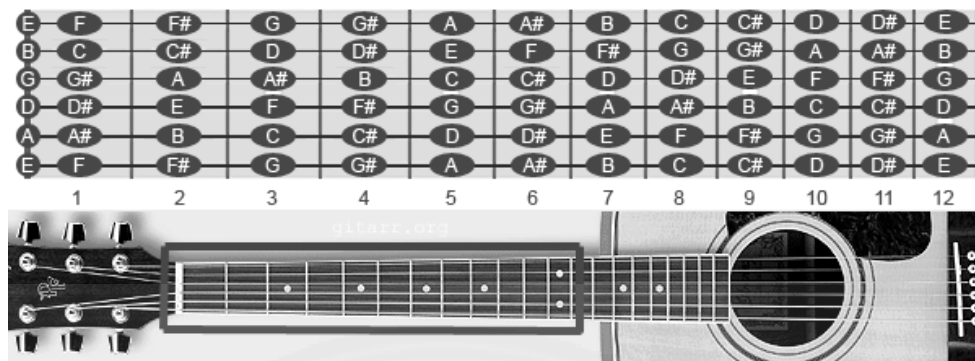
Figure 48 Capo⁷⁹Figure 49 Capo on the guitar⁸⁰

Generally, the fret board is the top part of the guitar neck, between the body and the headstock. Figure 50 shows all the notes on the guitar fret board, after the twelfth fret it would be repeating again, the thirteenth fret is the same as the first, but only one octave higher⁸¹

⁷⁹ *Id.*

⁸⁰ “FAQ: What’s a Capo?”, Pluck and Play Guitar, available at <http://www.pluckandplayguitar.com/whats-a-capo.html> (last visited Jun. 15, 2016).

⁸¹ *Fretboard with notes*, Guitar-Chord.Org, available at <http://www.guitar-chord.org/transposition-chart-for-capo.html> (last visited Jun. 15, 2016).

Figure 50 Fret board on the guitar⁸²Table 1 Transposition chart of how chord changes when use a capo⁸³

Chord Shape								
No capo	C	D	E	G	A	Dm	Em	Am
Capo 1	C#/Db	D#/Eb	F	G#/Ab	A#/Bb	D#m/Eb m	Fm	A#m/Bb m
Capo 2	D	E	F#/Gb	A	B	Em	F#m/Gb m	Bm
Capo 3	D#/Eb	F	G	A#/Bb	C	Fm	Gm	Cm
Capo 4	E	F#/Gb	G#/Ab	B	C#/Db	F#m/Gb m	G#m/Ab m	C#m/Db m
Capo 5	F	G	A	C	D	Gm	Am	Dm
Capo 6	F#/Gb	G#/Ab	A#/Bb	C#/Db	D#/Eb	G#m/Ab m	A#m/Bb m	D#m/Eb m
Capo 7	G	A	B	D	E	Am	Bm	Em

⁸² *Supra* note 76.⁸³ *Id.*

Table 2 Example of how key changes⁸⁴

Chord	Capo	Capo	Capo
C	on 2 nd fret = D	on 4 th fret = E	on 5 th fret = F
D	on 2 nd fret = E	on 3 rd fret = F	on 5 th fret = G
E	on 1 st fret = F	on 3 rd fret = G	on 5 th fret = A
G	on 2 nd fret = A	on 4 th fret = B	on 5 th fret = C
A	on 2 nd fret = B	on 3 rd fret = C	on 5 th fret = D
Dm	on 2 nd fret = Em	on 3 rd fret = Fm	on 5 th fret = Gm
Em	on 1 st fret = Fm	on 3 rd fret = Gm	on 5 th fret = Am
Am	on 2 nd fret = Bm	on 3 rd fret = Cm	on 5 th fret = Dm

According to Table 1 and Table 2 that shows a simply way of using a capo to change the key by just attach a capo around the guitar neck on a fret that one chose and then the pitch is raised. Thus, in the process of transposition there have no creativity at all since 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.

2.7.2 Variations

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,

⁸⁴ *Id.*

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. Here are some examples of variations showing that there are various ways to change the original song.

Figure 51 The theme Song⁸⁵

Moderato

mf

⁸⁵ **Improvisation Workbook Grade 6,7**, Yamaha Music Foundation. (8th ed. 2003).

Figure 52 Variation no.1⁸⁶

Moderato

The musical score for Figure 52 Variation no. 1 is in 3/4 time with a key signature of one sharp (F#). It is marked **Moderato**. The first system features a dynamic marking of *mf*. The score consists of two systems of piano accompaniment. The first system has four measures, and the second system has four measures, ending with a double bar line.

Figure 53 Variation no.2⁸⁷

Moderato

The musical score for Figure 53 Variation no. 2 is in 3/4 time with a key signature of one sharp (F#). It is marked **Moderato**. The first system features a dynamic marking of *p*. The score consists of two systems of piano accompaniment. The first system has four measures, and the second system has four measures, ending with a double bar line.

⁸⁶ *Id.*

⁸⁷ *Id.*

Figure 54 Variation no.3⁸⁸

Allegretto

mf staccato

Figure 55 Variation no.4⁸⁹

Andantino

mp

⁸⁸ *Id.*

⁸⁹ *Id.*

Figure 56 Variation no.5⁹⁰

Allegretto

The musical score for Figure 56 Variation no. 5 is in 3/4 time with a key signature of one sharp (F#). It is marked **Allegretto**. The score consists of two systems of piano music. The first system contains four measures with dynamics *mf*, *p*, *mf*, and *p*. The second system contains four measures with dynamics *mf*, *p*, *mp*, and *p*. The music features a mix of eighth and quarter notes, often beamed together, with some measures containing rests.

Figure 57 Variation no.6⁹¹

Moderato

The musical score for Figure 57 Variation no. 6 is in 3/4 time with a key signature of one sharp (F#). It is marked **Moderato**. The score consists of two systems of piano music. The first system contains four measures with dynamic *p* and triplets. The second system contains four measures with dynamics *poco a poco*, *cresc.*, and *f*, also featuring triplets. The music is characterized by triplet patterns in both hands.

⁹⁰ *Id.*

⁹¹ *Id.*

Figure 58 Variation no.7⁹²

Andante sostenuto

The musical score is written for piano in 3/4 time, key of D major. It is marked "Andante sostenuto" and "mf". The score consists of two systems of four measures each. The melody is in the right hand, and the bass line is in the left hand. The piece ends with a double bar line.

⁹² *Id.*

CHAPTER 3

INTERNATIONAL RULES AND FOREIGN LAWS IN RELATION TO MUSICAL WORKS

3.1 International Copyright Protection

3.1.1 Introduction

Copyright laws are fundamentally the same though out the developed and developing world. This is a feature that copyright similar to two other forms of intellectual property, patents and trademarks. The reason why intellectual property laws have to evolved globally rather than nationality is because of the nature of subject matter protected by intellectual that particularly trade internationally.

3.1.2 The Berne Convention

The Berne Convention, adopted in 1886, deals with the protection of works and the rights of their authors. The full title of the Berne Convention is the Berne Convention for the Protection of Literary and Artistic Works. It provides creators such as authors, musicians, poets, painters etc. with the means to control how their works are used, by whom, and on what terms. The current version of the convention is the Paris Act of 1971. The convention is administered by the World Intellectual Property Organization, (WIPO).⁹³

The member countries form a Union, and the Act have to provides protection for the work of authors who are nationals of one of the countries of the Union, or where the work is first published (or simultaneously published) in a country that is a member of the Union. According to the Convention, persons who are not nationals, but which have their habitual residence in a country of the Union, will be regarded as a national of the country.

⁹³ “*International copyright law-The Berne Convention*”, The UK Copyright Service, available at http://www.copyrightservice.co.uk/copyright/p08_berne_convention (last visited Mar. 7, 2016).

Moreover, the Convention also provide an incentive for countries that are not part of the Union in order to protect work by nationals of countries of the Union.

Therefore, an author from any country that is a signatory of the convention is awarded the same rights in all other countries that are signatories to the Convention as they allow their own nationals, as well as any rights granted by the Convention. The Convention also sets out a minimum duration that copyright will apply in various types of work. Even though the Berne Convention states a copyright duration which is the minimum period of protection that must be provided by signatory countries. However, the national laws of individual countries may can provide a longer copyright duration rather than provided by the Berne.

Musical work is one of the protected works as literary and artistic works under this Convention according to Article 2. Authors of literary and artistic works has certain exclusive rights. For example, the right of reproduction as stipulated in Article 9 that

“[Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings]

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention. Therefore, none of the acts against the exclusive right can be carried out without permission.”

Therefore, none of the acts against the exclusive rights provided by the convention can be carried out without permission.

3.1.3 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)

The TRIPS Agreement, concluded in 1994 as part of the Uruguay Round of negotiations under the former GATT (now the World Trade Organization) also contains provisions on copyright protection. Article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts. TRIPS sets out the minimum standards of protection that each member have to provide by requiring that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is sometimes referred to as a Berne and Paris-plus agreement.⁹⁴

3.2 National Copyright Protection

3.2.1 The United Kingdom Copyright Law

3.2.1.1 Historical background in European context and the United Kingdom Copyright Law

The first recorded copyright case is *Finnian V. Colomba* in 567, St. Colomba in his pre-saintly days secretly made a copy of a psalter, which is belongs to his teacher, Finnian, then the copy was reclaimed. The King Dermott ruled in Finnian's favor with famously saying that “*To every cow belongs its calf*”. In other words, every copies of a book belong

⁹⁴ “*What are intellectual property rights?*”, available at http://www.ukabc.org/TRIPs/intro_WTO.htm (last visited Mar. 7, 2016).

to the original book owner. Therefore, this decision recognizes the sole and exclusive right of Finnian over his work as the fruits of his labor.⁹⁵

The beginning of the copyright law in most European countries comes from the efforts of government to regulate and control the output of the printers, which had been invented and become established in the fifteenth and sixteenth centuries. Before this technology was invented, if one wants the copy of written work, the only way to get the copy is manual copying it out. Therefore, the printers made it easy and possible for people to have many copies of a work than before. Even though government and church use printing to flow their ideas and information such as Bibles and government information. However, they thought that it might be use for undesirable contents such as dissent and criticism of government or even the established religion, which could circulate too quickly for their comfort. Therefore, government all over Europe established controls over printing by requires printers to have official license for and produce books and to do this business. These official license gave the exclusive right to the printers for printing particular works and prevent others to do so, but for a fixed period of years. However, the owner of the official license has right to print only in the territory of the state where the license was granted. Moreover, the official license could not prevent printing of the same works in other territories but the government prohibit the import of foreign printings into the territory where the license had been granted.⁹⁶

In 1707 the parliaments of England and Scotland were united in a single body as the result of the Angle-Scottish Union. The new parliament was enjoyed to respect the separate identities of the English and Scottish legal system. An important legislation was the Copyright Act of 1709, which often know by copyright lawyer as “The Statue” or “Act of Anne”, introduced in 1709 and passed March 1710. This Act created a single regime for application in both England and Scotland. Moreover, it gave the sole right and liberty of

⁹⁵ Richard Roger Bowker, **Copyright its history and its law** (1912), available at <https://archive.org/stream/copyrightitshis00bowkgoog#page/n4/mode/2up> (last visited Mar. 7, 2016).

⁹⁶ Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown. **Contemporary Intellectual Property Law and Policy**. (2010).

printing books not only to printers but to the authors of such books. Thus, this is the first formal legal recognition of the exclusive or property right that belong to creators or originator.⁹⁷

3.2.1.2 Copyright, Designs & Patents Act 1988

(1) Subject Matter of Copyright

The current copyright law of the United Kingdom is the Copyright, Designs and Patents Act 1988 (the 1988 Act). Under the 1988 Act, generally the first owner of a copyright is presumed to be the author of the work. However, if a work is made by an author during the course of employment then the author's employer is the first owner of copyright.

According to The 1988 Act, *“Musical works are works consisting of music, exclusive of any word or action intended to be sung, spoken or performed with the music.”* Therefore, musical works means the musical elements with any word or action that intended to be sung spoken or performed with particular music. As long as the original work was still in copyright, permission would have to be obtained otherwise there would be an infringement. Of course, the requirement of originality applies equally to musical works as it does to literary work.⁹⁸

(2) Exclusive Rights and Infringements

The 1988 Act provides the owners of copyright works exclusive rights to do or to authorize other to do certain acts in relation to copyright works. Such as the right to copy the work, the right to make an adaptation of the work and the right to perform, show or play the work in public. However, this Act has a set of exceptions to copyright. In other word, some actions are referred as “Fair Dealing”. However, Fair dealing is much more restricted than the American concept of Fair Use. It only applies in strictly defined situations. Therefore, besides those situations there would be no defense against the copyright infringement at all.

⁹⁷ Hector MacQueen, Charlotte Waelde, Graeme Laurie and Abbe Brown, **Contemporary Intellectual Property Law and Policy** (2nd ed. 2010).

⁹⁸ Gerald Dworkin and Richard D. Taylor. **Blackstone’s Guide to the Copyright, Designs & Patents Act 1988** (2002).

(3) Fair Dealing

Fair dealing is in practice the most general and perhaps the most important defense or permitted act in relation to copyright. The word “dealing” is to be understood more in sense of “use” rather than as requiring any transaction. Therefore, copying a work in the privacy of one’s home could count as fair dealing even though no one else is involved. In the 1956 Act, it was only available in relation to part I works. However, the provisions of the 1988 Act are no longer quite so restricted but fair dealing is still not indiscriminately available for every type of work. The three allowable purpose of fair dealing are as followings:

- (a) research or private study,
- (b) criticism or review,
- (c) reporting current events.

The first purpose of fair dealing is for research or private study. This exception only applies to literary works, dramatic works, musical works, artistic works and published editions. Therefore, this should not be applied to sound recordings, films broadcast and cable programs. However, it allows only for a single copy but it does not require any acknowledgement. The second purpose is for criticism or review. This exception can be applied to all works, with multiple copies but it requires sufficient acknowledgement. The last purpose is for reporting current events. It can be applied to all works except photographs. Furthermore, this exception allows multiple copies, however it requires sufficient acknowledgement except in reporting done by means of a sound recording, film, broadcast or cable programs.⁹⁹

3.3.2 The United States Copyright Law

3.3.2.1 Historical Background of the United States

Copyright Law

The first legislation of the United States copyright law was patterned on its English forebears and give the protection only for books, charts, and maps. It provided protection upon the owner for fourteen years, with a renewal for an additional period of fourteen years.

⁹⁹ *Supra* note 97

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.¹⁰⁰

One of the first American creations in the field of music was the book printed by John Barnard in 1729 containing a tune known as "Mear". "The Archers" based on the story of William Tell was the first American opera, appearing in New York City in 1796. However, the authority for the Copyright Law in the United States is based on the Constitution which provides in section 8 that "*Congress shall have the power ...to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries....*" Therefore, when the copyright law was adopted, books were almost the only objects deemed worthy of protection, and although music was as old as mankind, it was not brought specifically under the protection of the law until 3 February 1831.¹⁰¹

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 United States to enforce rights in music has increased throughout the twentieth century and into the new millennium.¹⁰²

¹⁰⁰ *Supra* note 6.

¹⁰¹ *Id.*

¹⁰² *Supra* note 3.

3.2.1.2 Copyright Act of 1976

(1) Subject Matter of Copyright

Copyright law protects the "expression" of an idea, it does not protect the "idea" itself. Therefore, copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery as stipulated in the Act that:

“(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;*
- (2) musical works, including any accompanying words;*
- (3) dramatic works, including any accompanying music;*
- (4) pantomimes and choreographic works;*
- (5) pictorial, graphic, and sculptural works;*
- (6) motion pictures and other audiovisual works;*
- (7) sound recordings; and*
- (8) architectural works.*

*(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”*¹⁰³

Moreover, copyright protection subsists in original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.¹⁰⁴ According to the statute, even though musical works is a subject matter that copyrightable, but it requires the fixation in order to obtain such protection.

¹⁰³ 17 U.S.C. § 102

¹⁰⁴ *Id.*

(2) Exclusive Rights and Infringements

There are six basic rights protected by copyright. The owner of copyright has the exclusive rights as stipulate in the Act that:

“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;*
- (2) to prepare derivative works based upon the copyrighted work;*
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;*
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;*
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and*
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”¹⁰⁵*

Therefore, the owner of a copyright has the exclusive right to reproduce, distribute, perform, display, license, and to prepare derivative works based on the copyrighted work.¹⁰⁶ However, the exclusive rights of the copyright owner are subject to limitation by the doctrine of "Fair use."¹⁰⁷

(3) Fair Use

Fair Use is the use of a copyrighted work for certain purposes such as criticism, comment, news reporting, teaching, scholarship, or research. In other word, it fair for all people to use the copyrighted work in some instances. Therefore, when particular action

¹⁰⁵ 17 U.S.C. § 106

¹⁰⁶ *Id.*

¹⁰⁷ 17 U.S.C. § 107

was considered as a fair use, then it can be claimed for an exception of copyright infringement. In order to determine whether a particular use can be qualified as fair use or not, the court has to considered all of four factors as listed in section 107 that:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work.*

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

Therefore, in order to determine whether particular act is a fair use of copyright work or not, it requires the examination of these four factors. The analysis of fair use must be conducted case by case, depends on fact and circumstances. However, these four factors are only guidelines that the courts are free to use for analyse cases.

In relation to musical works, if one wants to claim for the fair use of particular song, then one has to consider all factors together. Firstly, one has to consider the purpose and character of the use whether it is for a commercial nature or not. if so, then it quite not favors to fair use. However, it depends on other factors and the circumstances as well.

The second factor is the nature of the copyright work. Since the nature of musical work has its own unique nature that differ from other works, such as literary works, it

requires much more specific elements to analyse the use of it. Therefore, the analysis of literary work reproduction will differ from the analysis of musical work reproduction.

The third factor is the amount and substantiality of the portion used in relation to the copyright protected work as a whole. This factor is very important matter for the study in this thesis. Since in order to analysis musical work infringements, it has to considered that the similarities between two songs are considered as substantial similarity or not. If it meets the point of substantial portion enough, then it would be considered as an infringement rather than qualify as a fair use. However, substantiality is also a complicate issue that cannot be determine only the quantity, but it require the analyse of quality as well. Even though one takes only a small portion of a work, it still may be too much if what is taken is very significant as “the heart of the work”. This is the reason why this thesis intends to point out some clues to analyse the musical similarities as a guideline.

The last factor of fair use is the effect of the use on the potential market for or value of the copyright-protected work. Generally, courts use this factor to determine whether the use of a work is likely to result in an economic loss which the copyright holder is otherwise entitled to receive.

CHAPTER 4

MUSICAL WORKS UNDER COPYRIGHT ACT B.E. 2537 (1994)

4.1 Historical Background of Thai Copyright Law

The protection of copyright law in Thailand has begun since B.E.2435 (1892). According to the regulation of Vajirayarn Library, which had the purpose only to grant the exclusive right to publish and sale their literary works, some scholars assume that this is the first copyright law of Thailand. On 12 August 1901, The Ownership of the Author Act was enacted. This act had eighteen sections and gave the protection solely for authors. Then the Amendment of the Ownership of the Author Act was enacted on 16 December 1914, this amendment added 22 sections in order to extent the protection not only for others, not only for authors like it was in the former Act. Moreover, this Act also gave the protection for more kinds of books. However, the protection was limited by the condition that the work must be registered in order to get copyright protection. On 16 June 1931, The Protection of Literary Work and Artistic Work Act B.E. 2474(1931) was enacted and had been used for forty-seven years without any amendment at all. However, in 11 December 1978, Copyright Act B.E.2521(1978) was enacted in order to substitute The Protection of Literary Work and Artistic Work Act B.E. 2474(1931). According to Copyright Act B.E.2521(1978), it provided more protections for copyrighted works. Nonetheless, the technology has been developed very rapidly so that the protection of this Act is not efficient enough. Furthermore, TRIPs requires the measure in the agreement that all members have to follow. Finally, Thailand has announced the Copyright Act B.E. 2537(1994) in the date of 9 December 1978, the current law, which provides more protections for computer programs and performers' rights.¹⁰⁸

¹⁰⁸ Chaiyos Hemarajata, *The characteristic of intellectual property law* (2010).

4.2 Rights of Copyright Owners in relation to Musical Works

Section 6¹⁰⁹ states that “*The Copyright work by virtue of this Act means a work of authorship in the form of literary, dramatic, artistic, musical, audiovisual, cinematographic, sound recording, sound and video broadcasting work or any other work in the literary, scientific or artistic domain whatever may be the mode or form of its expression...*” Therefore, musical works are considered as the copyrightable work under this act and section 4 given the definition of musical works 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 did not agree with the using of the term “rhythm” because besides the lyrics there were many elements in songs. For example, in one song there could be many musical parts such as melody part, harmony part and rhythm part. Moreover, in musical context rhythm refers to the organization of musical sound events that determines how sounds are produce over time. Therefore, instate of using the term “rhythm”, the term “music” might be better to describe the other parts of the song which is not the lyrics.

As stipulated in section 4¹¹⁰ “*‘copyright’ means the exclusive right to do any act according to this Act with respect to the work created by the author.*”, it means that copyright owners have exclusive rights over his works. Generally, this right is not a kind of positive right which actually gives certain rights to the copyright owners for reproduction, adaptation or communication to public. Instead of giving exclusive rights to copyright owners, copyright law gives an authority to copyright owners in order to forbid others to do any unlawful act against his works. Hence, it is more likely to be a negative right rather than positive right.¹¹¹ If one acts against an exclusive right of copyright owners then one is infringing copyright. Therefore, in order to analyse copyright infringements, one must know about exclusive rights of copyright owner fist.

¹⁰⁹ Copyright Act B.E. 2537(1994).

¹¹⁰ *Id.*

¹¹¹ *Supra* note 6.

According to Section 15¹¹² showing that owners of copyright have exclusive rights of reproduction, adaptation, communication to public and giving benefits accruing from the copyright to other persons. Moreover, they have the authority of licensing the rights reproduction or adaptation, communication to public with or without conditions. However, such conditions shall not unfairly restrict the competition.

Since the law provided that only the owners of copy right has an exclusive right, if others act against the owners' right without permission in accordance with Section 15(5)¹¹³ then it shall be deemed an infringement of copyright. However, it mentioned at the beginning of the statue that

"...subject to Section 9, Section 10 and Section 14, the owner of copyright has the exclusive rights..."

It means that in some instances copyright owners may not have some exclusive right over their own works. For example, according to section 9¹¹⁴ in case that a work was created by an author in the course of employment vests upon the author, then the right to communicate such work to public in accordance with the purpose of the employment is entitled to the employer, unless it has been agreed in written form.

Even though the Act provides many kinds of exclusive rights of the copyright owner, but this thesis will discuss only the exclusive right of reproduction and adaptation in relation to musical works infringements.

4.2.1 Exclusive Rights of Reproduction and Adaptation

(1) Reproduction

The right of musical works reproduction includes any method of copying, imitation, duplication of musical works, whether in certain part or of the whole. In order to analyse the reproduction of musical works, sometime it not just simply way as literary works that most people familiar with. For lay people, it seems to be like they have to analyse another language that they have never known before. Assume that one uses some musical

¹¹² *Supra* note 109.

¹¹³ *Id.*

¹¹⁴ *Id.*

knowledge to alter the original song, then he claims that his song was not similar with the original one. Moreover, he could show that the score of his song that has different notes position compare to the original score. In this situation, only legal knowledge is not enough to explain that it is considered as an illegal act or not. Therefore, musical knowledge is needed in the analysis process of musical case in order to provide fairness to the copyright owner as well as maintaining peace to the society.

(2) Adaptation

According to section 4¹¹⁵ “*“adaptation” means a reproduction by conversion, modification or emulation of the original work for the substantial part without a character of creating a new work whether of the whole or in part.... (5) with regard to musical work, it shall include an arrangement of tunes or an alteration of lyrics or rhythm.*” Similar to the analysis of reproduction, musical work adaptation also requires musical knowledge in the process of analysis cases as well.

4.3 Infringements of Musical Works under Copyright Act B.E. 2537 (1994)

According to Copyright Act B.E. 2537 (1994), any act of reproduction, adaptation or communication to public, against musical works without any permission of owners shall be considered as an infringement.¹¹⁶ However, to analyse an infringement, another issue must be concerned is that whether such act falling into the exceptions of copyright infringements or not. If so, it could be considered as an act of fair use because it fair to use copyright work. On the other hand, if it cannot claim for fair use then it is an infringement since it is unfair use of copyright works.

4.4 Exceptions from Infringements of Copyright

¹¹⁵ *Id.*

¹¹⁶ Section 27 of Copyright Act B.E. 2537 (1994).

The Act provides many exceptions for the use of copyright works in section 32¹¹⁷, section 33¹¹⁸ and section 34.¹¹⁹ Therefore, any act against the copyright work, which the Act allows to do so, shall not be considered as an infringement of copyright. The use of copyright works which considered as an exception from copyright infringement are as followings:

(a) the use of copyright works for research or study of the work which is not for profit,

(b) the use of copyright works for personal benefit or for the benefit of himself and other family members or close relatives,

(c) the use of copyright works for comment, criticism or introduction of the work with an acknowledgement of the ownership of copyright in such work,

(d) the use of copyright works for reporting of the news through mass-media with an acknowledgement of the ownership of copyright in such work,

(e) the use of copyright work reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorized officials or for reporting the result of such proceedings,

(f) the use of copyright works for reproduction, adaptation, exhibition or display by a teacher for the benefit of his teaching provided that the act is not for profit,

(g) the use of copyright works for reproduction, adaptation in part of a work or abridgement or making a summary by a teacher or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit,

(h) the use of copyright works as part of questions and answers in an examination.

Furthermore, the use of copyright works listed above must have an acknowledgement of the ownership of copyright in such work. However, the use of particular copyright works must not conflict with a normal exploitation of the copyright

¹¹⁷ *Supra* note 109.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

work by the owner of copyright. Moreover, it must not unreasonably prejudice the legitimate right of the owner of copyright as well.

4.5 Thai Supreme Court Decisions in relation to Musical Works

(1) The Supreme Court Decision No. 9602/2554

In this case, the plaintiff was the one who has created the music part, which Copyright Act B.E. 2537 (1994) used the word “rhythm”, and the lyrics of the song name “Nhum Doy”. Since the plaintiff is the creator, the Act grants copyright to him as the author of “Nhum Doy” song. Therefore, the song “Nhum Doy” was protected under this Act. Moreover, he has the right to claim for any damages against any unlawful actions against his exclusive rights over his copyright work. The defendant’s song name was “Dek Doy Jai Dee” and it was claimed that both music and lyrics of the “Dek Doy Jai Dee” were substantial similar to “Nhum Doy”.

According to the analysis of the case, the court mentions about music part and lyrics part that there was the identical in the hook part of both songs. Moreover, the most identical part is the part of music and lyrics of “Lah...lul-lah lul-lah lul lul lul-lah lul-lah lulla”. These particular parts appear in the defendant song for three times, and they always appear after the hook part of both songs. Therefore, it would be noticed by the listeners that the plaintiff’s song and the defendant’s song were similar. Therefore, the court concluded that the defendant reproduces by conversion, modification or emulation of the plaintiff work for the substantial part without a character of creating a new work, thus there was an infringement in this case according section 27(1)¹²⁰

¹²⁰ *Supra* note 109.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 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 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 system¹²¹. 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.

5.2 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*

¹²¹ The arrangement of all the tones and chords of a composition in relation to a tonic.

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. 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 thesis 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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