



COPYRIGHT PROTECTION FOR PERFORMERS IN INDIA

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ABSTRACT

The actors, singers, musicians enrich our lives, by their spectacular contribution in the entertainment industry. Even then the rights of these performers did not come to the forefront in the discussions about copyright till lately. In the past the performer's performance perished at the instance it was over. But with the advent of technological advancements more & more performances became easily accessible in the public domain. Thus, the need to protect the copyright of the performer gained momentum. The Copyright Act 1957 now prohibits reproduction, communicating to the public, issuance of copies or exploiting an artist's performance for monetary gain, whether directly or indirectly without the consent of the artist/performer. This paper tries to explore the development of the performer's rights at the national & international level. It also tries to point out to the lacunas in effective implementation of the legal provisions in this regard. It also deals with the copyright of the singers. It refers to the relevant cases in this regard.



KEYWORDS: Copyright, Performers' Rights, Copyright Act 1957, WPPT, Beijing Treaty

INTRODUCTION

Creative labour is the genesis of Intellectual Property Rights. In the last century, intellectual property protection has become an increasing area of interest, for the law makers. Industrially beneficial inventions were the first to receive intellectual property protection under the Patent Acts. In recent years, however, copyright & the neighbouring rights are gaining importance. The impact of intellectual property rights in the global economy and our society at large is growing fast. Copyright is a type of the intellectual property which gives an exclusive legal right to the original creator of a work. Copyright (or author's right) is a legal term used to describe the rights that creators have, over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings. However, the rights of a performer in a public performance remains an often-overlooked area of intellectual property law. A 'performer' is the person who disseminates the work of the author through his creative performances. Any effective performance demands a high level of discipline, commitment, talent and skill and sometimes even the professional training. Still the recognition & protection of performer's rights was not taken to forefront in the IP laws. A possible reason could be that a performance is done collaboratively and is a result of the efforts of multiple parties. It was hundreds of years later, after the

recognition of 'industrial patents' as an intellectual property, that the IP in 'performing arts' was granted international recognition.

DEVELOPMENT OF PERFORMER'S RIGHTS AT INTERNATIONAL LEVEL

The rights of the performers were recognized internationally after the adoption of the Rome Convention of 1961. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, was the first international effort in this direction. It aimed to provide protection for performers in performances, for producers of phonograms in phonograms, and for broadcasting organizations in broadcasts. This treaty gave performers, in audio-visual works such as feature films, videos and television dramas, rights against unauthorized broadcasts or recordings of their performances. In 1996, the Rome Convention was updated, to include audio performances, through the WIPO Phonograms and Performances Treaty (WPPT). WPPT encompasses both moral and economic rights of the performers. Article 5 of WPPT, addresses moral rights. It requires signatory countries to protect performers' moral rights of attribution and integrity with respect to their 'live aural performances' and their 'performances fixed in phonograms'. These rights fall in the category of inalienable rights. Articles 6-10 of WPPT grant performers some exclusive economic rights. Performers get the exclusive right to authorize the fixation and public communication of their performances. They have the exclusive right to reproduce phonograms of their performances. The right to make copies of those phonograms available to the public, through sale or other transfer of ownership is another exclusive right of performers. Making available wired and wireless transmissions, that enable the public to access the work, to authorize commercial rentals of their phonograms, are other such rights. However, Articles 11-14, purport to give these same exclusive rights to producers. This is self-contradictory & hence resulting in confusion. It simply is not possible for both parties to claim exclusive rights on the same subject matter. In practice, performers might be assigning their rights, in favour of the producers. So, one group of rights holders (producers), could prevent the other group (performers), from exploiting the work. As a result of WPPT, record labels, singers, and other audio performers started getting their economic rights enforced. However, in case of audio-visual media, producers initially refused to confer more rights to the actors. As digital dissemination of performance became easy & grew in scale, the performer became separate from the performance. Then the need to protect the rights of such performers over their performances was felt more than before.

The 'Beijing Treaty on Audio-visual Performances' is another international effort in the area of copyright of performers. The treaty was adopted on June 24, 2012 and entered into force on April 28, 2020. It deals with the intellectual property rights of performers in audio-visual performances. The Beijing Treaty grants performers four kinds of economic rights for their performances fixed in audio-visual fixations viz. (i) the right of reproduction (ii) the right of distribution (iii) the right of rental and (iv) the right of making available to the public, any performance fixed in an audio-visual fixation, on demand, through the Internet. As per Beijing treaty, the term of protection for the performer's rights must be at least fifty years. India has prominence in some of the major copyright-oriented industries like media and entertainment & the software sector. However, she was not a signatory to these major copyright treaties till recent times.

POSITION IN INDIA

Performers spend sufficient skill & labour to merit copyright protection. However, traditionally the labour of musicians, players, dancers was considered to be unproductive. As a result, their rights were not recognised for a long time. In the past their work also vanished at the instance of its production as there were no means to preserve the same. The situation changed with the development of technology to record & preserve the performance of an artist. But even when the rights of film producers were recognised by the Copyright Act, 1957, the rights of the artists had no separate recognition. In the old case of *Fortune Film International v. Dev Anand (1979)*, the court held that the performance of an artist in a film cannot be equated with a painting, photograph etc. The court rejected the contention that there could be different owners of copyright in portions of the film. In a way the

court completely denied the existence of rights of Performers. This was because the Copyright Act 1957 did not initially provide for the rights of the performers. Performance was not a 'work' within the definition of the term.

With the advent of the internet and sophisticated digital technologies, the scope for both authorized and unauthorized copying and digital manipulation of performances has vastly increased. These technological changes are threatening the livelihood of small & medium level performers. On the other hand, the entertainment industry has become global. The performances of actors, singers, musicians and dancers are an integral part of the creative process in the Bollywood movies. A huge revenue of Bollywood now comes from abroad. A performer being an artist, should have the right to restrain others from broadcasting his/her live performance to the public domestically or abroad, without his permission. Thus, the Indian Copyright Act was modified to protect performers. At the international level, the Uruguay Round of multilateral trade negotiations made it necessary for India to protect the rights of the performers. Thus, the Copyright (Amendment Act) of 1994 was passed. As per this 'Performer' shall mean and include an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance. 'Performance' means any visual or acoustic presentation made live by one or more performers. The Copyright Amendment Act of 2012 gave further recognition to the rights of the performers. Rights of performing artists in their performances are the 'related rights' or 'neighbouring rights'. The performer's rights are infringed if without his consent anyone reproduces or broadcasts or communicates a sound recording or visual recording of his performance. Even when he has consented to such recording, if someone reproduces it, for the purposes different from those for which the performer has given his consent, it is still an infringement of performer's rights. In 2003, the Delhi High Court, in *Super Cassettes Industries v. Bathla Cassette Industries*, while establishing that performer's rights were different from copyright, held that re-recording of a song without the authorization of the original performer constituted an infringement of the performer's rights. Thus, unauthorized broadcast of any performances without providing adequate compensation to the performers is not permitted. However, if recordings are made for private use or for teaching or research it is permitted. Similarly, when the use of the recorded performance comes under fair dealing such as reporting current events or review on television, blogs, twitter, FB, print medium etc. it does not amount to infringement of performer's rights. The Delhi High Court, in *Neha Bhasin v. Anand Raj Anand* (2006), addressed the question of what would constitute a live performance. The Court observed that "Every performance has to be live in the first instance whether it is before an audience or in a studio. If this performance is recorded and thereafter exploited without the permission of the performer, then the performer's right is infringed." Thus, if a singer would be singing a song written by the poet, on tune created by the music composer, but still he is entitled to certain rights under the law. Performers also have some moral rights. The performer should be given credit for his performance. So, in Bollywood movies the credits mention the name of the playback singers, backstage artists etc. The performer can claim damages if his or her performance has been distorted, mutilated or modified in a way that would harm his or her reputation.

The copyrights are generally enforced through the copyright societies. The Indian Performing Right Society Ltd. (IPRS) was previously registered as a copyright society under Section 33 of Copyrights Act, 1957. The Delhi High Court in the matter of *IPRS vs. Hello FM Radio* (2012), granted an injunction by restricting Hello FM Radio from playing music without obtaining a license from the Indian Performing Rights Limited (IPRS). In future the development of performers' rights may lead to formation of separate performers' organizations for each sector which will strengthen the implementation of the performers' rights. In another interesting case the performers' rights in a cricket match came up before the court for a decision. *Star India Pvt. Ltd. vs Piyush Agarwal & Others* (2014), brought up the issue with regards to the broadcasting of live sports events. By agreement between the parties, Star India had the exclusive right to broadcast all the matches organized by BCCI. The question was whether this right was covered by the Copyright Act 1957. The court held that a cricket match falls within the purview of the term 'performance' and thereby cricketers, commentators and umpires are

performers under the Act. Performer's rights are granted over only that part of the performance in which a performer has uniquely and distinctively contributed something, thus preventing any conflict with copyright laws. However, this may lead to multiplicity of claims. More authorship claims by performers can be expected in the future. As more performers assert authorship claims, courts will be required to address difficult legal and factual issues. Difficulties also arise when courts try to assess performers' rights of authorship in a collaborative work like music concert, dance shows etc.

COPYRIGHT OF SINGERS

Inclusion of Section 38A in the Copyrights Act brought with it, the right of performers to receive a royalty for the commercial use of their musical work. Performers including singers have the Right to Receive Royalty (R3) in case of commercial utilisation of their performances. Composition rights are usually owned by a publisher, whereas the recording rights are usually owned by the record label. In some situations, however, the artist can retain rights to their own recordings. This right of musical performers is available even when their work had been incorporated in a cinematographic work under an agreement. Hence it is a prerequisite for restaurants, bars, lounges and other commercial establishments to obtain a right clearance certificate from ISRA (Indian Singers' Rights Association). They need to pay the necessary amount of royalty or else they may face a future litigation, arising out of the commercial use of musical works. It includes both live performance of a song, as well as the playing of recordings. Thus, all commercial performances like playing music in a restaurant, or over the radio/TV/Internet, in shops, hospitals, airports or restaurants, or by DJs at commercial events need to take into account the copyright related issues. Problem remains however to decide the amount of royalty. Moreover, small commercial establishments cannot go on obtaining such clearance from multiple right holders like the performer, lyricist, composer, and the producer, on an individual basis. Organisers of sports events such as the IPL, where music is played for general entertainment, must also pay royalty for their commercial exploitation of the musical work. The law also provides for remedies in respect of the above discussed copyrights of singers & other performers.

REMEDIES FOR PROTECTION OF PERFORMERS' RIGHTS

The Copyright Act 1957 provides both civil & criminal remedies under sections 55 & 63 to protect the performers' rights. The civil remedies include obtaining an injunction against the unauthorised use in connection with the performance. This right may be exercised by the owner of the copyright (i.e. the performer) or his assignee or his exclusive licensee. Damages or monetary compensation may also be recovered for the loss arising from such infringement. The offence of infringement is also punishable with imprisonment which may extend from a minimum period of six months to a maximum period of three years or with a fine of Rupees fifty thousand to two lac.

CONCLUSION & FINDINGS

Performers' share in the proceeds from the commercial exploitation of their work was never debated or denied. Audio-visual performances can convey the literary works and music to the audience in an extremely effective way. This dimension of audio-visual performances is not only of economic significance but also important in promoting cultural diversity. However, at international level, performer's rights began to gain prominence in the 20th century, as technology to record and broadcast performances became more sophisticated. Performer's rights were formally recognized in India in the last few decades. India doesn't seem to have many significant judicial decisions related to performer's rights. The law relating to performer's rights seems to be in a rudimentary stage. The legislature & courts have a long way to go in developing legal doctrines to govern the authorship rights of performers. India has some major copyright-oriented industries like media and entertainment, the software sector and the telecommunications industry. Hence a comprehensive National IPR Policy may be brought forth to provide clarification and guidance regarding the rights of various stakeholders.

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