



PROTECTION OF PERFORMERS RIGHT IN INDIA: A CRITICAL ANALYSIS

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ABSTRACT

Artistry resides in the soul of India. India's Hindu religion, culture, art and tradition is the oldest in the world behind which is the hard work of our forefathers as well as the grace of Lord Shri 'Ram' then we are able to compete with the world today. India has always talked about human rights, it cannot be denied. In this context, the rights of the security of artists in India have always been kept in mind. This research paper endeavours to critically analyze the development of the performers' rights over the years. It attempts to examine the existing legal protection for performers under the Copyright Act, 1957.

Keywords: *Performers rights, Copyright, intellectual property, moral rights, ex-gratia, royalty, mythology, public communication*

1 INTRODUCTION

The chronicle of a performing artist's existence not about the star kids' cushioned success or the lucky ones who made it to the top of the charts, but about the others who need a call sheet the next day to keep them alive. The real facts about the life of an artist can be unveiled by having a close review of the entertainment industry. The avalanche of technology, the market's fluctuating tastes, and the hardships of time and ageing have all eroded the artist's safe haven. While the concept of copyright is very ancient, the laws granting these rights are of comparatively recent origin. Their genesis can be traced to the chaotic market conditions in culture industries created by the advancements in technology following the Industrial Revolution. (5) Although over time, many countries are taking many steps to improve the life of performing artists, the situation in India is gradually improving but still not upto the mark. The performer relays the authorship of literary, theatrical, and musical works. A performer gives a distinct identity to his art and tries to elevate authors throughout history. This is high time that the rights of the performers shall be saved and in order to do so a new concept of performers' rights has been evolved under the copyright law. The term performers' rights" refers to the performer's rights in his act as an intellectual creative. The grant of these rights will protect the performer from unauthorised and unrestricted and creative authors who are protected by copyright do. Earlier, copyright law did not



recognise the rights of performers. Actors' performances in cinematograph films and singers' performances in sound recordings were not legally protected. As a result, the use of a sound recording or dramatic work did not require the permission of a performer. In India, however, performer rights were recognised in 1994 under the Copyright Act 1957. However, performers' rights were not recognised internationally until 1961, when the Rome Convention was signed. The Rome Convention, on the other hand, provided protection against the broadcast of any performance without the performer's consent. It recognised the rights of performers and stated that the performer is an artist whose work cannot be broadcast without his consent. The Copyright Act's sections 38, 39, and 39A deal with the provisions related to performer right. When the Copyright Act of 1957 was introduced after independence, there was no mention of performer's rights. In *so and so case*,¹ The Supreme Court pronounced that an actor had no claim over his performance in a film as this performance did not fall within the five categories of artistic work contained in the Copyright Act. After the inclusion of Sections 38 and 39, in 2003, *Super Cassettes Industries v Bathla Cassette Industries* was decided by the Delhi High Court. It established that performers' rights were essentially different from copyright, and held that re-recording of a song without permission from the original performer constituted an infringement of performers' rights, thus taking a large step forward in creating performer protection jurisprudence in India. In *so and so case*, the Supreme Court pronounced that an actor had no claim over his performance in a film as this performance did not fall within the five categories of artistic work contained in the Copyright Act .¹⁶ After the inclusion of Sections 38 and 39, in 2003, *Super Cassettes Industries v Bathla Cassette Industries* was decided by the Delhi High Court. It established that performers' rights were essentially different from copyright, and held that re-recording of a song without permission from the original performer constituted an infringement of performers' rights, thus taking a large step forward in creating performer protection jurisprudence in India. Following this decision, it was felt that the performer's right should be included in the copyright act. The copyright amendment was passed in 1994, and Sections 38, 39, and 39A were added to recognise the rights of performers. The Indian Copyright Act recognises a wider range of performers than what is required by the Rome Convention and TRIPS. The term 'performer' is defined in Section 2(qq), and includes actors, dancers, musicians, singers, acrobats, conjurers, snake charmers, jugglers, lecturers, and anyone else who puts on a show. The Copyrights, Patents, Designs Act also grants moral rights to performing artists. They have the right to protect the integrity of their performance against 'derogatory treatment' (see section 205F) and the right to be identified as the performers in live performances or on the records of their performance (see section 205C). Performers' rights last for a period of 50 years, from the end of the year in which the performance takes place. However, if during that period a recording of the performance is released to the public, the duration of rights will be extended for another 50 years calculated from the end of the year

in which the recorded performance is released. In *Indian Singers' Rights Association V. Bar and Restaurant*² It is stated that the performer has the right every time his/her performance in a song is commercially used except when it is used along with the cinematograph film in a cinema hall. If the Performer consents to the incorporation of his/her performance in a film, he/she may by contract retain his/her performer rights even in a film. If a written consent is given by the performer in a written agreement to the producers of the film, the performer cannot object to the enjoyment by the producer of the Performer's right in the same film as long as he/she continues to receive royalty for the commercial use of his/her performance. (13)

2 FAIR USE PROVISIONS


The basic principle of copyright like other intellectual property rights is the balance of the interests of the individual creator and that of the society at large. Therefore, the laws while granting exclusive rights to authors or producers of creative works limit those rights in time. Even during the period of copyright, certain special uses are allowed without any specific permission from the copyright owners such as for private, academic, educational, judicial or legislative purposes (5).

3 WHAT ARE THE RIGHTS OF PERFORMER UNDER THE COPYRIGHT ACT?

The (6) phrase 'performers' rights' comprises all the rights that may accrue to a performer by virtue of his performance. They are hence, a bundling of three distinct types of legal rights: Economic rights, moral rights and intangible rights. Economic rights include property rights of reproduction, adaptation, distribution, rental, lending, remuneration and communication. Moral rights are the rights of attribution and integrity over the work performed. Non-tangible rights are the most difficult to define. They include the right over the persona of the performer, the right against use of likeness or name of the performer, rights over the performer's creativity in execution of the performance, over his unique and distinct expression and style. This three- pronged understanding of performers' rights ensures that the complete value of the performance is protected; its commercial worth through economic rights, its moral worth through moral rights and its creative worth through non-tangible rights.

4 DEVELOPMENT OF PERFORMERS STATUS IN INDIA

Performing arts have their origins in Hindu mythology, where they are referred to as the fifth Veda. In ancient India, it was à la mode to pursue performing arts as a vocation. Actors were practiced and reached cities, towns, and state capitals in order to gain favour and patronage from the royal family. They survived as a distinct social group with its own way of life and prestige. For their performances, the troupes used to move from one place to another. There were both unknown players and well-known performers and actresses with significant patronage. The



majority of performing artists' low social status was matched by their low economic status, which forced them to rely on government patronage or public charity for survival. Between the 13th and 16th centuries, Muslim invaders lavished a great deal of support on the art of music. Different types of arts like qawwali were appreciated and supported by the royals irrespective of their religion. During this time, musicians who were appointed to a royal court in the seventeenth or nineteenth centuries got a large monthly salary as well as a grant of landed property. In the performing arts, the gharana system of teaching knowledge was prevalent. Though it can be claimed that the system is anchored in the guru shishya teaching model of education. The essence of the training should not infiltrate outside the bounds of the lineage, according to the musical system of gharana. It was customary in the gharanas for there to be no unauthorised practitioners of the school's musical genre. It should be noted that it was the transfer of learning via oral or written means that was prohibited or regulated, not the performance of the same. As a result, protectionist measures were in place, but they did not imply a comprehensive grasp of intellectual property as it was regarded in Europe and the UK at the time. When the British Empire arrived in India, a new culture was born, and since then a different medium of theater and entertainment was introduced. Many types of stage performances were started in which many professionals from Europe and India used to participate. The professional performers were employed on a contract basis for a specific period of time. Non-Fixed performances, like in England, did not have or were not given any intellectual property value. There is no record of any professional theater performers' association in the country. Even with the arrival of performance fixation in India, the lack of historical precedent in organisational enterprise can be highlighted as one factor that has led to the sluggish and poor response. Copyright law provides the framework for transactions in the cultural industries and enables artists (authors and performers) and firms to appropriate returns to their investment, thereby increasing the incentive to supply. (12)

5 INITIATIVES BY THE GOVERNMENT

The Government of India has established the Sangeet Natak Academy in each state, which is headed by a nodal institution, the Kendra Sangeet Natak Academy. A number of programmes or schemes have been devised to assist artists who are in need, whether they are elderly or disabled due to disease or injury. The Academy provides monthly financial aid to a handful of artists who are in desperate need of help to make ends meet. In addition, the Academy provides ex- gratia payments to unfortunate artists who are forced to cease their artistic careers leading to permanent disability due to an accident or chronic disease.

6 INFRINGEMENT OF PERFORMERS RIGHTS


Section 38 of the Copyright Protection Act strengthens the rights of the performers by making certain provisions. Under this if any person without the consent of the

performer, does any of the following acts, he will be deemed to have infringed performers rights. These acts include: (a) Sound recording or visual recording of the performance; or (b) Reproduction of the sound recording or visual recording or reproduction for the purposes different from those for which performer gave his consent (c) Broadcasts the performance, and (d) Communicate the performance to the public otherwise than by broadcast. However, the above Acts are said to be infringed by a person only when these Acts are committed during the continuance of the performer's rights. When a performer has consented to the incorporation of his performance in a cinematograph film the performer loses the right to complain of infringement of that performance which means he assigned his entire rights and that performance to the producer of the cinematograph film.(8)

7 PERFORMERS RIGHTS AND THE COPYRIGHT ACT

The Copyright Act, 1957 was amended and came into effect on June 21, 2012. One of the most significant modifications it brought with it was the right of performers in India. Article 14 of the TRIPS agreement, as well as Articles 5 to 10 of the WIPO Performances and Phonograms Treaty, are now in compliance with Chapter VIII of the Copyright (Amendment) Act, 2012. A number of amendments were made to composers', lyricists', and performers' rights as a result of the 2012 amendment. There are various factors to copyright ownership in a song or piece of music. The lyricist owns the copyright to the song's lyrics, which can be protected as literary work. The 2012 Amendment Act established affirmative performers' rights. Sub-sections 3&4 of the section 38 were removed, and a new section 38A has been added to comply with WPPT Articles 6-

10. Section 38A grants the performer the exclusive right to do or permit the doing of any act in connection with the performance, without prejudice to the author's rights. The section's caveat allows performers to be eligible for royalties if their performances are commercially utilized. This is a great development, as performers previously had no right to royalties because they only had a negative right to prevent their live performances from being "fixed." The negative rights have been transformed into positive rights. In addition to the aforementioned, the Amendment Act 2012 attempted to change the definition of "public communication" (Section 2 (ff)), expanding the right to performances. The current amendment extends to performers the rights under this heading that were previously only available to authors. This is a result of the performers being granted new rights. The right of 'public communication' is vital for protecting work on the internet, and this protection, which was previously only accessible for works,' has now been extended to performances.' In accordance with Article 5 of the WPPT, a new section 38B grants moral rights to performers. In light of the prospect of digital effects of performances in a digital world, moral rights have been extended to performers. The section's 'explanation' underlines that editors are allowed to carry out their duties without fear of legal repercussions. Another noteworthy change in accordance with WCT Article 9 is the length of protection for



photographic works. The copyright period for photographs has been extended to the same length as that for other artistic works, i.e., until sixty years after the author's death.

8 REMEDIES

When a performer's rights are violated, the Court may issue an order authorising a search of the defendant's premises. The 'Anton Piller order' is the name given to this set of rules. An Anton Piller order is issued so that the plaintiff and their attorney can search the defendant's premises for any evidence that could support the claim that the performer's rights have been violated. In addition to an Anton Piller order, a performer may pursue civil and criminal remedies if their rights are violated. Civil remedies include obtaining a temporary or permanent injunction, while criminal remedies include obtaining a fine from the infringer and up to three years in prison. As a result, the inclusion of performer's rights is a huge step forward in copyright law. In the entertainment industry, several performers are frequently subjected to unfair practices by producers or music labels. As a result, the aforementioned rights would be extremely beneficial to the performers as well as the work they create.

9 REASONS FOR PROTECTING

AUTHOR'S MORAL RIGHTS

The first reason for the protection of the author's morality right is the jurisprudential value given for the upcoming of copyright laws in India. Copyright is related to creativity and expression of ideas. Actors use their own talent and skill to bring justice to the theme of the movie. Their expression, their style and their way of imparting a theme to one's mind, all are subjects of creativity and skill. Thus copyright protection must subsist with them. *Norowzian vs Arks12* is a famous English case, where the Courts recognized that acting in an advertisement film is a dramatic work that is capable of an independent copyrightable existence. It is awful to note that in India, there is no case as such which clearly says that the actor's work is subject to a separate copyright protection. Secondly, confirming morality rights to the actors would ensure their value more than a commercial interest of the film makers. Actors are becoming the puppets in the hands of the directors and producers. So in order to bring a balance between the economic interest of the producers and creativity of the actors, the need is to specify the morality rights to actors. In India there is no provision of 'right to publicity', In *Haelan Lab, Inc v. Topps Chewing Gum, Inc*¹³, the US Court has clarified that the right to publicity also protects the 'unauthorized commercial use of a public figure's image'¹⁴. The actor's image is not at all protected in the Indian copyright laws. Therefore the actors only demand for an injunction related to libel or slander imposing tortious liability to the Defendants. It's high time that the actor's morality rights should be confirmed and specifically mentioned in the Copyright Act. (10)



10 RETROACTIVE OR LIMITED RETROSPECTIVE APPLICATION OF PERFORMERS RIGHTS

The legislature, through the 2012 amendments to the Copyright Act, furthered a proactive change towards beneficial protection of performers, wherein Section 39A was introduced. This Section extends the application of Sections 18 and 19 to performances and performers rights, with necessary adaptations and modifications.¹⁷ Section 18 and 19 of the Copyright Act provide for “Assignment of Copyright” and the inalienable equitable right to royalty of the authors with the assignee upon exploitation of the work.¹⁸ The extension of the same to performances and performers implies an inalienable right to royalty for the performers on the event of exploitation, assignment and broadcasting of their performances. The question for litigation before the Delhi High Court,¹⁶ concerns as to whether this inalienable provision of royalties extends to performances which have taken place prior to 2012 as well. It is clear that no complete retrospective application can be suggested due to the unimaginable number of claims from prior to 2012 which would come up for litigation, including the royalty claims thereto,¹⁹ however this question concerns with acts of unauthorized reproduction of performances recorded prior to 2012 (performances that took place prior to the amendment), although reproduced or broadcasted post the amendment. This issue was also debated and argued by Javed Akhtar, in the Parliamentary debates concerning the 2012 amendment act, and was acknowledged by the Parliamentary Committee. (11)

11 OUTCOMES

Performers’ rights are given *sui generis* protection, and all economic, moral and non- tangible rights are protected;

These rights protect even the non-commercial, community interests of performers, hence ensuring that folk culture is preserved;

Performers rights are granted over only that part of the performance in which a performer has uniquely and distinctively contributed

12 CONCLUSION

In the year 1994, the Copyright Act of 1957 granted the performers’ rights as well as the rights that are attached to the performances. There has also been through elaboration of the rights that are required for the protection and benefit of the performers under certain international instruments. The adequacy of the same is an important issue that can be pinpointed and reviewed. Municipal legislation, as well as Indian legislation covering performers’ rights, such as The Indian Copyright Act, 1957, has generally been found to have failed to develop in terms of technological development. Despite the fact that authors have had copyright protection for a long time, performers have not. When performers’ rights are protected, they are given an incentive to excel in a particular field, which helps to place a country on the global map and is directly proportional to the level of fame

that a country achieves in the global arena. At first glance, the definition of performers given under The Copyright Act, 1957 appears to be an inclusive definition; however, there are new age performers who have emerged with the development of the internet and who have not been given the justified rights that are required for the performance to thrive. There are several reasons why international instruments are pursued; traditionally, there are two reasons that can be used as justifications. The first reason is that there is a need for standardisation in terms of the protection that is provided; it is possible that one country protects citizen performers while denying foreign performers rights. The second reason is that it is assumed that developing countries will not grant rights to performers unless the severity of the protection can be increased through the implementation of a treaty. When it comes to the protection of the laws, it is common to see municipal laws and international instruments clash. In the scenario of performer rights protection, there was a difference of opinion regarding access to the works and their protection. Technology protection measures, digital5. James, T.C. “Indian Copyright Law and Digital rights management, and safe harbor principles can all be used to prevent unauthorised access to work. While the EU and the US want to keep work access free and Technologies, Department of Industrial Policy & Promotion, Udyog bhawan, New Delhi.” no. 25th July 2002, unrestricted to some extent. Copyright is a type of Ambast, Sanhita. “Protecting Performers’ Rights: Does India Need Law Reform?, National Law School of India intellectual property protection afforded by law to the creators of original works of literature, as shown in the University, Nagarbhavi, Bangalore 560 072.” vol. 13 ,no. 29th March 2008, preceding discussion. Actors, musicians, jugglers, snake Fortune Films International v Dev Anand, AIR 1979 charmers, and other performers have exclusive rights to perform particular activities. The performers' rights have Bom 17 been granted, which is a significant step toward fostering their creativity. The Delhi High Court has granted judicial recognition to the Performers' Rights, as amended by the Copyright (Amendment) Act, 2012. In Deshpande, Shweta S. “Copyright Protection of Performers Rights.” vol. 28, no. May, 2008.

8. https://www.copyrightuser.org/wp-content/uploads/2017/10/CU_CaseFile_26.pdf
9. Verma, Monika. “Actors in India: Asking to bestow the near future, such implementation of the Act's changes could be a milestone toward protecting performers' their Morality Rights.” rights. Nonetheless, even though there have been flaws¹¹. Agarwal, Akshat. “Interpreting “Performers Rights” in the grant of rights to performers, it can be said that a¹². The Indian Copyright



Act to Appropriately Provide for significant amount of effort has been dedicated to the Singers Rights.” vol. 26, no. January, 2021.

protection of performer's rights in India and around the13. Towse, Ruth.

“Copyright and Economic Incentives: An world. Only time will tell whether or not there will be aproblem with the enforcement of the laws.

REFERENCES

- [1] Prof.V. Subramani, The Sacred and the Secular: Symbiosis and Synthesis –Roots of Drama in Hindu Religion in Prof. Subramani (Ed), The Sacred and the Secular in Indian Performing Arts, Ashish PublishingHouse, New Delhi (1st edn. -1980)
- [2] T.C. James, "Performers Rights in the Digital Era", Paper Presented at the National Seminar on Challenges of Internet Cyber Law and Enforcement of Copyright Law, March 3rd to 4th, 2001, Indian Law Institute, New Delhi
- [3] T.C. James, Performers Rights In The Digital Era", Paper Presented at the National Seminar on Challenges of Internet Cyber Law and Enforcement of Copyright Law, March 3rd to 4th, 2001, Indian Law Institute, New Delhi, Rajeev Dhavan, Coping with Copycats”, Frontline,
- [4] 28/7/9-Application to Performers’ Rights in the Music Industry.” vol. 52, no. 1999, pp. 369-390. 14. Indian Singers’ Rights Association V. Bar and Restaurant AIR.