RIGHTS FOR PERFORMERS IN INDIA

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Introduction

Intellectual Property Law regulates the creation, use, and exploitation of mental or creative labour.[1] The Indian Copyright Act for a very long time did not recognize the rights of performers like musicians, singers, actors, acrobats, etc. It is only recently when the technological changes have threatened the livelihood of performers that the law has been intervening to protect them. According to the World Intellectual Property Organization (WIPO) Convention signed in Stockholm on July 14, 1967 and amended on September 28, 1979, 'Intellectual Property' includes 'the rights relating to literary, artistic and scientific works, *performances and performing artists*, photographs and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations, protection against unfair competition and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.'[2] Also, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) resulting from the Uruguay Round of Conferences of the World Trade Organization (WTO) in 1995, defines the scope of 'intellectual

1 According to Art. 2, WIPO Convention (1967)

2 *See* Art. 2 (viii) of the WIPO Convention of 1967. As present in http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=4046

property' as: copyright, trademark, geographical indicators, design, patents, trade secrets, and integrated circuits.[3]

In this paper, the researcher will focus on the facet of 'Intellectual Property' as included in Copyright Law with special reference to the protection afforded to "Performers and Performance Rights" in the international sphere as well as in the domestic legislation present in India, i.e., the Copyright Act of 1957.

In India the first Copyright Act was passed in1914. It was a replica of the English Copyright Act of 1911 suitably modified to make it applicable to the then British India. The Act, presently in force was legislated in the year 1957 and is known as Copyright Act, 1957 as amended by Copyright (Amendment) Act, 1999.

Copyright is a form of intellectual property protection granted under the law to the creators of original works of authorship.[4] Usually, copyright extends to the authors of certain 'works' and copyright law delineates rights and duties of the authors. However, apart from copyright protection there exists a parallel scheme of rights known as "neighbouring rights" that have developed to afford safeguards to certain classes of works, *which are not covered specifically by copyright.* Although different from copyright protection as such, these neighbouring rights have assumed importance at the present time with the advent of Information Technology as the exercise of these rights is sometimes inextricably linked to the exercise of copyright.[5]

It was in 1961 that the Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organisations adopted in Rome (popularly known as the ROME CONVENTION OF 1961), granted for the first time legal recognition of "performers rights" in terms of the rights to fixation, reproduction and broadcasting of their performance. Subsequently, there have been favourable developments in the international regime with the introduction of the WIPO Performance and

3 *See* Art. 1 of TRIPS

4 Chattejee, Sumitra Kumar. Law of copyright: An overview in Law of Intellectual Property Rights, edited by Dr Sukanta K.Nanda. Orissa Law Reviews , Cuttak, 2003, p.136

5 *See* Ahuja, V.K., pp- 141

Phonograms Treaty of 1996, which sought to consolidate the intellectual property law in relation to performers' rights. In India, the Amendment Act of 1994 introduced the concept of "performers' rights" in the Copyright Act as a response to the TRIPS Agreement, thus providing a legal framework for the protection of performers as part of the domestic law of the country.

As we all know, law changes with time and adapts to the ever varying needs of society. Therefore, as the need to protect "performances" heightens owing to enormous potential to commercially exploit such performances, the law also needs to transform itself and ensure that the purposes and objectives of intellectual property law are maintained and protected.

The concept of 'neighbouring rights'

The creative intelligence of man is displayed in multiform ways of aesthetic expression, but it often happens that economic systems so operate that the priceless divinity which we call artistic or literally creativity in man is exploited and masters, whose works are invaluable, are victims of piffling payments.[6] To protect those intellects, the Copyright Act was enacted in India in 1957. The term 'copyright' is normally used to refer to the area of intellectual property law that regulates the creation and use of works such as, books, songs, films and computer programmes. Section 13 of the Copyright Act, 1957 of India states that copyright subsists throughout India in: (a) original literary, dramatic, musical and artistic works, (b) cinematograph films, and (c) records. Section 14 of the Act defines the meaning of "copyright" in terms of the various rights, which are bestowed upon the holder such as the right to reproduce, publish, perform, adapt, and communicate the work. The basic purpose of Copyright Law is to safeguard the interests of the author or the creator and enable such person to commercially exploit his work and derive benefits from the work, thus encouraging and providing incentive to the person to continue creating more works. Copyright law essentially strives to ensure

6 As said by Krishna Iyer, J. in Radio Today Broadcasting Limited vs. Indian Performing Rights Society, 2006 INDLAW CAL 28, 2007 (34) PTC 174(Cal)

a balance between the private, individual rights of the author and the public interest in the use and exploitation of the author's work. [7]

The development of copyright law may be traced back to the invention of the 'printing press' in 1436 that for the first time made it possible to reproduce and replicate books and other literary works by a fast and economical mechanical process, thereby sowing the seeds of modern day piracy and unauthorised duplications and subsequent commercial exploitation. There arose a need to recognise certain rights of the authors and also the extent of the right of the emerging class of 'stationers'.[8] Thus, came into existence the first statutory enactment on copyright law, the Statute of Anne, 1709, passed by Queen Anne in the United Kingdom. The statute for the first time introduced the concept of "limited ownership" as it restricted the time frame in which the publishers/stationers could commercially exploit a literary work. Also, the statute granted the monopoly rights of printing to the author for 14 years, thereby recognising the skill and effort of the author and providing a means of remuneration for the author. This laid down the basic principle that was mentioned before, of "safeguarding the interests of the author as the creator of the literary work". Consequent to the Statute of Anne, there were numerous other enactments made in the UK that sought to protect the authors of not just literary works, but also dramatic, musical and artistic works. The scope and extent of the rights of the authors were also gradually increasing as greater recognition was granted for their work. For example, the Dramatic Copyrights Act of 1833, generally known as the Bulwer-Lytton's Act, gave a '*right of representation*' to the authors in addition to the rights to publish their work. The Act of 1835, Talfourd's Act, extended this right to authors of musical work, thus creating two separate and distinct rights for authors of literary, dramatic and musical work: firstly, the right to publish, and secondly, the right to perform the work. It is pertinent to note at this juncture, that

7 As stated so succinctly in Art. 7 of TRIPS, "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

8 Stationers were usually, people who were printers and made some initial investment in the publication of the books. *See* Stewart, S., 'International Copyright and Neighbouring Rights', 1983, pp-20; as present in Ahuja, pp- 16.

the "*performing rights of the author*" mentioned in this Act are quite different from the "*rights of performers.*" There were a number of other legislations that sought to add to and define the copyright protection granted to authors, and finally the Copyright Act of 1911 formed a single code rationalizing and codifying the different laws granting protection to various works, including works that were not protected before, such as sound recording, cinematographic film, etc. However, in this scheme of development of copyright law, the focus was fixed strongly upon the *rights of the author of the work alone and performers were given the cold shoulder.*

Historically, there have been distinctions created in copyright law between 'authors' rights' and 'neighboring rights' (also known as 'related/entrepreneurial rights' or '*droits voisisns*'). While authors' rights refer to the 'work' of authors of literary, musical, artistic or dramatic work protected by copyright law, neighbouring rights include the right of performers, broadcasters, etc., that have for long remained unrecognized and unprotected in law. There is no denying that in the initial stages of formation of copyright law, a preference was given to protecting the rights of the author and the performers were relegated to a second-rate status. There have many reasons cited for the creation of this hierarchy and the neglect of the performers rights in the development of copyright law.

Firstly, since neighboring rights are deemed to exist only in 'Derivative Works', i.e., works that are resultant from an existing, copyrightable, original work, performers are often categorized as "less creative" than authors. Authors were granted copyright for creation of "original work" that may be an original idea or an original expression of an existing idea. Performers, on the other hand, were considered as only 'disseminating such original work'. Since the performers themselves were not considered to be creating any original work, they were excluded from the protection of copyright law.

Secondly, the prevalent societal norms at the time of the development of the nascent concept of copyright, by virtue of which 'actors and strolling players were regarded as vagrants by the law, and musicians, opera-singers, opera-dancers and

the like were considered classical examples of unproductive labor', led to the unwillingness of the law makers to recognize the right of performers and enact statutory legislations granting protection for the so-called 'vagrants' and their indulgence in 'unproductive labour'.

Thirdly, the problems on the ground of logistics, namely the extent of rights to be granted to performers in a 'composite performance' involving more than one performer. For example, in any performance where more than one person was involved there would arise the need to define the rights of each performer with respect to the other as well as the performance as a whole and the reluctance of law-makers to resolve this issue led to inaction on their part in recognizing performers right in any manner at all.

Fourthly, perhaps the most important reason for overlooking the creative effort of performers and ignoring the need for proper protection to the performers was the fact that performances by their very nature are 'ephemeral' or spontaneous. In the absence of any way to "fix" or record the performance, the performance would always be associated with the performer and would be accessible to only a limited number of people who saw the performance themselves.[9] Thus, even in the absence of any law, it was relatively simple for the performers to derive remuneration for their performance from the audience assembled before them merely by way of contractual relationship. However, with the advent of time and development of technology various methods were devised that made it possible to record a performance in a medium and publish, display or broadcast the performance again to a different audience without the permission of the performer and to the detriment of the rights of the performer. The recording of performances essentially meant that performances were no longer associated with the performer alone and *could be physically separated* from the performer. Thus, the performers in the absence of any regulation or legal protection of their rights were unable to prevent the commercial exploitation of the recorded performance.[10] In effect the performers

9 http://www.med.govt.nz/templates/MultipageDocumentPage____1649.aspx
10 http://www.musiclawupdates.com/articles/ARTICLE%2005PerformersRights.htm

were faced with the twin problems of: (a) Technological Unemployment, and (b) Bootlegging.

The first refers to situations where recorded performances were replacing the performer, in the sense that there was no longer any need for people to employ the performer since they could use the recorded performance itself. Thus, the performer was literally losing employment by virtue of the recording technology. The second was the more serious problem of 'unauthorized recording of the performance' without the permission of the performer and then commercially exploiting the recorded performance by selling it, making copies, distribution or even broadcast, all of which adversely affecting the rights of the performer.[11] In the face of these adversities, the performers raised a clamour for legal recognition of what they claimed was their lawful right over their own performance. It was argued that the performers provided the 'creative intervention' necessary in the portrayal of any 'work' created by the author.[12] It was further argued that 'neighbouring rights', though often overshadowed and over looked, had indeed developed parallel to the copyright law and was inextricably linked to the exercise of copyright law. Therefore, there was a growing need to afford legal recognition and protection to the neighbouring rights, such as the performers rights in today's world.

Performers Rights in India

Before the amendment made in 1994, the Indian Copyright Act 1957, contained *no provision in relation to the rights of the performer*. This is remarkable all the more because of the fact that the rights of translation or other acts of "derivative work" were afforded protection under the Act, in preference to the recognition of the performers' rights. As a result, performers in India were helpless to counter the problems of unauthorized recording of their performance and the exploitation of the same. The performers had no power to control the fixation and subsequent use

11 It is important to note that in the United Kingdom, certain restrictive and specific rights were available to performers to stop the unauthorized appropriation of performances (termed as "bootlegging") by virtue of the Performers Protection Acts. Indeed, subsequent development of Performers' Rights have primarily focused on the need to restrain the illegal use of 'live performances' as well
12 Ahuja, pp- 23

of their performance either when they performed live before an audience or in the case of a performance being broadcast over radio or television. It is in fact ironic that while the performers had no rights to protect or exploit their performance, the people making "records" of such performance were attributed copyright by the Act. Thus, they had the lawful rights to reproduce and distribute the record embodying the performance.[13] The problems of 'technological unemployment' of the performers and that of 'bootlegging' were rampant and there was no safeguard in the municipal regime of copyright law to protect the interests of the performer. Indeed, in an important decision by the Bombay High Court in ***Fortune Film International v. Dev Anand***[14], it was held that in the absence of any specific provisions in the Copyright Act, there existed no scope for performer's right in copyright law in India.

In this case, the famous movie star/actor Dev Anand claimed copyright in a film (*'Darling Darling'*) by virtue of his performance in the film. While the trial court accepted that the actor would have a copyright claim over his own work in the film, i.e., his performance, the Division Bench of the High Court overruled, saying that the performance of a movie actor in a cinematographic film was not protected by the Copyright Act in India.[15] This was the conclusion reached by the High Court on the basis of a number of factors: (i) It was held that "performance" *per se* could not be included in the definition of "work" in s. 2(y) of the Act.[16] Therefore, performance was not granted any copyright protection under the Act; (ii) the court refused to accept the argument that performance of an actor could be equated to 'artistic work' and the definition of the same in s.2(c) of the Act; (iii) the contention that performance was a part of 'dramatic work' was also countered as

13 Prior to 1994, S. 2 (w) of the Act defined record as "any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced therefrom, other than a sound track associated with a cinematograph film." S. 14 (d) of the Act lay down the rights in relation to owner of such 'records'.

14 AIR 1979 Bom 17

15 Ahuja, pp- 113, 114

16 S.2 (y) of the Copyright Act defines work as: (i) literary, dramatic, musical or artistic work; (ii) a cinematograph film; (iii) a sound recording, the last introduced in 1994 by way of amendment replacing "record".

the definition of dramatic work excluded the work in a cinematographic film.[17]; (iv) and finally, the court relied on one of the basic principles used to deny recognition of performers' rights, by stating that granting individual actors any right in a cinematographic film would create unnecessary confusion and uncertainty with regards to the extent of the rights of each copyright holder, either in part or for the whole of the film. Therefore, this case in 1979, almost two decades after the recognition of performers' rights in the Rome Convention of 1961, refused to take into account the international move towards expanding the scope of copyright protection, and contrary to prevalent international principles, declined to include performers' rights in the fold of Copyright law in India. It, therefore, became an established principle that performers had no legal recognition or protection under the Copyright Act in India and this sorry state of affairs continued until 1994 when, finally, amendments were made to bring the domestic law on par with international standards.

Further, TRIPS Agreement mandated that member states had to introduce the provisions of the Agreement into the municipal regime of the country. As a result, India being a party to the TRIPS Agreement had to introduce amendments in 1994 to incorporate provisions for "Performers Rights" at long last into the Copyright Act of 1957.

The amendment of 1994 introduced the definition of "performer" in Section.2 (qq) and altered the definition of "performance" in Section.2 (q) of the Act. Section. 2 (qq) of the Copyright Act, 1957 defines "performer" as inclusive of: "an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance." This is a fairly broad and inclusive definition that may be widely interpreted to include other 'performers' as well. It is interesting to note that while the definition is based primarily on the definition of performer provided in the Rome Convention[18], certain additions have been made, such as 'juggler, conjurer, and snake charmer', keeping in mind the Indian sensibilities and to give a particular Indian flavor to the definition. This move is to be appreciated since it shows the intent of the legislators to make

17 *See* S. 2 (h) of Copyright Act, 1957.
18 *See* Ch.2, pp- 11 of this paper.

the protection of performer's rights available to every class of performers in India. Section 2 (q) of the Act was also amended so that it now defines "performance" as "in relation to performer's right, means any visual or acoustic presentation made live by one or more performers." Apart from the changes made in the definition clause, the amendment of 1994 most importantly introduced a new provision for "Performers Rights" in Section 38 of the Act. This section primarily lays down the nature of the performer's rights, the duration as well as restrictions upon such rights.

Section 38 grants to the performer the multiple rights of:

(i) Making a sound recording or visual recording of the performance,

(ii) Reproducing a sound recording or visual recording of the performance,

(iii) Broadcasting the performance, and

(iv) Communicating the performance to the public otherwise than by broadcast.[19]

In this regard it is relevant to consider the UK Copyright, Patents and Designs Act of 1988 and the rights granted to the performers therein. By virtue of the 1988 Act that was enacted to incorporate the mandate of the EC Directive on Rental and Related Rights the performers in the UK have three categories of rights:[20]

(a) *Non-property Rights* – to prevent 'bootlegging' and illicit recordings of the performance,

(b) *Property Rights* – in relation to the performance, which would include the right to make and issue copies of the recordings of the performance, and most importantly,

(c) *Remuneration Right* – wherein the performer is to be paid royalty by the owner of sound recording of the performance in every case where such sound recording is played in public.

19 *See s.* 38(3) of the Copyright Act, 1957

20 The EC Directive required the member states to grant rights of controlling lending and rental to be given to the performers as well as providing for remuneration to the performer when copies of such performance are rented. Also, it requires performers to be given the *exclusive rights* to authorize or prohibit the fixation and broadcasting or communication of the same.

Thus, it is quite apparent that the scope of performers' rights in the UK is much broader and to a tangibly higher extent as compared to the performers' rights and protection present in the Indian Act. While in India the Act only seeks to protect the *property* and *non-property rights* of the performer to a limited extent; there is no mention of the all important *remuneration right* that would ensure royalty to the performer in every case of public communication of his performance. This is a major lacuna in the Copyright Law in India that needs to be addressed in order to ensure that greater protection is forthcoming for the performers.

Section 38 (2) of the Act, consistent with Article 14 (5) of the TRIPS Agreement, provides that performers right "shall subsist until *fifty years* from the beginning of the calendar year next following the year in which the performance is made." Section 38 (4) of the Act, based on Art. 19 of the Rome Convention 1961, provides that "once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of sub-sections (1), (2) and (3) shall have no further application to such performance."[21] Section 39 of the Copyright Act seeks to create exceptions to the performers' rights in addition to the "Fair Use Clause", i.e., Section 52 of the Act, as it lays down conditions when the performers' right will *not* be deemed to be infringed.

Finally, it is important to note that the Copyright Act of 1957 does *not* provide any "Moral rights" to the performers. Section 57 of the Act deals with "Authors' special rights" wherein it grants the moral rights of paternity and integrity to the "author" alone. No provision is made for granting moral rights to the performer. Also, since India is not a party to the WIPO Performance and Phonograms Treaty of 1996, there is no provision for moral rights of performer in the copyright law in India. This is another lacuna in the legislation that needs to be addressed summarily. The granting of moral rights to performers is a small step towards granting performers a status and standing equal to authors enjoying copyright protection. So recognition of the moral rights of the performer will strengthen their rights under the Act.

21 Ahuja, pp- 116

Conclusion

At the end of this paper it can be concluded that the legal landscape in India has proven inadequate to protect the myriad rights that performers have in their performance. Today rapid technological change, inter connected entertainment markets and the quantum of the unprotected folklore in India have all made the need of protection more urgent. In this paper, the researchers began with a discussion of the development of "neighbouring rights" as a parallel scheme of rights to the copyright law, with special emphasis on performers rights as a part of such 'neighbouring rights'. The researchers looked into the historical negligence of performer's rights and the reasons for the same, countering them with the modern times and how the development of technology has made it imperative to develop legal protection for the performers.

Finally, the researchers made an analysis of the performer's rights as it exists in India, before and after the amendment of 1994. Also, the researchers sought to trace the development of performer's right by way of a study of the chief international agreements or treaties. While perusing the relevant provisions of the act in relation to performer's rights, the researchers also sought to compare and contrast the rights guaranteed in the Copyright Act of India of 1957 with the protection and rights afforded to performers under the UK legislation. Although it is undeniable that the development of copyright law in the UK has been a much longer process thus resulting in greater benefits over time, it remains a fact that to bring the domestic law up to notch with international standards the Copyright Act of India needs to incorporate a more comprehensive scheme of protection for performers.

At the present time, there have been growing demands by the performers to bring their rights on par with other copyrighted and protected authors. The distinction between neighbouring rights and copyright is progressively getting blurred as performers have laid claims of copyright protection over and above the 'secondary rights' that they are granted at present. The debate over 'copyright for performers' is one that may soon be nearing its end and in such circumstances the

law would also need to be adept at accepting and altering according to the prevalent conditions and demands of society.

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