

# Performer's Right: Its Development and Protection

-Isha Kaushal & Z. Zakhar Naved\*

## ABSTRACT

*Performers have long agonised owing to the sparse protection of law afforded to them. It was primarily after the threat that the advent of rapid technological advancement posed to the livelihood of performers that the law took it upon itself, and interceded in 1994 to protect the performers by way of an amendment to the Copyright Act, 1957. Alas, it failed to achieve the desired objective, primarily on account of the limited scope and extent of such rights. Eventually, it was the Copyright (Amendment) Act, 2012 which breathed new vitality to the rights of a performer. The Parliament, after much deliberation, and being mindful of the misery of performers, passed the 2012 Amendment which inter alia recognises a bundle of rights, being sui generis in nature. The Amendment was much required in order to dissuade people from exploiting a performer's right to dictate the fixation as well as multitude of their succeeding performances. Furthermore, since performer's right is a relatively new concept in India, it requires much deliberation, especially in light of limited judicial interpretations in this regard. It is against this backdrop that this paper seeks to examine the development of performer's right and the surrounding questions emanating therefrom, chiefly in context of India.*

---

\* Isha and Zakhar are 5<sup>th</sup> year students of law from the Faculty of Law, Jamia Millia Islamia University, New Delhi. The authors may be contacted at zakhar1996@gmail.com.

## INTRODUCTION

Art in its multifarious manifestations, and its contribution within the framework of culture and creativity, has always been duly acknowledged. However, performers who manage to eke out a living by their relentless display of creative prowess had been given a backseat. Several artists who have carved out a niche in the hearts of people through their mesmerizing creations, are forced to live a life in poverty and obscurity.<sup>1</sup> Prior to 1994, the legal landscape in India had turned a blind-eye to the supposedly intrinsic rights of the performers. This was in disregard of the apparent fact that a performer's creative intervention is essential in order to give life to the work of an author.<sup>2</sup> Accordingly, the justification for protection of performer's right is in both the utilitarian arguments that justify all intellectual property rights, and the natural justice discourse, which sees an individual performance as being a part of his body.<sup>3</sup>

In grip of this emotion, it is to be underscored here that performer's rights are also known as 'neighbouring rights'. The rationale behind it is that while functioning as intermediaries in disseminating the works of the authors to the public, performers gain a parallel interest in the copyrighted work.<sup>4</sup> Thus, there exists a close proximity between the performer-audience, as the audience starts associating the performance with the performer. The reclusiveness of Indian regime to the rights of a performer produced a sore, the panacea of which was the Copyright (Amendment) Act, 1994. However, the rights even then recognized were very minimal and restrictive in essence, thus being grossly inadequate. Act was revamped by the Copyright (Amendment) Act, 2012 in order to accommodate the dangers posed by digital technology. But, it would be remiss to not mention that there still exists certain vagueness and ambivalence in context of the true nature and extent of such rights. This will be discussed below, while strenuously averting that a fine tuning through consultative process is much required.

## NEED FOR PROTECTION OF PERFORMER'S RIGHT

Before dwelling into the whole concept of performer's right, it becomes imperative to analyse the dire need for protecting the same. The advent of internet and sophisticated digital technologies has resulted in "technological unemployment"<sup>5</sup> of the performers, as once recorded, the performance can be repeated in public without the necessity of engaging the

---

<sup>1</sup> Statement by Mrs Sushma Swaraj, *Copyright (Amendment) Bill, 2012*, Lok Sabha (22/05/2012).

<sup>2</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, UNDERSTANDING COPYRIGHT AND RELATED RIGHTS, 28 (2<sup>nd</sup> ed. 2016).

<sup>3</sup> BENTLY L., ET AL, INTELLECTUAL PROPERTY RIGHTS 33 (Oxford University Press, London 2004).

<sup>4</sup> A.K. KOUL & V.K. AHUJA, LAW OF COPYRIGHT: FROM GUTENBERG'S INVENTION TO INTERNET, 19 (Delhi, 2001).

<sup>5</sup> ADAM SMITH, THE WEALTH OF NATIONS 144, International Copyright and Neighbouring Rights (London, 1983).

performer anymore. Therefore, it cannot be called justice if all the benefits of this technological penetration are usurped by owner of copyrighted work. Even, Krishna Iyer, J. had noted as early as in 1977, that disentitlement of performers like musician to copyright is un-Indian; and that such rights should be recognized.<sup>6</sup> In a similar thread, even Parliamentarians went on to the extent of saying that a 'civilised society' is one, which respects its literary figures and creative talent.<sup>7</sup>

The creative intelligence of man is displayed in multiform ways of aesthetic expression but it often happens that an economic system so operate that artistic or literary creativity in man is often exploited.<sup>8</sup> A study sponsored by Ministry of Human Resource and Development showed that as early as in 1996, the rough average estimate of infringement of performer's right stood at 21%, which consequently led to loss to the tune of Rs. 23 crores annually.<sup>9</sup> Thus, it is noticeable that many of the artists, who are exploited by the producers/authors, are living in misery.<sup>10</sup>

It is for this reason that the Parliament felt the need for introducing a robust framework for protection of such rights, and consequently the Copyright (Amendment) Act, 1994 was brought into force. Additionally, another reason for said Amendment was to bring the national law i.e. the Act in harmony with Rome Convention, 1961<sup>11</sup>, being the first treaty to enumerate provisions exclusively for neighbouring rights. Moreover, following conclusion of Uruguay Round of Multilateral Trade Negotiation on December 15, 1993, the Parliament enacted the Copyright (Amendment) Act, 1994 as it became clear by then that it would be obligatory for India to protect the rights of performer in order to become a member of the upcoming treaty; and the TRIPs Agreement consequently came into force in 1995.<sup>12</sup>

As a point of information, in 1996, a significant international convention had been adopted by international community aimed at protecting rights of performers, namely WIPO Performances and Phonograms Treaty (WPPT). As its Preamble elucidates, it was an acknowledgement

---

<sup>6</sup> Indian Performing Rights Society v. Eastern Indian Motion Pictures Association & Ors., (1977) 2 SCC 820.

<sup>7</sup> *Supra* note 1.

<sup>8</sup> *Supra* note 6.

<sup>9</sup> National Productivity Council, *Study on Copyright Piracy In India*, sponsored by Ministry of Human Resource and Development, Government of India (December, 1999). Available at: <http://copyright.gov.in/documents/study%20on%20copyright%20piracy%20in%20india.pdf>

<sup>10</sup> Statement by Dr Anup Kumar Saha, *Copyright (Amendment) Bill, 2012*, Lok Sabha (22/05/2012).

<sup>11</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation. It is pertinent to note that though India being a signatory to this convention, have not ratified the same. See also, World Intellectual Property Organization- Administered Treaties.

Available at: [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=17](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17)

<sup>12</sup> V.K. AHUJA, *INTELLECTUAL PROPERTY RIGHTS IN INDIA* 98 (2<sup>nd</sup> ed. Lexis Nexis, 2015).

towards the profound impact of the development, and convergence of information and communication technologies on the production and use of performances.<sup>13</sup> However, as pointed out in Rajya Sabha during year 2010,<sup>14</sup> that India unfortunately was not even a signatory to it, despite the Amendment seeking to comply with provisions of these treaties.<sup>15</sup> It is only as recent as in July, 2018, that the Union Cabinet has approved the proposal to accede to the above-mentioned treaties.<sup>16</sup> These conventions gain significant importance while protecting the interests of a performer in international scenario. This is for the reason because each Contracting State would then be under an obligation to accord “national treatment”<sup>17</sup> i.e. treating the nationals of other Contracting States at par with its own nationals.

### MEANING AND AMBIT OF ‘PERFORMANCE’ AND ‘PERFORMER’

First and foremost, a clear understanding of ‘performer’ is required, to meaningfully engage with the legal questions surrounding performer’s right. The term has been defined under Section 2(qq)<sup>18</sup> of the Act. The word “include” used in the definition connotes that it is not exhaustive, since the word “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute.<sup>19</sup> By extension, since the closing words of the definition mentions “any other person who makes a performance”, it becomes exigent to understand the implication of ‘performance’ in this context, which has been defined under Section 2(q)<sup>20</sup> of the Act.

There is an element of ambiguity in as much as the word ‘live’ finds mention within the last leg of section 2(q) of the Act. Thus, the question which further arises for consideration is whether performances are restricted to only ‘live performances’. Explanation 3 to Rule 68 of Copyright Rules, 2013 answers the said question in negative, providing that performance

---

<sup>13</sup> RUTH L. OKEDIJI, THE REGULATION OF CREATIVITY UNDER THE WIPO INTERNET TREATIES, 77 Fordham L. Rev. 2379 (2009).

Available at: <http://ir.lawnet.fordham.edu/flr/vol77/iss5/12>

<sup>14</sup> Statement by Mr P. Rajeeve, *The Copyright (Amendment) Bill, 2010*, Rajya Sabha (17/05/2012).

<sup>15</sup> Department-Related Parliamentary Standing Committee on Human Resource Development, Rajya Sabha, *Two Hundred Twenty-Seventh Report on The Copyright (Amendment) Bill, 2010*.

<sup>16</sup> *Cabinet approves accession to WIPO Copyright Treaty, 1996 and WIPO Performance and Phonograms Treaty, 1996*, Press Information Bureau, Government of India. <http://pib.nic.in/newsite/PrintRelease.aspx?relid=180389>

<sup>17</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, art. 4, October 26, 1961; 496 UNTS 43. See also, WIPO Performances and Phonograms Treaty, art. 4, December 20, 1996; 2186 U.N.T.S. 203.

<sup>18</sup> “Performer” ‘includes’ an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.

<sup>19</sup> *Dilworth v. Commissioner of Stamps*, 1899 AC 99; *Mahalakshmi Oil Mills v. State of Andhra Pradesh*, (1989) 1 SCC 164.

<sup>20</sup> “Performance”, in relation to performer’s right, means any visual or acoustic presentation made live by one or more performers.

includes sound and visual records in the 'studio or otherwise'. It is pertinent to note that even before the aforementioned provision, the Delhi High Court<sup>21</sup> as early as in the year 2006 has held that every performance has to be live in the first instance whether it is before an audience or in a studio. Therefore, if a performance is recorded and thereafter exploited without the permission of the performer, then performer's right is infringed.

Nonetheless, how the word 'live', implying a restrictive approach, has the overtone of such a liberal meaning is still a moot question. Without an iota of doubt, recorded versions should come within the scope of performance in order to save performers from being denuded of their rights. However, in order to give substance to this effect, suitable amendment in the parent Act should be resorted to. The primary impulse for such manoeuvre arises from the limitation placed on courts, that is, while interpreting a provision of statute not even a single word can be added or subtracted that may amount to changing the fabric of which an Act is woven.<sup>22</sup> This is in consonance with the legal maxim "*A verbis legis non est recedendum*", which means "From the words of law, there must be no departure".

Furthermore, the implications of 'defining' the word performance ought to be deliberated upon. Owen Morgan denotes "performance" to mean "the transitory activity of a human individual that can be perceived without the aid of technology and that is intended as a form of communication to others for the purpose of entertainment, education or ritual."<sup>23</sup> However, there arises reasonable apprehension against prescribing to such an enlarged meaning of "performance", especially as present in the Act. This is manifest from the Delhi High Court judgment wherein section 2(q) of the Act was construed liberally. In case of *Star India Pvt. Ltd. v. Piyush Agarwal & Ors.*,<sup>24</sup> it was observed that even a cricket match falls within the definition of "performance"; and in context of visual recording, the various *dramatis personae* which means and include cricket players, umpire and commentators are all "performers". The judgement palpably widens the scope of this definition. It is for the reason leant by this yardstick, even Billy Bowden and Malinga would have rights in their unique style of umpiring and bowling, respectively. This judgement admittedly does not constitute a judicial overreach keeping in mind the language of section 2(q) of the Act, which when read in isolation, is capable of wide interpretation. However, it does pose some inextricably intertwined questions.

---

<sup>21</sup> Neha Bhasin v. Anand Raaj Anand, (2006) 132 DLT 196.

<sup>22</sup> Rohitash Kumar & Ors. v. Om Prakash Sharma & Ors., AIR 2013 SC30. See also, Nasiruddin & Ors. v. Sita Ram Agarwal, AIR 2003 SC 1543.

<sup>23</sup> L. BENTLY & B. SHERMAN, INTELLECTUAL PROPERTY LAW, 342 (4<sup>th</sup> ed. Oxford University Press, 2014)

<sup>24</sup> 2014 (58) PTC 169 (Del).

As a consequence, it becomes vital to put the interpretation clause pertaining to ‘performance’ under scrutiny. In drawing a parallel comparison in international context, it is rather interesting to note that neither the WIPO Performances and Phonograms Treaty (WPPT), nor the International Convention for protection of Performers, Producers and Phonograms and Broadcasting Organisation, 1961 (Rome Convention) goes to the extent of defining ‘performance’. Both these Conventions provides for the definition of performer only, while maintaining restraint in defining performance. Similarly, the Intellectual Property Code of Philippines follows the same format, and while it defines performer under section 202.1 of its Code, it does not define performance. Additionally, under copyright regime of United Kingdom, section 181<sup>25</sup> of the Copyright, Design and Patents Act (CDPA), 1988 also leaves the definition of performance upon judicial discretion and essentially on a case to case basis, by just stating that a performance is one ‘given by a qualifying person.’ In extension, ‘qualifying person’ has been enumerated to include a British citizen or citizen of any contracting state to Rome Convention.

Countries like New Zealand have defined performance in a more comprehensive and fairly confined way. The Act expressly excludes the performance of sporting activity and reading, recital or delivery of any item of news from the ambit of performance. India, however, seems to have taken a leaf out of Canada’s wide definition of the term in its Copyright Act of 1985<sup>26</sup>. Regardless, it is safe to presume that such an open-ended definition can have far-reaching implications. It is for this reason that a revised definition of the term ‘performance’ along the lines of that in United Kingdom or Philippines might prove to be advantageous. Perhaps, the definition performance is better left ‘described’ than to be ‘defined’.

#### **CONUNDRUM ON NATURE OF PERFORMANCE**

As a general rule, copyright subsists in classes of ‘works’ elaborated under section 13 of the Act. However, it is pertinent to note that in spite of the 1994 and 2012 amendments to the Act, the definition of ‘work’ under section 2(y) of the Act still does not include performer’s performance as a class of work which is perplexing.

---

<sup>25</sup> A performance is a qualifying performance for the purposes of the provisions of this Part relating to performers’ right if it is given by a qualifying individual (as defined in section 206) or takes place in a qualifying country (as so defined).

<sup>26</sup> Section 2, Copyright Act, 1985 - performance means any acoustic or visual representation of a work, performer’s performance, sound recording or communication signal, including a representation made by means of any mechanical instrument, radio receiving set or television receiving set

Irrespective of that, in case of *Star India Pvt Ltd. v. Piyush Agarwal & Ors*<sup>27</sup> and *Sanjay Kumar Gupta & Ors. v. Sony Pictures Network India Pvt. Ltd. & Ors.*<sup>28</sup> Valmiki Mehta, J held that a conjoint reading of sections 13 and 38 leads to the conclusion that copyright subsists in seven classes of 'work', performer's performance being one of them. Further, it was pointed out that even "though the definition of work may not include performer's right, , this section 2(y) has necessarily to be read with section 38 which provides for a performer to have a copyright in his performance and therefore performance is a work in which copyright is created under the Act." Per contra, an earlier judgement in case of *Music Broadcast Pvt Ltd. v. Indian Performing Right Society Ltd.*,<sup>29</sup> held that section 13 and 38 provides for different rights in different work altogether.

It seems plausible to subscribe to the view adverted in *Star India*<sup>30</sup> case. This is for the reason that *Music Broadcast Pvt. Ltd.*<sup>31</sup> dealt with law prior to Copyright (Amendment), 2012, wherein the law encompassed only limited nature of performer's right. Furthermore, during the passage of the 2012 Amendment Bill in the Parliament, it was intended to make available all the rights to the performers equally, which already existed in respect of authors and others.<sup>32</sup>

However, sections 2(ff) and 2(xa)(a) of the Act defining "communication to the public" and "Rights Management Information", respectively, appear to imply disagreement with this proposition. The opening leg of section 2(ff) of the Act defines the term as "making any work 'or performance' available..." Similarly, section 2(xa)(a) defines the term as "the title or other information identifying the work 'or performance'." Evidently, both terms are used in a dissimilar fashion which insinuates that there was absence of intention in keeping copyright (in works) and performer's performance at par. It is supposedly apparent that, performer's right differs from copyright.<sup>33</sup>

It is germane, in this context, to mention that a statute has to be read as a whole, and the language of a section may affect the construction of another.<sup>34</sup> In addition to this, force may be

---

<sup>27</sup> *Supra* note 24.

<sup>28</sup> AIR 2018 Delhi 169.

<sup>29</sup> (2011) 47 P.T.C. 592 (Bom.).

<sup>30</sup> *Supra* note 24.

<sup>31</sup> *Supra* note 30.

<sup>32</sup> Statement by Mr. Kapil Sibal, *Copyright (Amendment) Bill, 2012*, Lok Sabha (22/05/2012).

<sup>33</sup> WORLD INTELLECTUAL PROPERTY ORGANIZATION, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, 1 (2000). SEE ALSO, SANJAY PANDEY, NEIGHBOURING RIGHTS PROTECTION IN INDIA, 9 *Journal of Intellectual Property Rights* (2004).

<sup>34</sup> TK Vishwanathan, *Legislative Drafting- Shaping the Law for the New Millennium*, INDIAN LAW INSTITUTE 211(2007).

found from Section 38 of the Act which provides for performer's right as "*special rights*"; and that this right shall subsist for 50 years, as opposed to 60 years rule under copyright protection. Hence, in entirety, it unfolds that the true nature of performer's right is still not clear, and perhaps warrants further deliberation by the Supreme Court.

Apparently, the Court in the case of *Star India*<sup>35</sup> was guided by the teleological approach while interpreting the Act. It essentially means that judges instead of going by the literal meaning of the words or by the grammatical structure of the sentence, go by the design or purpose which lies behind it.<sup>36</sup> However, due to reasons in preceding paragraph, it is asserted that court should have adhered to The Literal Rule by curtailing itself from treating performer's right beyond a class of 'special rights'. It refers to giving plain meaning to the Act.<sup>37</sup> The situation which emerges certainly poses a dilemma as to whether the true intention of legislature has been given effect to, or not.

A hypothetical situation may be taken to illustrate as to why such an unbolted definition might result in clashing of rights of an author and a performer. By definition of section 2(h) of the Act, recitation is included under "dramatic work"; and recitation of news by an anchor (performer) would also come within the ambit of "performance", having regard to the observations made in *Star India*<sup>38</sup> case. Now, both sections 14(a)(ii) and 38A(a)(ii) provide an author and performer with an 'exclusive right of issuance of copies', which is mystifying. Further, it may not be out of context to mention that from a bare perusal of both sections, it can be understood that there are variations in the nature and kinds of rights available to both performers and authors.

Placing both performer's right and copyright protection on the same pedestal as of copyright protection may not be viable because it seems to present an idea of 'dual' ownership, which would lead to legal disputes between a performer and author of a work. Further, apprehension pertaining to the dilution of ownership was also raised by some stakeholders before the Parliamentary Standing Committee. The Committee, after consultation with the concerned Department, clarified that the 'rights of performers were subject to the rights of author of the work'.<sup>39</sup> This line of argument finds further force in section 38A of the Act which enumerates the exclusive right of performers and states that the right of performers are 'without prejudice

---

<sup>35</sup> *Supra* note 24.

<sup>36</sup> *Buchanan and Co. v. Babco Limited*, [1977] QB 208.

<sup>37</sup> *Supra* note 35. See also, *Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd. & Ors.*, (2003) 2 SCC 111.

<sup>38</sup> *Supra* note 24.

<sup>39</sup> *Supra* note 15.

to the rights conferred on authors'. This can be reiterated through Article 1 of Rome Convention, 1961 which spells out that no provision of the Convention should be interpreted in such a way that would be prejudicial to the protection afforded to 'copyright' in literary and artistic works. It may be informative to refer to the case of *Kajal Aggarwal v. The Managing Director, VVD & Sons P. Ltd.*<sup>40</sup> wherein court refused to curtail prescribed period of copyright protection afforded to respondent/'author' on basis of a contract to contrary with petitioner who was the performer. Further, it was observed that on the completion of the production of Cinematography film, the copyright in it would be vested only on the 'author' of the copyright, and it is only him/her, who can exploit the same and the performer as such cannot claim any individual right.

### **DEVELOPMENT OF PERFORMER'S RIGHT IN INDIA**

To analyse the *sui generis* nature of performer's right, it is necessary to examine it in two stages, that is, prior to and subsequent to the Copyright (Amendment) Act, 2012. Prior to the Amendment, these rights were limited. It was only after Copyright (Amendment) Act, 1994 that performer's right came to be recognized. Before this Amendment, the question whether copyright subsisted in the performance of a performer was decided by the Bombay High Court in negative in the case of *Fortune Film International v. Dev Anand*<sup>41</sup>. One of the issues before the court was to decide whether copyright subsisted in the work of a cine artist under the Act. It was contended on behalf of Appellant (producers) that under section 2(y) of the Act, 'work' only covers work which is tangible in nature. On the other hand, the respondent contended that such performance is covered under the ambit of 'dramatic work' or 'artistic work'. The Court while rejecting the contentions of the respondent held the case to be *res integra* (untouched matter) which needs to be decided in accordance with statutory provisions of the Act, which does not recognize the performance of an actor as 'work'. Similarly, Supreme Court also observed that performers like singer have no copyright in the work.<sup>42</sup>

Be that as it may, even the Copyright (Amendment) Act, 1994, which ultimately recognized these special rights, proved to be of limited practical value and failed to give any substantial justice to the performers due to limited protection afforded to performers. It merely provided

---

<sup>40</sup> MANU/TN/1985/2017

<sup>41</sup> AIR 1979 Bom. 17. In this case, the film producers entered into a contract to engage the popular cine actor Dev Anand in their Hindi movie "Darling Darling" and to pay him an amount of Rs. 7 lakh as remuneration. Para 7 of the said agreement further provided that the copyright subsisting in the work of the actor shall vest in him, unless full payments is made by way of annuity policies of L.I.C. The actor subsequently sought an injunction in some named territories as mentioned in agreements and other unnamed territories, until full payment is made to him.

<sup>42</sup> *Supra* note 6.

that those who makes or reproduces the sound or visual recoding of a performer without his 'consent' shall be deemed to infringe performer's right. However, any moral right such as right to be acknowledged or prevent work from distortion, and any exclusive/economic right such as entitlement to receive royalty were earlier clearly absent from the purview of the Act.

Ultimately, it is the Copyright (Amendment) Act, 2012 which has proved to be a stepping stone towards recognising protection of performer's right in a more holistic manner. This amendment was also intended at bringing the Act in harmony with WIPO Performances and Phonograms Treaty (WPPT) and WIPO Copyright Treaty (WCT).<sup>43</sup> The effect of such protection can be seen in the cases of *The Indian Singers Rights Association v. Chapter 25 Bar and Restaurant*<sup>44</sup> and *The Indian Singers Right Association v. Night Fever Club and Lounge*.<sup>45</sup> In both these cases the Delhi High Court held that the exploitation of the performances of the members of the plaintiff by the defendant by playing the said performances in its bar and restaurant without obtaining the Performer's Rights Clearance Certificate constitutes an infringement of the R3 (Right to Receive Royalties) of the members of the Plaintiff Society. However, it is pertinent to note, rather surprisingly, that both these judgements were delivered 'ex-parte'.

However, as discussed under previous heads, there is still confusion regarding the *sui generis* nature of performer's rights. The judgement delivered by Hon'ble Kerala High Court in case of *Anupama Mohan v. State of Kerala & Ors*<sup>46</sup> may be taken as a representative example. In this case, the petitioner, a famous Kuchipudi dance teacher, claimed that visual recording of the performances of her students in a State level dance competition was being reproduced on the internet and is being sold in digital format with connivance of the organizers, and without their consent. The recordings were meant to avoid complaints about the judgment of performance. The Hon'ble Court instead of going into the nitty-gritty of the performer's right in the case, directed the petitioner to approach the Director of Department of Higher Secondary Education with representation in order to consider in what manner the audio-video recordings are to be regulated, since it is the authority under which the event is being organised. Thus, petitioner was bereft of the benefit of judicial interpretation.

---

<sup>43</sup> ZAKIR THOMAS, OVERVIEW OF CHANGES TO INDIAN COPYRIGHT LAW, 17 Journal of Intellectual Property Rights 324 (2012).

<sup>44</sup> (2016) 159 D.R.J. 244.

<sup>45</sup> (2016) 234 D.L.T. 22.

<sup>46</sup> 2015 SCC OnLine Ker 39420.

### INTERNATIONAL SCENARIO

Since performer's rights is still in its formative stage, a glance at development of similar rights in international context may be used, as a comparative lens, to shed some useful light upon the *sui generis* nature of such right. *Firstly*, United Kingdom may be taken as an illustrative example, which is party to the Rome Convention, 1961. Initially protection of performer's right was achieved there through Performers Protection Acts<sup>47</sup> as early as in 1925. However, back then the available sanctions were restricted to criminal penalties and it conferred no civil rights of action by explicit terms.<sup>48</sup> Nevertheless, it was the Whitford Committee<sup>49</sup> which was of the view that performers should enjoy a civil right of action to injunction and damages, though it considered that this should not amount to copyright, even though it did not vouchsafe what limitations ought to be imposed to this end.<sup>50</sup> Following the lead of this Committee's recommendation, the Queen's Bench in the case of *Rickless v. United Artist Corp.*<sup>51</sup> held that a performer could proceed for an injunction or damages as one of a class specifically protected by the Act.<sup>52</sup> Incidentally, the court held that performers do have a civil right; and that such a right prohibits the making of an unlawful film without the consent of performer, even though he might be dead.<sup>53</sup>

Presently, performer's rights in U.K. are dealt by Part II (Section 180-205B) of the Copyright, Design and Patents Act (CDPA), 1988 which exclusively deals with rights in performances including moral and economic rights. It has further been held that provision of CDPA, 1988 (sub-clause 3 of section 180) applies retrospectively and even live performance of a singer, prior to the Act coming into force, is also protected since it is a 'qualifying performance'.<sup>54</sup>

---

<sup>47</sup> Initially the Dramatic and Musical Performers Protection Act, 1925; and subsequently the Performers Protection Acts 1958-1972.

<sup>48</sup> The Copyright Act, 1956 was passed after the 1952 report of Gregory Committee (Report of the Copyright Committee (Cmd 8662)). The committee was of the view that 1925 Act did not create private rights for performers and advised against the introduction of such a right.

<sup>49</sup> Cmmd. 6732, Section 412.

<sup>50</sup> W.R. CORNISH, *INTELLECTUAL PROPERTY: PATENT, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS* Para 13-027 (2<sup>nd</sup> ed. 1999).

<sup>51</sup> [1987] 1 All. E.R. 679.

<sup>52</sup> Sir Nicolas Browne-Wilkinson, V-C, observing that Parliament did have the necessary intention that the limited class of person for whose protection the 1958 Act was passed i.e. performers were to have private rights. See also, Hector MacQueen & Charlotte Waelde, *Audio-Visual Performers' Right in the U.K (World Intellectual Property Organisation, Geneva, 2003)*.

Available at: <http://www.era.lib.ed.ac.uk/bitstream/handle/1842/2188/Audio>.

<sup>53</sup> In this case, the defendant made a film using take-outs from previous films in Pink Panther series, starring the late Peter Sellers. Furthermore, the court held that since such performer right is not personal and does not extinguish upon his death, the defendant should have acquired the consent of representative of late Peter Sellers.

<sup>54</sup> *Experience Hendrix L.L.C. v. Purple Haze Records Ltd. and Lawrence Miller*, [2005] E.W.H.C. 249 (Ch.). The case was brought by plaintiff (the successor in title to the Jimmy Hendrix estate) against the defendant for the

In a different slant, in the U.S.A., the principal mechanism for protection of the rights of performers is imposition of tortious liability on the grounds of unjust enrichment, unfair competition and defamation. The doctrine used by American Courts, right to publicity,<sup>55</sup> is predominantly used in cases of infringement of performers right.<sup>56</sup> Building on this premise, the court in cases of *Lahr v. Adell Chemical Co.*<sup>57</sup> and *Midler v. Ford Motor Co.*<sup>58</sup> restrained the defendants from selling particular products using imitations of the plaintiff's voice, who had acquired distinctive attributable voices.

However, the theory of "work made for hire" removes the roadblock and hurdle in the protection of such right.<sup>59</sup> An illustrative case in this regard is of *Baltimore Orioles v. Major League Baseball Players Association*<sup>60</sup> where the court, *inter alia*, held that because the players are employees and their performances before broadcast audience are within the scope of their employment, the telecast of games which consists of player's performance, are works made for hire.<sup>61</sup> The court herein further held that Clubs copyright in the telecast of baseball games pre-empt the player's right of publicity in their game time performances.

In U.S., however, the Copyright Act does not place performance within the spheres of copyrightable work.<sup>62</sup> Another peculiar case with regard to protection of performers under copyright law of U.S. is of *Garcia v. Google, Inc.*<sup>63</sup> In the instant case, the movie producer transformed plaintiff's five-second acting performance for a film titled *Desert Warrior* into part of a blasphemous video proclamation against Prophet Mohammed in *Innocence of Muslims*, as a consequence of which she even received death threats from agitators. Film

---

release of an album with a performance by Jimmy Hendrix and his band that had been recorded in Stockholm in 1969.

<sup>55</sup> Right of Publicity prevents the unauthorised commercial use of an individual's name, likeness or other recognizable aspect of one's persona.

<sup>56</sup> SANHITA AMBAST, *PROTECTING PERFORMERS' RIGHT: DOES INDIA NEED LAW REFORM*, 13 Journal of Intellectual Property Rights 574, 576 (2008).

<sup>57</sup> 300 F.2d.256. The plaintiff sued for selling Lestoil by means of a commercial in which an imitation of Lahr's voice accompanied a cartoon duck.

<sup>58</sup> 849 F.2d. 460. The case centres on the re-recording of a song of plaintiff by the defendant in a commercial (after plaintiff expressly denied from doing it herself). However, the court observed that every imitation of a voice to advertise merchandise is not actionable. It is only when distinctive voice of a professional singer is deliberately imitated.

<sup>59</sup> LITMAN, JESSICA D. "PERFORMER'S RIGHTS AND DIGITAL SAMPLING UNDER U.S. AND JAPANESE LAW." Law Quad. Notes 32, no. 2 (1988): 36-43.

<sup>60</sup> 805 F.2d. 663. The appeal arose out of a long standing dispute between the parties regarding the ownership of broadcast rights to the player's performance during Major League Baseball games.

<sup>61</sup> See also, Nimmer, § 5.03 [D].

<sup>62</sup> Cindy Lee Garcia v. Google, Inc., MANU/FENT/0549/2014. See also, Gervais, Daniel (2015), "The Protection of Performers' Under U.S. Law in Comparative Perspective," I.P. Theory: Vol. 5: Iss. 1, Article 8. Available at: <http://www.repository.law.indiana.edu/ipt/vol5/iss1/8>.

<sup>63</sup> MANU/FENT/1205/2015.

producers dubbed over Garcia's lines and replaced them with a voice asking, "Is your Mohammed a child molester?" This caused a huge outcry, particularly in the Middle-East. But, the *en banc* court held that law and facts of the case does not favour the plaintiff's claim to copyright in her acting performance as it appears in *Innocence of Muslims*. It is to be stressed that the plaintiff exclusively prayed for 'copyright protection', *de hors* other legal theories like right to publicity to protect her performing right in performance; and therefore, the *en banc* court was correct in holding that a five second performance does not qualify for copyrightability. It is so primarily because it goes without saying that a five second performance implies a less developed character,<sup>64</sup> and if that were the yardstick for copyright protection, then it would be a sheer horror for further creativity. However, before parting with the judgement, McKeown, Circuit Judge speaking for the majority observed that they were sympathetic to plaintiff's plight and, that she is not without options and could have sought an injunction against different parties on other legal theories, like the right of publicity and defamation. Therefore, the case would have been different in its entirety, had the plaintiff sought these other rights.

#### CONCLUSION

At this juncture, it can be fairly concluded that the jurisprudential aspect relating to performer's rights in India is still in its initial stage. This *sui generis* nature of such right warrants deliberation, which this present paper attempted to seek, by putting different complexion upon its formative stage. Performer's right gain significant importance in present society, which has undergone a paradigm shift. Sophisticated digital technologies have transformed the world into one single enormous hub, connecting and making accessible the creativity of performers all over the world, at the touch of a button. Although, performer's rights have been recognised, it goes without saying that in India, the devil lies in the implementation. This is in light of the 'scams' pertaining to non-payment of royalties to performers being surfaced,<sup>65</sup> which strikes a jarring note.

Be that as it may, Copyright (Amendment) Act, 2012 appears to merge momentarily, the divergence between the rights of the performers and copyright owner. The Parliament by this

---

<sup>64</sup> In *Nichols v. Universal Pictures Corp.*, 45 F.2d. 119 (2d Cir. 1930), it was observed that the less developed the character, the less they can be copyrighted. Similarly, in *Warner Bros Pictures v. Columbia Broadcasting System*, 216 F.2d. 945, it was held that if the character is only a chessman in the game of telling the story, then he is not within the area of protection afforded by copyright.

<sup>65</sup> Rashmi Rajput, *Enforcement Directorate quizzes T-Series, Saregama Honchos*, Indian Express (November 6, 2017). <http://indianexpress.com/article/cities/mumbai/enforcement-directorate-quizzes-t-series-saregama-honchos-4923015/>

Amendment, has given substance to the notion that both these corresponding rights can co-exist. However, the parameters for the same are yet to be articulated. By venturing to keep performer's right at an equal footing with copyright work, it is apparent that the Indian regime provides for a more comprehensive framework for protecting performer's right, compared to U.S.A. and U.K. However, it is extremely crucial for the Parliament to reappraise the definition of 'performance', and for courts to ascertain the extent of such rights. It will thus be enthralling to see the ensuing development in this regard.

In bringing things to a conclusion, the purpose behind the Act may be spelled out, which was to give 'protection' to the authors, musicians, artists and 'all kind of people' who are doing 'creative work'.<sup>66</sup> Undoubtedly, the creative intellect of a performer is involved, while the work of an author is diffused through her; thereby, acquiring an important role in the whole process. Hence, performers who are stakeholders in any particular work should be fully entitled to reap benefit of their individuality, identity and ingenuity.

\*\*\*

---

<sup>66</sup> Statement by Dr K.L. Shrimali, *The Copyright Bill, 1955*, Rajya Sabha (13/05/1957).