

# Performer's Rights Under the Copyright Law

<sup>1</sup>Akash Trika, <sup>2</sup>Annapurna Pattnaik

**Abstract---** *The research papers aims to elucidate the Performer's rights as a part of the Copyright law regime and its development over time. The paper talks about the neighbouring rights which led to the emergence of performers' rights before discussing the performer's rights laid down in various international conventions. The rights relating to performers as they exist under the Indian Copyright Act, 1957 have also been discussed. The paper concludes by talking about the Indian judgements relating to the rights and throws light on the need for a regime that would grant better protection to the performers.*

**Index Terms---** *Performer's rights, Copyright, TRIPS, Neighbouring rights.*

## I. INTRODUCTION

There are a number of views regarding what a copyright is and what is its purpose. It is often seen as a means of general welfare as it makes it possible for literary and artistic works to be accessible at reasonable prices. It is also viewed as a diluted version of the author's rights which state that the author shall be the holder of his work and his work shall be protected under his name before it is made available to the public.

Section 14 of the copyright Act lays down the subject matters of a Copyright. The same are as follows:

- Literary, dramatic or musical works;
- Computer programmes;
- Artistic works;
- Cinematograph films; and
- Sound recordings.<sup>1</sup>

"A perusal of the said acts listed under the Section suggest copyright to be the sole right to produce or reproduce the work in any manner whatsoever for the purpose of monetary benefit or any substantial part thereof; one which will be infringed whence any person *sans* the consent of the owner of copyright does anything, the sole right to which is bestowed on said owner."<sup>2</sup>

"By incorporating the negative right of preventing others from copying material subsisting in creative works, copyright seeks to promote sciences and useful arts by protecting writers and artists from the unlawful reproduction of material they have created."<sup>3</sup>

Copyright bestows upon the owner of an artistic work, the right to issue copies of his work to the public, to perform his work in front of an audience, to make an adaptation of his original work or to license his work to be used by another. This is the reason why copyright is referred to as a bundle of rights.

To ensure that there is a balance between the rights of the author and the right of the public to make use of the artistic work, there are certain limitations which exist in the rights available to the copyright owners such as the doctrine of

---

<sup>1</sup> Section 14, Indian Copyright Act, 1957

<sup>2</sup> *Time Warner Entertainment Co. v. RPG Netcom*, 2007 (34) PTC 668, 672 (Del) (DB).

<sup>3</sup> *Eastern Book Co. v. DB Modak*, (2008) 1 SCC 1.

fair use, statutory licensing and the limited time period for which a copyright exists in the name of the author before falling into the public domain.

“Copyright remains an incorporeal property, and is concerned only with the copying of material form and not with the reproduction of ideas.”<sup>4</sup> The statement means that copyright is a subject matter of only the expression and not the idea itself.

### **Neighbouring and Related Rights:**

Neighbouring rights saw their emergence with the Rome Revision Conference in 1928. Though it was 33 years later that with the *Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961* that neighbouring rights were defined.

Neighbouring rights contains three kinds of rights:

- the rights of performing artists;
- the rights of producers of phonograms; and
- the rights of broadcasting organizations in their radio/television programmes.

These rights also contain an offshoot of rights which are called related rights. These rights are:

- rights in photographs;
- rights of film producers; or
- rights in first editions of books.

The authors are a lot of times not capable of making their work accessible to public by themselves and need services from third parties for the same. These third parties also need to be protected against any unsolicited use of their functions. These third parties are performers, phonogram producers, broadcasters and publishers. These rights exist in the derivative works that arise due to the existence of the copyrightable subject matter. “As a result, they are situated “in the vicinity” of copyright.”<sup>5</sup>

## **II. PERFORMER’S RIGHTS**

Performers are entitled to remuneration of their labour, skill and creativity. Performers are the links between the copyrightable work, that is, literary, dramatic, musical and artistic works and the public. Earlier, live performances were the only medium of expression to the public. But with the advent of 20<sup>th</sup> Century, sources such as films and sound recording came along which expanded the scope of performances beyond live performances. These newer mediums became the basis of the performing rights as they exist today.

The Rome Convention defined a performer as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.”<sup>6</sup> The Indian Copyright Act, 1957 gives a wider scope to the definition. It defines a performer as an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.”<sup>7</sup> The Act defines a ‘performance’ as any visual or acoustic presentation made live by one or more performers.”<sup>8</sup>

Earlier, a performer was required to repeat his performance time and again due to the unavailability of the means of recording. With the introduction of the enabling technology, recording of performances became possible. A performer had no remedy available to him against anyone who recorder his performance without his permission and reproduces it and made it available to the public. Due to this, the performer’s rights had to be set in motion in order to prevent anyone from recording their performances.

---

<sup>4</sup> *Supra* Note 2.

<sup>5</sup> HC Jehoram, *The Nature of Neighbouring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations*, COLUMBIA-VLA JOURNAL OF LAW & THE ARTS (Vol. 1, No. 1, 1990-1991).

<sup>6</sup> Article 3(a), Rome Convention, 1961.

<sup>7</sup> Section 2(qq), *supra* Note 1.

<sup>8</sup> Section 2(q), *Id.*

Article 7 of the Rome Convention states that protection provided for performers shall include the possibility of preventing:

- II.I. the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;
- II.II. the fixation, without their consent, of their unfixed performance;
- II.III. the reproduction, without their consent, of a fixation of their performance:
  - II.III.I. if the original fixation itself was made without their consent;
  - II.III.II. if the reproduction is made for purposes different from those for which the performers gave their consent;
  - II.III.III. if the original fixation was made in accordance with the provisions of Article 15 [Permitted Exceptions], and the reproduction is made for purposes different from those referred to in those provisions.”<sup>9</sup>

The TRIPS Agreement of 1994 also provides for the protection of the performers’ rights under Article 14 which states that “in respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.”<sup>10</sup>

A critique of the Article would be that it grants the right against fixation only in the case of phonogram. The agreement does not provide any remedy to the performers if the fixation is through an audio-visual medium.

The WIPO Performances and Phonograms Treaty, 1996 has superseded the Rome Convention as regards to the rights relating to the performers. The treaty grants the performers the aforementioned rights as regards to the phonograms:

- The right of reproduction, i.e. “the right to authorize direct or indirect reproduction of the phonogram in any manner or form.”<sup>11</sup>
- The right of distribution i.e. “the right to authorize the making available to the public of the original and copies of the phonogram through sale or other transfer of ownership.”<sup>12</sup>
- The right of rental i.e. “the right to authorize the commercial rental to the public of the original and copies of the phonogram, as determined in the national law of the Contracting Parties.”<sup>13</sup>
- The right of making available i.e. “the right to authorize the making available to the public, by wire or wireless means, of any performance fixed in a phonogram, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them.”<sup>14</sup>

The treaty also grants rights to performers with respect to live performances. The same are as follows:

- the right of broadcasting (except in the case of rebroadcasting);
- the right of communication to the public (except where the performance is a broadcast performance); and
- the right of fixation.

The performers are also accorded with moral rights under Article 5. This right entitles one to be identified as a performer and also bestows upon him the right to object if there is any distortion with respect to his performance.

### **III. PERFORMER’S RIGHTS UNDER THE COPYRIGHT ACT, 1957**

The Copyright (Second Amendment) Act was enacted in order to bring the Act in accordance with the provisions of the TRIPS Agreement and the definition of performance was amended to include “visual or acoustic presentation made live by one or more performers”.

---

<sup>9</sup> Article 7, *Rome Convention, 1961*.

<sup>10</sup> Article 14(1), *Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994*.

<sup>11</sup> Article 7, *WIPO Performances and Phonograms Treaty, 1996*.

<sup>12</sup> Article 8, *Id*

<sup>13</sup> Article 9, *Id*.

<sup>14</sup> Article 10, *Id*.

The 2012 amendment in the Act was brought about Section 38 A which grants some exclusive rights to the performers. These rights are similar to that of the authors under Section 14 and exist without any prejudice to the rights of the authors. The Section reads as follows:

- III.I. “To make a sound or visual recording of the performance, including-
  - III.I.I. Reproduction of it in any material form including the storing of it in any medium by electronic or other means;
  - III.I.II. Issuance of copies to the public not being copies already in circulation;
  - III.I.III. Communication of it to the public;
  - III.I.IV. Selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;
- III.II. “To broadcast or communicate the performance to the public except where the performance is already broadcast.”<sup>15</sup>

The Act also, in line with the moral rights provided to the authors, provides the same to the performers under Section 38 B. the Section lays down that the performer has the right to be identified as the performer. The provision also grants the performer the right against distortion or mutilation of his performance which would harm his image.

Section 39 of the Act provides some exceptions as regards to the rights enjoyed by the performers. Anyone can make a sound or visual recording if such recording is for the private use or for a research or teaching. The excerpts of a performance can also be used with respect to reviews and teachings. The Section also allows acts with any adaptations or modifications which do not constitute infringement of copyright under Section 52 (i.e. fair use exceptions).

In *Indian Performing Rights Society v. East Indian Motion Pictures Association*, the Supreme Court was of the view that “if the creator of a musical work has authorised a film producer to include his works in the film by incorporation in the soundtrack, the creator (composer) cannot restrain the film producer from causing the same to be performed/screened/projected in public for profit or from communicating or authorising the communication of the acoustic work through radio.”<sup>16</sup>

*Neha Bhasin v. Anand Raj Anand and Anr*<sup>17</sup>. The defendant’s used the plaintiff’s voice in three different versions in different songs in a film and the music director was named as the lead singer. The court, after hearing all the versions of the songs held them to have been sung by the plaintiff and ordered the original singer to be shown as the singer.

#### IV. CONCLUSION

The legal protection regime in India has not been able to provide protection to the performers in all its glory. The entertainment markets are interconnected and the scope of piracy is larger than ever. These call for a tighter protection of the performers’ rights.

Further Substantive provisions are required to fill the gaps in the already granted protection. . While the details and modalities in the suggested scheme warrant deliberation, a policy of distinct and exclusive performing rights is more preferable to protection extended via copyright or tort law.

In today’s day and age, the concept of right of publicity does not seem outlandish. It stands for “a person’s right to own, protect and profit from the commercial value of his or her name, likeness, activities, and identity.”<sup>18</sup> This right would safeguard the performers from anyone who seeks to utilise any aspect of the performer’s personality in order to gain any commercial advantage. The legal regime shall protect the economic as well as the non-tangible rights of the performers.

#### REFERENCES

- [1] S. Y. Yang and C. L. Hsu, ‘A location-based services and Google maps-based information master system for tour guiding’, *Comput. Electr. Eng.*, 2016.

---

<sup>15</sup> Section 38(3), *supra* Note 1.

<sup>16</sup> *Indian Performing Rights Society v. East Indian Motion Pictures Association*, AIR 1977 SC 1443.

<sup>17</sup> 2006 (132) DLT 196 : 2006 (32) PTC 779 (Del).

<sup>18</sup> L Wohl, *The Right of Publicity and Vocal Larceny*, *FORDHAM LAW REVIEW*, (Vol. 57, pp. 369, 1998).

- [2] D. Tom-Aba et al., 'Innovative technological approach to ebola virus disease outbreak response in Nigeria using the open data kit and form hub technology', PLoS ONE. 2015.
- [3] F. Pappalardi, S. J. Dunham, M. E. LeBlang, T. E. Jones, J. Bangert, and G. Kaplan, 'Alternatives to GPS', Ocean. Conf. Rec., 2001.
- [4] R. Azhagumurugan, G. Vignesh Kumar, and A. Karthik, 'Guiding & control of fishermen boat using GPS', in 6th International Conference on Computation of Power, Energy, Information and Communication, ICCPEIC 2017, 2018.
- [5] Y. H. Chang and B. S. Lin, 'An inquiry-based ubiquitous tour system', in Proceedings of the International Conference on Complex, Intelligent and Software Intensive Systems, CISIS 2011, 2011.
- [6] B. Séroussi et al., 'Why GPs do not follow computerized guidelines: An attempt of explanation involving usability with ASTI guiding mode', in Studies in Health Technology and Informatics, 2010.
- [7] A. Repenning and A. Ioannidou, 'Mobility agents: Guiding and tracking public transportation users', in Proceedings of the Workshop on Advanced Visual Interfaces, 2006.
- [8] A. Al-Halhouli, H. Qitouqa, N. Malkosh, A. Shubbak, S. Al-Gharabli, and E. Hamad, 'LEGO Mindstorms NXT for elderly and visually impaired people in need: A platform', Technol. Heal. Care, 2016.