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Performer's Rights under Copyright Act, 1957: Critical Analysis

Saksham Bhardwaj*

Abstract

Law of copyright in India exhaustively provides for the mechanism to safeguard the rights of author. The performers have also been given certain right so that they can exploit the work, either by way of communication to the public or by broadcasting of the same. Through an amendment made in 1994, the Copyright Act has granted rights to the performer in their performances. The scope of definition of the 'performer' under section 2 (qq) was also widen up through the 1994 amendment act. In the later stage, the performer under section 38A and section 38B has been granted exclusive rights and moral rights, through an amendment of 2012. Section 38A (1) (b) of the said act provides for only 'first broadcast rights and communication to the public'. In this paper, there will be comparative study of the similar provision among Nations like India, United States and United Kingdom. The paper will also discuss certain international agreements with regard to performer's rights. Finally, the paper will carve out what could be the proposed amendment under Indian Copyright regime for strengthen the regime of performers rights in India.

Keywords: *Copyrights, Copyright Act, 1957, Performer, Performer's Rights, Broadcast Rights*

Introduction

In every society the performers establish a nexus between the literary, musical work, dramatic work and the public. The fact that the performers spend enough time, skill and labor in any act must be rewarded. The key definition of 'performer' provided under the international law will include actors, singers, musicians, dancers and other people who sing, act, deliver, play in, declaim, or otherwise perform the artistic work. This

* Advocate, Delhi High Court

definition covers all sorts of components of performers of work in public domain under its sweep. On the contrary note it excludes all types of person who do not perform any 'work' like acrobats, sports personalities, variety artistic, and extras on the stage. This led us to frame an opinion that the umbrella cover of the definition of the performer needs wider interpretation in the coming days. Thereby we can say that the performers' rights are very weak. This can be traced out from the history itself. In the ancient time, strolling players or actors were basically regarded as vagrants. This was that era when the copyright law was in its initial stage of its developments. Adam Smith in his own work i.e. *The Wealth of Nations* has given the buffoons, players, musicians, opera dancers, opera singers as the key example of the unproductive labor.[1] The modern era has tried to remove this kind of social stigma and from the bottom of the social parameter, star performers had gone to the top and infact some has become an idol in the modern society.[2] The other reason can be the technical and historical one. Further Adam Smith says that ''the work of all of them perishes in the instant of its production.'' This connotation might be correct in his era. The performance needs to be fixed. When the performance can be fixed and the resultant fixation can be performed in public and can be reproduced thereby involves two key rights in the copyright regime. These rights are basically known as the right of reproduction and the right of the performance. The performer has a key role in the work and he must be vested with certain rights without prejudice to the interest of the author or the owner of the work. The copyright law, therefore, has made it possible for the performers through the amendments of 1994 and 2012 to claim their right and prove their existence under the law.

In India, the definition of the performer which was inserted through the 1994 Indian Amendment in the Copyright Act covers wide variety of components. Under Section 2(qq), it defines that "performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or anyother person who makes a performance." However, this does not suffice purpose unless interpreted in the favor of performer broadcasting rights. As far as the Indian regime of Copyright Law is concerned, the broadcasting and communication of the performance to the public is provided within the sweep of section 38A (1) (b) of the Copyright Act of 1957. This amendment was brought in the year 2012 in the light of the performer's right with respect to broadcasting or communication to the public. How much is it justifiable to say that the performer will have just one chance of broadcast and communication to the public, to the performer, though

1 Smith Adam, *The Wealth of Nations* Book II, Ch. III, quoted by Thomson, Edward, 'Twenty Years of Rome Convention' Copyright, (1981), 274.

2 *Copyright Law and Performers Right*, Chapter-8, SHODHGANGA available at http://shodhganga.inflibnet.ac.in/bitstream/10603/52362/13/13_chapter%208.pdf (last accessed on Mar. 07, 2018)

he is not having any authorship/ownership over the work created. This is unjust provision which will be analysed in this paper at the later stages. Thereby we can opine that the performer position under the law is somehow seems to be weak. On one said the Copyright Act is trying to improve the status of performer and on the other hand they are curtailing the right of performance for the one-time maximum. These things will be analyzing in the further stages in this paper after going through comparative analysis of the same.

As per the Indian Copyright Act, 1957, the performer is granted broadcasting right or communication to the public for one time only, under the auspices of section 38A (1) (b) of the said Act. The prime objective in this paper will be to analyze the impact of the amendments upon the performer's rights and moral rights of the performers. This paper will restrict itself to the comparative analysis of India, US and UK legislations dealing with the regime of Copyright Law, as far as performer's rights are concerned.

Role of International Treaties in Performers Right

There are various international treaties which specifically provides for the performers right and its components. Some of key international instruments are categorically discussed below

Trade Related Aspects of Intellectual Property Rights (TRIPS)

Article 14 (1)[3] provide for the authorization of the rights of performers under the Trade Related Aspects of Intellectual Property Rights (TRIPS)[4] agreement, which provides for the extensive protection of performers rights under its sweep.[5] Clause 3 of the said article also provide for the broadcasting organisations and its fixations. So under the TRIPS agreement which is also followed by India, it has provided the exclusive right of prevention of performances if done without their authorisation. The Indian Act is not silent about the aspect of live performance and broadcast by wireless means. There is no ambiguity here. Moreover, the mode of communication to the public since clause 3 of the said article 14 talks about the communication to public of the TV broadcast, which is also provided under Indian legislation of the copyright Act, 1957.

3 *Article 14, TRIPS*- 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.

4 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 UNTS 299; 33 ILM 1197 (1994), available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last accessed on Jul. 04, 2018)

5 Standards concerning the availability, scope and use of Intellectual Property Rights, WTO, available at https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm (last accessed on Mar.09, 2018)

WIPO Performance and Phonograms Treaty (1996)

It is basically one of the WIPO Administered treaties. This was brought into force for specifically concentration over the regime of the performer's rights. The other goal of this treaty is to recognize the key impact of the information and the communication technique on the side of the production and use of the performances. Now if we take the recourse this treaty, it also provides for the performers communication right and broadcasting right. Article 6 of WPPT[6] says that the performer can have communication and broadcasting rights of the said performance for one time i.e. its right will get extinguish as far as broadcast is concerned, after one performance.[7]

So there is a clear understanding that under Indian Copyright Act, 1957, the legislator has done cut and paste option by copying it verbatim. Though they have provided for the concept of fixed or unfixed performances but still there is some ambiguity lying as to why there is one time/first broadcast as to unfixed performance. Section 38A (1) (b)[8] of the said Act provide for exclusive rights which need more clarity. So the difference can be seen where the WPPT expressly provides for the unfixed performance but this is not mentioned in Indian legislation clearly. Still there is an ambiguity that why only one time of broadcasting and communication to the public right is provided even under WPPT. This led us to ponder over that if the performance is unfixed than can the performer have aforesaid rights for more than one time since Section 38 A (1) (b) is somehow seems to be silent upon this aspect. Through the lateral interpretation of clause (b) under section 38A, it can be figured out that this clause talks about unfixed performances. So it can be inferred that Indian legislation talks about the unfixed performance too.

Beijing Treaty on the Protection of Audiovisual Performances, 2012

The said treaty was adopted on 24 June, 2012 for conferring rights upon the performers. Under this treaty Article 11 say that the "performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their fixed performances in audiovisual fixations".[9] This treaty also provides for the right of equal remuneration

6 *Article 6 of WPPT* Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance.

7 WIPO Performance and Phonograms Treaty (WPPT), available at http://www.wipo.int/edocs/lexdocs/treaties/en/wppt/trt_wppt_001en.pdf (last accessed on Mar. 10, 2018)

8 Act, 1957, No. 14, Acts of Parliament, 1957 (India).

9 Beijing Treaty on Audiovisual Performances, WIPO, available at http://www.wipo.int/treaties/en/text.jsp?file_id=295837#art11 (last accessed on Mar.11, 2018)

under its sweep. Now after going through this provision of the Beijing Treaty, it can be categorically compared that it also does not talk about the concept of one time performer communication to public and broadcasting right. This is one of the most recent treaties signed at the international level. Indian government could have taken its recourse while coming up with 2012 amendment and thereby they could have expended the scope of performer's rights.

Copyright Law in United States

In the United States, the senate has passed the resolution so as to ratify WIPO Internet treaty in the year 1998. During the deliberations made on the implementation of the treaties, the exclusive rights thing which includes making the work available, the officials from the Copyright Office has testified that this treaty will not be requiring any amendment to the regime of the exclusive rights provided under section 106, US copyright law.

In the light of the proposition taken up in this paper that whether the one time broadcasting and communication to the public right is justified under Indian law, if we go by the comparative analysis of section 106, US copyright law, it talks about the exclusive rights in clause 4[10] which means that there is no restriction on the performance of the work, which is copyrighted in the public. In the sound recording clause 6[11] there is no as such restriction to perform the work publicly only for one time.

In US, The Digital Millennium Copyright Act (DMCA), 1998 is not clearly specifying the implementation of the right of the communication to the public or providing available to the public. Due to this there is an uncertainty that mere just transmission or the access of a copyright work upon online is falling within the ambit of the existing US rights as far as the reproduction etc are concerned. Article 10 of the said Act basically talks about the fixed performances and making them available to the public. However, the recent digital performance rights enacted law grants rights for digital transmission as far as the sound recording is concerned.[12] So here also the US does not restricting the performance communication to the public for one time only, under the umbrella cover of the performers' rights.

10 Copyright Law, USC title 17, Section 106- In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

11 US Copyright Law, USC title 17, Section 106- In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

12 Iftikhar Hussian Bhat, *Right of Communication to the Public in Digital Environment,* available at http://www.ijesi.org/papers/Vol%202(4)/Version-2/B240714.pdf (last accessed on Mar. 11, 2018)

The other thing which needs attention is the number of broadcasting rights given in the United States. The issue initially was before the court of law was whether mere picking up of broadcast will constitute as the performance or not. The Supreme Court in its opinion has categorically stated that it will not be termed as the performance.[13] They established the theory of multiple performances. Infact previously the court has held that picking up of broadcast of radio is a kind of separate performance. Still it did not clear that whether author's performance right is infringed or not when the broadcast is authorized by author.[14]

From the above discussion in the light of the USA legislation pertaining to copyright, it is clear that they do not have such a kind of one-time performer's broadcasting right which is like in India under Section 38A (1) (b).

Copyright Law in United Kingdom and European Union

The regime of the copyright in the United Kingdom is basically governed by the CDPA, 1988. All the kind of copyrights are governed by this Act including performers broadcasting and communication to the public right also. If we take the wholesome concept of the Europe, the performers are basically granted the protection in their performances. These protections are granted in the field of audiovisual, dance, music or any other type of performances. The performer right is generally divided into two key category namely moral and economic rights in the Europe. In Europe the exclusive rights are granted to the performer who enjoys the following rights: -

- Right to have equitable remuneration for broadcasting and communication to public.
- Right to have the equitable remuneration for the rental.
- Remuneration for the private copying as the counterpart for a use of corresponding exception to reproduction right.

No doubt that the rights of the performer are limited in the Europe too. No where it is specifically mentioned in the text, that the exclusive right for the broadcasting and communication to the public of the performance is granted for one time only upon the performer. Factually also the most performers in Europe are basically dependent upon the economic right i.e. right of remuneration, rather than the exclusive performance rights.

Even the broadcasting right granted under Article 3 of Directive of 2001/29/EC says about

13 283 U.S. 191 (1931), Annotated in Numerous Law Reviews, quoted in Varmer.

14 *supra* note 2.

exclusive rights of performers.[15] Here also it can be seen that the broadcasting right is not limited to one time broadcasting only, unlike India. In the case of the Germany, the exclusive right of communication to the public is basically excluded for fixed performance or broadcast. They are having right to get remuneration.[16]

In the United Kingdom under CDPA law, it does not specifically talks about the process of the exclusive rights as far as the performer's rights are concerned.[17] Under Section 182 of the UK CDPA it says that the consent will be required for the broadcasting of the performance under the regime of performer's rights. This is the place where we can say that in somewhat manner the performer rights are being protected and will amount to infringement if the broadcast is done without his/her consent. On the other hand, if we talk about the concept of making the work available to the public, Section 182C of the CDPA says that the consent of the performer will be required while the work is communicated by third party to the public. These are the rights which are falling in the favor the performers.

Now in the light of the India legislation, we can say that the performers rights in UK also does not specify and such restriction which will lead it to confer upon the performer only one-time performance right.

Indian Scenario of Performer's Right

If we go by the Indian Copyright Act of 1957, the broadcasting rights are governed by it. The amendment made in the year 1994 has granted certain rights in the name of the performer's right. The ambit of these rights was widen up under 2012 Amendment Act in which certain rights like performer's broadcasting and communication to the public rights has got its space under the provision of section 38A of the Copyright Act, 1957. Also the pre-existing section 38 clause 3 and 4 were also omitted so as to incorporate this under section 38A. This was done in line with Article 6-10 of the WPPT.[18] The ambit of the

15 Article 3, Directive of 2001/29/EC- Member nation shall provide for exclusive right upon performers to basically authorize/prohibit making it available to public, by wireless or wire means of the fixation of their performance, in such a way that the member of public might access it from a place and a time chosen individually.

16 *Performers Rights in European Legislation: Situation and Elements for Improvement*, AEPO-ARTIS, available at https://www.ipf.si/media/1078/aepo-artis-study-update_200912.pdf (last accessed on Mar. 12, 2018)

17 Copyright Design and Patent Act, 1988, available at https://www.legislation.gov.uk/ukpga/1988/48/contents (last accessed on Jul. 02 2018)

18 *WIPO Performances and Phonograms Treaty*, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997), available at, http://www.wipo.int/clea/docs_new/pdf/en/wo/wo034en.pdf (last accessed on Jul. 04, 2018)

section 38A is vast to cover ample no of rights in favour of the performer under the Indian legislation. The need has come to analyse this section in the favour of the performer.

Section 38A of the said Act provided for the exclusive performers right, which encompasses a duty to do or not to do certain acts. These rights can be exercise without prejudice towards the rights of author. However, the proviso appended to this section allows performers to get the royalty, if they are commercialising the performance. This is one of the great steps taken up by the Indian legislators because earlier they are deprived of the same. The negative right is now a positive right.

Initially in the 20th century when the case like *Fortune Film International v. Dev Anand*[19] had come up before the Bombay High Court, it has refused to recognize the claim of the actor in the movie *Darling Darling*. The actor wants to claim the copyright in his own performance, which was vehemently denied by the court. Later on, the initiative was taken up by the then government in the form of strengthening performer's rights through 1994 Amendment Act and 2012 Amendment Act.

Moreover, the amendment of 2012 has also brought the definition of 'communication to the public' under the provisions of section 2 (ff), which has extended the rights of the performers. By this way, the right which was limited to author is now also available to the performer as well. The right of communication of work to the public is the key component of the performers' right. This is so because it helps in protecting the work on the internet as well also. Now this protection is also available to 'performances' from just 'work'.

Now after the insertion of the new section 38B through 2012 Amendment Act it secures the moral rights for the performers. This insertion was made by virtue of Article 6 of the WPPT.[20] The concept of the moral right may have been brought for preventing the possibility of alteration of performances in the digital world. The explanation appended to this sections says that the 'mere removal of a performance for editing can be done for technical purposes' without any fear of legal suit.'[21]

This was the actual scenario in which the process of the performer's rights was strengthened. The ambiguity is still prevailing that is why there is only first broadcast right afforded to

19 *Fortune Film International v. Dev Anand*, (1979) 17 A.l.R. Bom.

20 *WIPO Performances and Phonograms Treaty*, Dec. 20, 1996, art. 06, S. Treaty Doc. No. 105-17, 36 ILM 76 (1997), available at http://www.wipo.int/clea/docs_new/pdf/en/wo/wo034en.pdf (last accessed on Jul. 04, 2018)

21 Abhai Pandey, *Inside Views: Development In Indian IP Law: The Copyright (Amendment) Act 2012,* IP WATCH, available at https://www.ip-watch.org/2013/01/22/development-in-indian-ip-law-the-copyright-amendment-act-2012/ (last accessed on Mar. 09, 2018)

the performer in terms of broadcasting of his/her performance. Let's take a look at the bill which was tabled down in the parliament, so as to ascertain the intent of the legislature.

Proposed Bill History for Insertion of Section 38A

The clause 25 of the 227th report on Copyright Amendment Bill, 2010 ought to omit Section 38 (3) (4) and thereby inserting Section 38A. Clause 26 specifically brought section 38A.

The said committee has taken the note of certain factors for the insertion pertaining to the moral and exclusive rights. In this report, the committee was later intimated that insertion of section 38A was done so as to substitute the existing rights of performer which was providing only the right to prohibit. This was also laid in this report that such insertion was done so as to be in line with article 6-10 of WPPT, as discussed above. Likely the insertion of section 38B was done for the introduction of the moral rights of the performers.[22] This was also in line with the Article 5 of WPPT.[23]

In the above stated parliamentary debate, we can say that there is no as such discussion prevailed during the formulation of the above stated report, which is conferring only first broadcasting right of the performance, while inserting section 38A (1) (b). So this is a grey area under the Indian Copyright Act, which needs more clarity.

22 Two Hundred Twenty-Seventh Report on the Copyright (Amendment) Bill, 2010, Department-Related Parliamentary Standing Committee On Human Resource Development, available at http://www.prsindia.org/uploads/media/Copyright%20Act/SCR%20Copyright%20Bill%202010.pdf. (last accessed on Mar. 10, 2018)

23 Article 5- Moral Rights of Performers (1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.
(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.
(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.
Available at http://www.wipo.int/treaties/en/text.jsp?file_id=295578#P90_8664 (last accessed on Jul. 04, 2018)

Conclusion

In light of the discussion held above, we can say that the statement of purpose framed in this paper has been disproved. This is so because there are no traces as to why the great mind of our legislators has incorporated this provision while securing the rights of the performer through the Copyright (Amendment) Act, 2012.

Article 7 of the Rome convention for protection of performers, producers of phonogram and broadcasting organization (1961) provides for the minimum level of the protection for the Performers.[24] According to this the broadcast and communication of the performance can be done (without the consent of the performer), except where it has been already broadcasted. Under the TRIPS, it provide for the concept of controlling fixation of performance which is unfixed for the phonograms.[25] The provision of Article 7, Rome Convention was copied by WPPT during its drafting. However as far as international agreements are concerned it can be seen that where the WPPT expressly provides for the both fixed and unfixed performance under article 6, the same has been provided under section 38A of the Indian copyright law. Still there is an ambiguity that why only one time or first broadcasting right under WPPT is provided, which was adopted by India in its legislation. The mere cut and paste option performed while copying WPPT provision will not going to suffice the purpose. Even under the TRIPS agreement which is also followed by India, it has provided the exclusive right of prevention of performances, if done without their authorisation. Still the Indian Act is silent about the aspect of live performance and broadcast by wireless means under the provision of section 38A (1) (b). This is also a grey area which needs to be worked upon for clearing the clouds of ambiguity. Than going through the provisions of recent treaty i.e. Beijing Treaty of 2012, it can be categorically compared that it also does not talk about the concept of one-time performer's broadcasting right. This is one of the most recent treaties signed at the international level. Indian government could have taken its recourse while coming up with 2012 amendment and thereby they could have expanded the scope of performer's rights. Though the fact that this amendment made in Indian Copyright Act, 1957 was brought 3 days before the Beijing treaty has come up, is undeniable.

In the context of the United States, through the above discussion in the light of the USA legislation pertaining to copyright, it is clear that they do not have such a kind of one-time

24 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961, Oct. 26, 1961, art 7, 496 UNTS 43; BTS 38 (1964), available at http://www.wipo.int/treaties/en/text.jsp?file_id=289757 (last accessed on Jul. 04, 2018)

25 Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions Geneva 1996, Vol.1, WIPO, available at ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_348e_v1.pdf (last accessed on Mar. 14, 2018, 03:52 PM)

performer's broadcasting right like India has under Section 38A (1) (b). In the European context, there is no doubt that the rights of the performer are limited in the Europe also. The statue seems to be does not specifically mentioned, that the exclusive right for the broadcasting and communication to the public of the performance, except where it has been already broadcasted, is granted for one time only upon the performer. However, only in the case of Germany, the exclusive right of communication to the public is basically excluded for fixed performance or broadcast. Under the United Kingdom CDPA law, it does not specifically talk about the process of the exclusive rights as far as the performer's rights are concerned.

It can be concluded that the India need to make certain amendment in the existing regime of copyright law, as far as performer's rights is concerned. If they are verbatim copying WPPT, though India had not signed it, then an amendment must be made under section 38A (1) (b) of the said act so that the performer can excise its right of broadcast and communication to the public even though his/her performance has already broadcasted. There is no as such justification brought down from the above discussion held, which will substantiate this arbitrary clause 'first broadcast or one time broadcast'. There is a need to increase the threshold of the performer's rights in India form now onwards after indulging in comparative study of various Nations law of Copyright. Without prejudice to the right of the author, every effort should be to promote the performer's right in Indian legal system. India must take recourse of the recently incorporated Beijing Treaty for further amendment in our Copyright Act, 1957.