
HARMONIZING ARTISTRY AND LEGALITY: A COMPREHENSIVE EXAMINATION OF PERFORMER'S RIGHTS IN INDIA, WITH EMPHASIS ON THE AUDIO- VISUAL REALM

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ABSTRACT

This Article deals with the analysis and evaluation of performers' rights concerning the audio-visual industry. Performers' rights are a new element in the intellectual property law. The performers (dancers, actors, singers etc) interest should be protected as there is the application of intellect in the diffusion of talent. This is the thought with which the paper concludes. The Article studies the degree of vulnerability of a performer and whether or not his rights are truly availed or they just merely exist. In India although the performers are protected but how far these rights turned fruitful for them is a question that the paper will be dealing with as these performers contribute to the promotion of creativity and innovation, adequately the interest of the performer should be protected. It endeavours to analyze the approach of the judiciary to the issue of performers' rights. It tries to examine international instruments and the need to protect performer's rights in light of these international instruments.

Further, the paper analyses the Performer and the philosophy of Intellectual Property where it is observed whether the performer's right in the performance fully fits into the four corners of the discourse on the philosophy of intellectual property law. The research indicates that all the reasons sustaining a common law property rights protection for intellectual creations like literary works and artistic works are equally applicable to the performances too. The theories that have substantiated property rights for intellectual creations are logically and harmoniously applicable to performers' creations as well. The discord and debate in this respect has now been laid to rest and almost all jurisdictions as well as international instruments today acknowledge the legitimacy of performers' aspirations. The uncertainties are now confined to issues of objectivity and the manner of administering the rights.

CHAPTER ONE: JUSTIFICATION OF PERFORMER'S RIGHTS

The objective of the Chapter: The chapter seeks to explore the justification for performers' rights in the context of the philosophies and theories that have justified intellectual property protection in the past. It seeks to unravel whether the chances of common law protection for performers exist in the absence of statutory protection. The chapter endeavours to understand the common issues of conflict that have been confronted by the performers, the producers and policymakers in realizing an effective rights regime for the performer.

- **PERFORMERS' LABOUR**

The fundamental condition that has to be satisfied while demanding intellectual property rights for the performers' creative labour is the need for substantiation of performances as being one emanating from creative or intellectual labour. The performer is the person who disseminates the work of the author through creative performances. The Performer also excels in performances that are not derived from any prior authors' work like the folk arts. The effective rendition of the same demands a high level of discipline, commitment, talent and skill and perhaps professional training as well. In other words the performers' skill requires a definite set of tools and is a recognized creative effort in itself. This makes the performance of a work a very distinct aesthetic art form. This has been so in ancient India, in ancient Greece and Rome, in medieval Europe and the rest of the world, down to the present when professional and other contemporary art forms have taken root. The classical, folk and contemporary art forms all demand a tremendous commitment and discipline particularly when it is pursued as a discipline and profession.¹

Though the manner of creativity might have changed over the centuries nevertheless the effort has been continuously recognized and patronage has been extended to encourage the performer. With the advent of fixation and scope of mechanical and cost-effective dissemination of recorded performance performers' economic and commercial value has also increased". It also brought along craftsmen in performances especially attuned to the demands of the new media. The performer's spirit to create and impress has been persistently challenged and the performer has responded ably by applying creativity and tact.

¹ Richard Arnold, *Performers' Rights*, Sweet and Maxwell, London (2nd edn.-1997)

In the cultural sphere, the political system of all countries has acknowledged the distinct creativity and intellectual prowess of the performing artist. The performer has been able to tilt the fortunes of works by the sheer magic of their presence and performance.

The performer unambiguously falls into the ambit of the general prescription of what constitutes intellectual property which is those things that emanate from the exercise of the human brain. The element of originality, labour, skill and judgment that is indispensable to the grant of copyright is also evident most expressively in the performing art form. Further, the onset of affixation has facilitated the performer's eligibility as the drawback of being ephemeral has been displaced and tangibility, an important requirement for copyright protection, stands fulfilled. The philosophies that aided and moulded the development of intellectual property in the form of patent, copyright and trademark laws apply in equal measure to the performer. The Lockean theory with its impetus on the personality and the rights of property over labour rings true for the performer as it has for other forms of intellectual property. Under the general theory of labour as propounded by Locke, the performer's subject matter finds accommodation within the labour theory of value. According to it, the labourer removes the subject matter from the common state and the labourer fixes his property in them. In other words, the rationale is that the labour was to be his title to the creation. Others do not have the right to meddle with another's labour and pain. If this philosophy influenced the juristic and the political philosophy of intellectual property then the intrinsic worth of the performers' labours should also come within the eligibility quotient. The profundity of the philosophy cannot be lost as even literally the philosophy propounded by Locke affirms the property of men in his person that nobody has any right to but himself. This affirms the fundamental human right of the person to his personality that guides him and the respective uses of both the physical labour and the faculties of his personality that guide him. Nobody has a right to the labour of his body and the work of his mind but the labourer himself. One of the justifications theoretically advanced for the creator is that it is the natural right to the product of the intellect. Creativity has to be encouraged the social and economic justice to the creator has to be realized. The proponents of this theory would base their criticism based on social utility.²

Besides the natural justice arguments, several other theories that were advanced to justify intellectual property rights seem applicable to the performers' rights as well. Cultural

² Richard Arnold, *Performers' Rights*, Sweet and Maxwell, London (2nd edn.-1997)

promotion is as much a rationale and cause for intellectual property protection advancement. The importance of performances in being a source of cultural accomplishments cannot be denied in any nation-state. The creative incentive argument put forth on behalf of the rights of literary and artistic entities applies ditto with equal gusto to the performer as well. Kant's Personality Rights Theory which influenced the moral rights crusade in France in the 18th century is as much relevant for the performers who are the new communicators of the modern era. The act of creation bearing the imprint of his personality justifies the grant of the inalienable right to his name and the right to respectable treatment of his work that is the result of his ingenious labour. The theory impacted a change in presumptions in contractual dealings that created a new system, securing the creator's interest in the marketplace. Even if it were assumed that the categorization of the performers' labour as property couldn't take place due to logical constraints nevertheless the value of the performers' labour could still be safeguarded from theft based on the misappropriation principle under the head of equity. Thus seen from the perspective of the effort and creativity displayed by the performer and the philosophical theories that have substantiated intellectual property in the past, the performer does not appear any less eligible for protection than the entities so far protected by copyright principles of intellectual property.

CHAPTER TWO: LAW IN INDIA AND THE PERFORMER³

The part follows the historical backdrop of the status of the entertainer in India. It attempts to investigate conceivable outcomes of customary law security furthermore, to break down the approach of legal to the issue of entertainers' rights. It endeavours to clinically investigate the current statutory security for the entertainer under the Copyright Act, of 1957 and survey its qualities and lacks in the light of the universal instruments and the requirement for acknowledging ideal security and productive organization of rights. The section embraces a basic assessment of the statutory insurance by and by accessible for entertainers in India.

The beginning of performing expressions can be found in the mythology of the Hindu religion in which it has been perceived as the fifth Veda. Its significant nearness can be felt in ceremonies furthermore, sanctuary conventions. Music and the seven swaras (sounds) were considered to have been passed down from the divine beings to the mortals. The quest for performing expressions as an expert interest was likewise in vogue in antiquated India. Actors were

³Available at <http://www.lawinfowire.com/articleinfo/performers-rights-india>

prepared and used to visit the urban communities towns and state capitals to look for support and support from the royalty. The lord was to give the securities. There were select sensational troupes and the specialists lived in a different social class with a way of life and status of their own. The troupes used to venture out from place to place for their exhibitions. There were low meandering on-screen characters and also surely understood performers and on-screen characters with gigantic patronage. The on-screen characters and the supporting cast were separated on a hypothetical scale. Going about teaching was investigated as a science and examined, archived and merged as a hypothesis for the routine of the same. Along these lines, one finds a review and comprehension of the quest for acting having a stunning scholastic refinement and an organized logical deliberate way to deal with theatre. This is typical of the reality with which the dramatic expressions and specifically the performing expressions were seen in antiquated India.⁴

The craftsmen professionally possessed low social positions reliant on the general public for support or the rulers for support and sustenance. The specialists lived as an unmistakable social class and were not for the most part considered of respectable status.

The low social position was supplemented by the low monetary position appreciated by most of the performing specialists who needed to rely on the state support for sustenance or on the philanthropy of the open.⁵ Well-off dealers and all individuals from the Hindu people group were benefactors of sanctuaries and expressions of the human experience". The sanctuary excessively bolstered move instructors. At the point when the craftsman started playing out a piece of her acquiring went to her master. Without the support of the rulers or artists couldn't have built up the craftsmanship to an elevated requirement. In short in antiquated India move was innate and disparaged by the sanctuary, the imperial courts and the gentry. There is documentation that demonstrates that amid the medieval period, natyas left the budgetary security of the lords and privileged people and from the physical confinement of their royal residences and took to open spaces except for kuttiyatom. The customary theatre is expressed to have taken roots identified with the life of the general population also, in view of their inclusion and support. Between the 13th and the 16th centuries, the Muslim trespassers extended a considerable measure of support to the field of music. Distinctive fine arts like qawwali especially Middle Eastern – Arabian origin discovered incredible consolation, be that as it may,

⁴ Available at https://www.academia.edu/9802088/Performers_Rights_in_India

⁵ Available at https://www.academia.edu/9802088/Performers_Rights_in_India

imperial support was accessible regardless of religion. Open show was for all intents and purposes obscure as for traditional performers and they were well secured by their admirers.⁶ Amid this period artists who obtained an arrangement at an eighteenth-century or nineteenth-century imperial court more often than not got a liberal month-to-month stipend and regularly a concede of landed property as well. He was positioned exceptionally and regularly delighted in a particular privileged title. The gharana arrangement of giving learning in the performing expressions was prevalent. Even though the framework can be said to have moorings in the master shisha instructing model of instruction. While the master shishya-parampara did not limit educating to be conferred to the offspring of the educator alone other than the limitations based on the qualification of twice conceived positions to be started, the melodic arrangement of gharana was specific that the centre of the showing should not to leak outside the forms of the lineage. A portion of the gharanas was tranquil and thorough with deference to the advancements and style with which they were related to that even solid strictures were set down if at any point the information came under the control of untouchables.⁷

In spite of the fact that there were clearly no lawful standards that have all the earmarks of being abused when there was an untoward drainage of the creation to the outside world without approval however it was the standard among the gharanas that there ought not be unapproved experts of the frame that was trailed by the school of music. By and by it must be seen that it was not the execution of a similar that was confined or managed however the exchange of learning by oral or reported implies. Therefore there were protectionist measures yet that was not synonymous with a refined thought of licensed innovation as comprehended in Britain and Europe amid the comparing time frame The coming of the British run got its wake a performing society much the same as the theatre and excitement drifts in Britain and Europe. Stage exhibitions were held with expert theatre entertainers from England and India". Great performers instructed enormous costs". The expert entertainers were contracted on contracts went into for a time of engagement.⁸

• THE ROME CONVENTION AND THE INDIAN LAW

India is not yet a signatory to the Rome Convention despite the way that it had taken an interest

⁶ Available at <http://www.lawinfowire.com/articleinfo/performers-rights-india>

⁷ Available at <http://www.lawinfowire.com/articleinfo/performers-rights-india>

⁸ Available at <http://www.lawinfowire.com/articleinfo/performers-rights-india>

wholeheartedly in the consultations of the Rome meeting in the year 1961. It was simply after a pass of over 33 years that India dared to fuse the performers' rights into the Indian copyright law in the year 1994. The Indian law shockingly leaves from a few other national enactments or universal instruments like the Rome Convention by the way that there is no securing arrangement that the status of scholarly and masterful works with regards to the performers' rights conceded under Section 38 of the Copyright Act. This may be supported on the ground that the privilege allowed under Section 38 of the Indian law has just been of a unique character or a unique right and does not convey a parallel copyright status or even a neighbouring rights status. This nonattendance of capability can fuel a juristic hypothesis, as the correct character of the term uncommon right can't be observed from the arrangements of Section 38. The oversight of the shield statement could be owed to the obvious absence of probability of any equality in the way of copyright or rights delighted in contrast with the customary substances.

In any case, a nearer investigation of the Segment uncovers that the entertainer could in all actuality have a great deal more than what is clearly a lesser give of rights. Significantly, it has not been neglected to join the shield condition for copyright-secured substances in the Act, particularly with regards to security agreed to sound and cinematograph recordings.

- **THE TRIPS AND THE INDIAN PERFORMER** ⁹

The Indian sanction of the TRIPS and the entry of the change consolidating Section 38 in the Indian Copyright Act are adventitiously inside a similar time frame. The winds of progress in the global field were enthusiastic elements to adjust national points of view with regard to the entertainers and different figures the protected innovation system as the character of developing global instruments like the TRIPS accompanied a rider of being melded with compulsory advantages and endorses in the exchange field. This required condition guarantees that the substance of the TRIPS would be conveyed forward into the letter and soul of the national enactments who were signatories of the GATT and the TRIPS. Conversely both the Rome Convention as well as the following WPPT was discretionary in their commitments. The TRIPS does not digress nor add essentially to these mandatory cutoff points cast by the Rome Convention. The entertainers are furnished with the privilege to keep the unapproved obsession of their unfixed execution and the generation of such fixation. The telecom by remote means and the correspondence to the open of their live execution without the performers' approval

⁹ Available at https://www.academia.edu/9802088/Performers_Rights_in_India

are additionally perceived under TRIPS as an infringement of the entertainer's rights. The broadcasting and correspondence to people in general of the live execution covers varying media exhibitions too and thusly these demonstrations would require the assent of the entertainer. The TRIPS just unequivocally concedes assurance to exhibitions joined in phonograms. The revision in the Indian Act conveys such an extensive amount of the slant in the TRIPS agreement. The insurance stretched out to attachments against unapproved proliferations in India was a qualified insurance yet TRIPS puts no conditions in this respect. Then again in India, there is the requirement for further agreement to repeat if the multiplication is not tuned in to the reason hinted at the time of concede of assent for the appendage or recording of the execution. An inconspicuous yet significant contrast is the utilization of the expression "approval" in TRIPS instead of "assent" which is utilized as a part of the Rome Convention. In approval, a more self-assured, formal and positive give is required. Its sign requires more conclusiveness. The word utilized as a part of Section 38(3) of the Indian Act is "assent" What's more, in this manner the meticulousness of convention required could be lesser than that justified under TRIPS.

There has been no endeavour to characterize the expression "entertainer" in the TRIPS and consequently, the nations are allowed to have a meaning of their decision. The quiet of TRIPS in such a manner does not seem to make any challenges as the Indian definition is wide to include all entertainers who render any execution without capabilities like adding them to imaginative works. The Rome convention in such a manner does not appear to fall on the TRIPS. The live entertainer in the communication and the correspondence with people in general, regardless of whether it is in the varying media arrangement or in the sound configuration, is supplied with insurance under Section 38(3) of the Copyright Act. Under the TRIPS excessively the live execution of entertainers in the varying media and the sound in its communicate what's more, correspondence to people in general is allowed security and the assent of the entertainer is required. No place under the TRIPS has it been expressed that the entertainer's rights should subsist in the live execution. It has just been expressed that the span might begin either from the obsession or the date of execution. Under both the instruments, there is no order to agree to be required from the entertainer for his agree to communicate or impart to the open from the obsession of the execution. The TRIPS conceded a time of fifty years to the entertainer as against the stipulated time under the Rome Convention. The

relationship between the Rome Convention and the TRIPS unavoidably prompts the Rome impact to be pertinent to India too.¹⁰

CHAPTER THREE: CONCLUSION AND SUGGESTION

It can be safely concluded that the performers' right in the performance fully fits into the four corners of the discourse on the philosophy of intellectual property law. All the reasons sustaining a common law property rights protection for intellectual creations like literary works and artistic works are equally applicable to the performances too. The theories that have substantiated property rights for intellectual creations are logically and harmoniously applicable to performers' creations as well. The discord and debate in this respect have now been laid to rest and almost all jurisdictions as well as international instruments today acknowledge the legitimacy of performers' aspirations. The uncertainties are now confined to issues of objectivity and the manner of administering the rights. It can be inferred that the persuasive effect of performers' rights could not be stonewalled for long with the interests in the industry and the international opinion realizing the need for conditions to be confidence-inspiring. Traditionally the aspirations of new entities to protection under the copyright umbrella have been opposed by entities that have already been provided protection. They feared a dilution of in safeguards that they had cherished and gained after much strife. The same opposition and misgiving can be seen reflected in the approach to the rights of the performers as well. However, developments and functioning in countries that have accommodated the performers cautiously at some level or the other have shown that performers' rights can coexist with other rights without any substantial threat to their rights or the administration of rights.

¹⁰ Available at https://www.academia.edu/9802088/Performers_Rights_in_India