

The logo of Galgotias University is a stylized 'G' composed of three overlapping, curved bands in shades of red, yellow, and blue. It is centered in the upper half of the page.

Copyright in Performances

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Topics Covered

Unit-3 Author of Work & Owner of Copyright

- Development of Copyright Law in context of Performers' Rights
- Copyright Introduction
- Copyright Act and its important Amendments
- Meaning of Performance and Performer
- Term of Rights
- Applicability of other Provisions
- Need for the protection of Performers' Rights
- International Treaties and Conventions
- Remedies against Infringement of Performers' Rights
- Case Study
- Conclusion



COPYRIGHT INTRODUCTION

- Copyright is the part of intellectual property which gives exclusive legal right to the original creator of the work. The copyright law protects the intellectual creations in the work that is original. It protects the work as soon as it is created and no registration formalities are required. Earlier the concept of Copyright was limited to the books, painting or films, but now the ambit is widened even to computer software and compilation of data.
- The Oxford English Dictionary defines Copyright as “The exclusive right given by the law for certain term of years to an author, composer etc (or his assignee) to print, publish and sell copies of his original work.”

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Copyright Act and the important Amendments

- The Copyright Act, 1957 No protection was given to the actors, musicians, jugglers, dancers etc the act was silent on the performers' rights.
- **The Copyright amendment Act, 1994** Recognised the rights of the performer under section 38 of the Act 'Performers Rights' were introduced.
- By the **2012 amendment to the Copyright Act**, the performers (Singers, Actors, Music composers etc.) have got their "rights" (more rights) which were demanded for more than two decades.

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Meaning of Performance & Performer

- **Section 2(a)(q)** of the Act defines performance as follows: *“Performance”* in relation to performer's right, means any visual or acoustic presentation made live by one or more performers;
- **Section 2(a)(qq)** of the Act defines Performer as follows: *“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;
- The **section 38A** of the Act which provides legal provision for performers' right which gives exclusive right or authorizes for doing any act in respect of the performance without prejudice to the rights conferred on authors. This provision enables the performers' for royalties which are subjected to committed use.

PERFORMER'S RIGHTS:

A performer has the following rights in his/her performance:

- Right to make a sound recording or visual recording of the performance;
- Right to reproduce the sound recording or visual recording of the performance;
- Right to broadcast the performance;
- Right to communicate the performance to the public otherwise than by broadcast.

TERM OF RIGHTS

- The Performer's rights subsist for **50 years** from the beginning of the calendar year next following the year in which the performance is made. Copyright Act, 1957, **Section 40A** says about the application of performer's right to foreign countries where there is no rights of such a nature presently. The Central Government may by notification may extend these rights to such countries if the country has already provided and intended to provide the such rights.
- Copyright Act, 1957, **Section 42A** similarly talks about restriction of foreign organisation and performers, if the foreign country does not give protection of these rights , the central government may by notification may put restriction upon the applicability of the provisions of this act on that country or organisation established there.

APPLICABILITY OF OTHER PROVISIONS

- Under **Section 39A** the following provision of the Act with necessary adaptation and modification apply to performer's right as they apply to copyright in a work.
- **Section 18 and 19** – assignment of copyright
- **Section 30** – Licenses
- **Section 55** – Civil remedies for infringement of copyright .
- **Section 58** – Rights of owner against persons possessing or dealing with infringing copies.
- **Section 64** – power of police to seize infringing copies.
- **Section 66** – disposal of infringing copies or plates for the purpose of making infringing copies.
- Thus in many essential respects the performer's right bear close resemblance to copyright.

Need for the protection of Performers' Right

- The need for the protection of Performers' Right arose with the passage of time. The fundamental reason was the technological development that enabled recording & broadcasting of the performers' right. Acts not constituting infringement of a performers' right under section 39 of the Act:

The rights of the performer and broadcasting organization are not conclusive.

Following are the acts which does not constitute infringement of a performers' right:

- A person makes any sound recording or visual recording for the private use or solely for bona fide teaching or research purpose,
- Excerpts of a performance are used, consistent with fair dealing, in the reporting of current events or for bona fide review, teaching or research,
- An act is done after necessary adaptation and modification which does not constitute infringement of copyright under section 52 of the Act.

International Treaties and Conventions on Copyright for the protection of Performers

International Treaties and Conventions on Copyright Copyright is granted only by the law of the country in which the work is created. Therefore, if copyright does not subsist in certain country, to prevent piracy in that country is impossible. To meet this problem international conventions are formed. The Member States offer minimum copyright protection on reciprocal basis to the works originating in another member country. In 1886, the International Convention for the Protection of Literary and Artistic Works commonly known as **“Berne Convention”** was adopted to recognize and regulate the rights of the copyright owners. This was the first international convention on copyright which was revised several times at Berlin in 1908; at Rome in 1928; at Brussels in 1948; at Stockholm in 1967; and at Paris in 1971, to meet the various challenges posed by the technological development. In 1952, Universal Copyright Convention was adopted which was revised at Paris in 1971. In 1967, the ‘Convention Establishing the WIPO’ was adopted by which WIPO was established. In 1996, WIPO adopted two treaties – WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.

In addition, to these treaties, three more treaties were also adopted in the field of neighboring rights. These are International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961, commonly known as **‘Rome Convention’**; Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms 1971; and Convention Relating to the Distribution of Programme – Carrying Signals Transmitted by Satellite 1974.

Case Study

- In ***Fortune Films International v. Dev Anand AIR 1979 BOM 17***: The earliest case on performer's right in Indian court was in 1979, when section 38 & 39 were not a part of the copy right act. The Supreme Court held that an actor had no claim over his performance in a film as this performance did not fall within the five categories of the artistic work contained in the copy right act.
- ***Cassettes Industries v. Bathla Cassette Industries 107 (2003) DLT 91***: After the inclusion of section 38 & 39 in 2003 in the Act, the Delhi High Court held in this case that performer's rights were essentially different from copyright, and held that re- recording of a song without the permission from the original performer constituted an infringement of performers' rights.

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Case Study

• **Neha Bhasin v/s.Raj Anand Raj & Performer's Rights**

- It was held in this case that the plaintiff has sung the song and is protected under the performers rights. The plaintiff Neha Bhasin, a singer, alleged that her voice has been stolen and falsely attributed and held out to be used by the defendants for the three versions of the song "ek look ek look" in the hindi feature film "Aryan the music director -Anand Raaj Anand, had shown herself to be the lead singer in credits for the three versions in the inlay card of the audio compact disc and plaintiff has been shown as a backup vocalist in all the three versions of "ek look ek look", but it is the voice of the plaintiff that is heard. The plaintiff had agreed to render voice for the film on the term that remuneration would be paid suitably after looking to the popularity of the song once it is released in the market. However, song broadcasted and CDs sold did not contain her name as the singer. In response to the notice by the plaintiff the respondent send a notice claiming that, though she had been auditioned to sing the song, it was the version sung by Poonam that was used by the music director. However due to technical inadvertence the version of Neha was overlapped with the version of Poonam, and hence the credit of backup vocal inserted. However, the court derived at the conclusion that the three versions of the song are sung by the plaintiff and not the defendant.

REMEDIES AGAINST INFRINGEMENT OF PERFORMERS RIGHTS

The following remedies may be availed in a suit against infringement of performers rights under Sections 55 and 63 to 70 of the Copyright Protection Act.

- (i) **Civil remedies:** Under civil remedies, the owner of the copyright, or his assignee or his exclusive licensee or a legatee may obtain
- (ii) *injunction* or
- (iii) *claim damages*
- (iv) **Criminal remedies:** In addition to civil remedy the Copyright Act enables the owner of the copyright to take criminal proceedings against the infringer. The offence of infringement of copyright is punishable with imprisonment which may extend from a minimum period of six months to a maximum period of three years or with a fine of the order of Rs 50,000/- to Rs 2.00 lakhs.
- (v) **Anton Pillar order:** In appropriate cases the court may on an application by the plaintiff pass an ex parte order requiring the defendant to permit the plaintiff accompanied by solicitor or attorney to enter his premises and take inspection of relevant documents and articles and take copies thereof or remove them for safe custody.

The necessity of such an order arises where there is a grave danger of relevant documents and infringing articles are being removed or destroyed so that ends of justice will not be defeated.

CASE LAWS ON PERFORMERS RIGHTS

Garcia v. Google Inc.

- Garcia v. Google Inc. is a copyright case in which the Ninth Circuit has ordered Google to remove copies of the notorious "Innocence of Muslims" film from YouTube. Why?
- Because one of the actors in the film insists she has a copyright interest in her performance and, based on that interest, claims to have a right to have the video taken offline. Actress Cindy Lee Garcia—who was tricked into appearing on-screen, overdubbed, for five seconds—sued Google to have the footage removed. A Ninth Circuit panel ruled 2-1 in her favour in February 2014. As a result, Google was forced to remove the film from YouTube and take steps to prevent future uploads.

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Bollywood Controversy



They want to get money from sponsors and not share some of it with us which is why they want us to sign these contracts



Singers should take rendering a film song as an opportunity and not arm-twist producers by not signing the contracts on the basis of unreasonable and unrealistic demands



I'm ready to be replaced, like in Heartless, but I won't give up the fight



Singers don't need to be given royalty, we are giving them one-time payment



We have always worked on trust, but the time has now come for a change



Many constituents are interpreting the law at their own will /viewpoint and that may or may not be necessarily correct for the industry to grow



Besides being denied royalty, we have now been told that once we record a song for a film, we cannot sing it on any other platform

Singers protest 'feudal' contract, music companies maintain 'no royalties'.

On going war between ISRA and the Music compines is going viral. The reason behind that is

➤The singers are being asked to sign a contract which stipulates that they are assigning their performer's rights to the music director who passes them on to the producer who then has "exclusive right including but not limited to the right to reproduce the performance in any material form".

➤Further states that in the case of any audiovisual recording of a performance, the singer has to assign his/her right to royalty under Section 38A (2) to the music director who passes it to the producer in lieu of a lump sum of royalty payment

➤Section 31C according to which a singer has to agree that he/she will not perform or record a song, and this includes cover versions, without the permission and licence of the music director and/or the producer

Contd.

However, from a plain reading of the new Section 39A, it appears that Parliament may have granted singers the same rights as composers and lyricists which means that more people get a slice of the pie, provided of course that everybody takes a smaller slice of the pie. Section 39A was an old provision in the law which basically applied the old Section 18 & 19 to even performer's rights enjoyed by singers. During the 2012 amendment, Section 39A was amended to include some extra provisions (such as TPMs) which would apply to even performer's rights. However Parliament didn't make any attempt to exclude the newly added provisions to Section 18 & 19 from the ambit of Section 39(A). As a result singers who qualify as performers qualify for the same rights as composers and singers.

Conclusion

A performance is not just Kamala Hassan singing a song at Filmfare Awards or Prabhu Deva showing his dancing skills at a 'Dancing Fest' or Shobana Classical acting in a stage show but Christ Gayle celebration of a wicket, MSD's Helicopter shot, umpire style of umpiring; manner of cheering by fans of a particular football club is concerned is also to be considered as performance and the person doing such act as performer. There is no protection against imitation of the above said acts under the performer's rights provision in Indian Copyright Act. As far as india is concern if a person copies a famous umpire's style of umpiring throughout the match, the only solution would be Section 38B(b) of the Act which allows a performer "to restrain or claim damages in respect of any distortion, mutilation or other modification of performance that would be prejudicial to his reputation." But even for availing that, he shall have to prove that the performance by such a person has been prejudicial to his reputation, which might not be that easy.(Actress Namitha and Actress Sona Controversy). Thus I conclude saying the recent amendment in copyright law regarding performers rights is a good start but it has to have a wider provision and must be broad enough for the understanding of any performer their rights.

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REFERENCES

- Law Of Copyright-Comparative Perspectives by Alka Chawla
- Law Relating to Intellectual Property Rights by V.K. Ahuja
- Performer's Rights under the Indian Law, <https://Racolblegal.Com/Performers-rights-under-the-indian-law/>
- Copyright in Performance, <https://www.slideshare.net/altacitglobal/copyright-in-performance>
- Effect of Copyright (Amendment) Act, 2012 on Indian Film Industry, <https://www.slideshare.net/nsrkbharat/effect-of-copyright-amendment-act-2012-on-indian-flim-industry>.

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