

CHAPTER IV

NEIGHBOURING RIGHTS

Origin of Neighbouring Rights

Law is a cultural product. It follows that the legal development surrounding copyright and neighboring rights echoes the social and cultural advancement of the society. Undoubtedly, the history of copyright reflects the progress of technology. In the second half of the 19th century technology created photograph and sound recording and in the 20th century, films with sound track, radio and television. The problem then arose of deciding whether, in the terminology of copyright, these new subject matters needed and deserved full copyright protection and, in the terminology of the '*driot d'auteur*', whether they constituted work to be protected.¹ For example, in the case of sound recording, to recognize the sound engineer or the producer who is in charge of recordings in the studio or the performing artists as the co-authors of a recording was felt to be stretching the point of *driot d'auteur*' doctrine too far. Further, when it came to the making of broadcast the broadcasting corporation is too large an enterprise to conceive as a team of co-authors. Thus on the international platform for phonograms and broadcasts a new solution had to be found.² It is important to note that the new situation arose during a period which is marked with a discrepancy between the position and status of performers and that of the authors.

The third and fourth quarters of the twentieth century witnessed a sudden rising of performers: they began to achieve great economic power as well as social position. The performers who have gained greatest economic powers have done so through combining performance with authorship. The performers started to become authors of the work they performed. This phenomenon was increasingly felt in the case of film and music industries.

1 S. M. Stewart, *International Copyright and Neighbouring Rights* 185 (Butterworths, 1989).

2 *Id.* at 189.

The changes in the social and economic position of performers have been reflected in changes to their legal rights and the legal protection afforded to the performers against unauthorized exploitation of their performances. The demand for performers' right became tremendously perceptible when the technical means to fix the performances emerged. Once it became possible to exploit performances by means of phonogram and cinematographic film, the economic arguments in favour of authors' rights became equally applicable to performers' rights.³ When faced with the new technology the '*droit d'auteur*' jurisdictions reacted differently to each new inventions. However, an international consensus has been reached to treat the new technological developments including broadcasting as subject matters of intellectual property rights, and as such, it is close to or connected with or neighbouring on the '*droit d'auteur*'.⁴ Italian law called these new rights as '*diritti connessi*' (connected rights); German law '*verwandte schützrechte*' (related rights) and French law '*droit voisins*' (neighbouring rights). The term neighbouring rights is most commonly used in English.

Scope

Neighbouring right is a facet of copyright law. Three kinds of rights neighbour upon copyright protection. Since copyright or author's rights do not protect anything other than creations of a human mind, certain products that have been considered valuable enough to merit protection are excluded from author's right protection. The purpose of neighbouring rights is to serve the protection of such products.

These are the rights of performing artists in their performances, the right of producers of phonograms and the rights of broadcasting organizations in the radio and television programs.⁵ Neighbouring rights also called as related rights have emerged out of technological changes in a context where live performances could be broadcasted. These rights are conferred to persons or organizations taking effort to make the works available to the public. Though in the narrow sense the term 'neighbouring rights' covers only the rights of performers, producers of phonograms and broadcasting organizations, in a broad

3 Richard Arnold Q.C., *Performers' Right* 6 (Sweet & Maxwell, London, 2004).

4 The view that the performers are less deserving of protection since their contribution is subsidiary to that of authors led to the classification of these rights as neighbouring or related rights.

5 See generally, Michael Blackener (ed.), *Border Control of Intellectual Property Rights* (Sweet & Maxwell, London, 2004).

sense it covers the rights similar to copyright. In the broad sense, "rights similar to but less than full copyright" are addressed to. The latter sense is derived from the traditional reluctance of the civil law systems based on the concept of *driot d'auteur*' to accord full copyright where the object to be protected is derivative from a literary and musical work and particularly where the author is a corporation as with a recording company or a broadcasting corporation. In such cases rights which are *neighbours* to true authors' rights are conferred.⁶

Since the concept of neighbouring rights is not rooted in the natural law philosophy, protection is usually more limited than that of author's rights. While authors in principle enjoy a broad right of exploitation for their works so as easily to cover future kinds of exploitation, neighbouring rights owners are only granted specified rights, which must be considered necessary against the background of justification of their protection.

Neighbouring rights are nearly always rights in derivative works as they presuppose a pre-existing work. Performers are protected if they perform the work. Phonograms are nearly recording of works and broadcasts consist largely of performances of works.

Neighbouring rights are similar to copyright with reference to its subsistence, infringement and remedies.⁷ The important distinction is that the initial copyright owner in the case of neighbouring rights is in most cases a corporate body with the notable exception in the case of 'performers' whereas the initial owner of other copyrights is usually a natural person. Similarly, the scope of copyright is wider than the scope of neighbouring rights. The neighbouring rights encompass only three categories of rights; reproduction right, public performance right and broadcasting rights.

The Rationale

Neighbouring rights have their origin from French term "*Droits Voisins*" and thus owe their origins to Civil Law. The English and American law categorize it as a form of protection under copyright and thus neighbouring to copyright. These rights are conferred to persons or organizations taking effort to make the works available to the public. The key point is that there is a communication by one or

6 *Supra* note 3.

7 *Id.* at 35.

more persons to an audience for certain particular purpose. They involve public performance of the works through:

- Live performance by artists
- Performance through sound records
- Performance through broadcasting, and
- Performance through Internet

The primary justification for protection of neighbouring rights is that the public performer displays certain creativity in making the work enjoyable to the public. A performance or a phonogram is as much of an intellectual creation as a copyright work. Thus they can also easily satisfy any test of originality which may be required for traditional copyright protection.

It is also due to the possibility of fixing the performance and its commercial exploitation using technology. In case of sound recording and broadcasting the justification seems to be investment in converting the works into signals and transmitting the same. It is also due to the possibility of theft of signals and their simultaneous transmission causing economic loss to the broadcasting organizations.'

As R. Arnold argues, only copyright or a protection analogous to copyright can ensure that performers are remunerated as exploitation occurs, including payment for new or unforeseen forms of exploitation. Otherwise, performers are forced to bargain for the right to exploit their performances in advance, at a time when the potential market, and perhaps even the technical means of exploitation are unknown.⁸

Neighbouring rights can be justified on the basis of moral right theory. In fact, the moral case is stronger in the case of performers than in the case of authors since the performance is so intimately connected with performers' own personality.⁹ As such he has the right to decide the terms and conditions for the exploitation of his performance.

As in the case of copyright, the protection would provide the performers etc. an economic incentive to perform by ensuring that they are properly rewarded for their performances as exposed in the Rental Directive:¹⁰

8 *Supra* note 3 at 6.

9 *Id.* at 7.

10 Directive 92/100/EEC of 19th Nov. 1992 on Rental Right and Lending Right.

Whereas the investments required particularly for the production of phonograms and films are especially high and risky; whereas the possibility for recouping that investment can only effectively be guaranteed through adequate legal protection of the right holders concerned.

Though Morgan holds an opposite opinion still he agrees to the fact that there will be a marginal increase in the quantity and quality of production if rights are conferred because they will be able to support themselves and be less reliant from obtaining non-productive sources of employment.¹¹ The protection against unauthorized exploitation helps the performers as well as the industries that provide employment to the performers. In the digital era of rampant Internet piracy and file sharing the producers and the artists have a common interest in combating the piracy which deprives both of them from revenue.

The scope of protection of neighbouring right involves enjoyment of the rights only with the permission of the owner of the works and that the right is limited to the extent to which permission is granted. In terms of nature of protection, one may question the right to prohibit activities resulting in economic loss?, or if it is an exclusive property right. The difference between the two can be crucial because the first one suggests that everyone can by providing adequate compensation enjoy the right while the second creates exclusivity.

International Legal Framework

An overview of the international legal framework on neighbouring rights reveals that initially neighbouring rights did not fall under the scope of Berne Convention. In international law, the first move towards neighbouring rights was made in 1928 by the Rome Revision Conference of the Berne Convention when the Conference, although refusing to grant copyright to the performers, as had been suggested, expressed a *voeu* (wish) at the end of the Conference that the members of the Berne Convention should consider the possibility of measures intended to safeguard the rights of performers.

It was envisaged that one convention for performers and producers of phonograms and other convention for the broadcasting organizations should be annexed to the revised Berne Convention. Meanwhile, in 1936 Austria and in 1941 Italy granted neighbouring

11 See, Morgan, *International Protection of Performers' Rights* (Hart, 2002).

rights to performers and record producers. Brussels Revision Conference of 1948 also took a similar view. Almost all the states felt that the rights of performers, producers of phonograms and broadcasting organizations were interlinked and a fair and equitable balance between them could only be achieved in one instrument. This consensus led to the signing of the Rome Convention, 1961 which was followed by the Phonogram Convention, 1971 giving phonogram producers further rights which could be implemented by national legislation granting copyright/neighbouring right and by Satellite Convention, 1974 taking broadcasting rights into the realm of public international law.

Rome Convention

As the name suggests the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961) secures protection in performances of performers, phonograms of producers of phonograms and broadcasts of broadcasting organizations. It came into force on 18 August, 1964. This was the first multilateral convention covering selected neighbouring rights. It contains specific provision to the effect that:

- Performers are protected against certain acts they have not consented to.
- Producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.
- Broadcasting organizations enjoy the right to authorize or prohibit certain acts, namely: the rebroadcasting of their broadcasts; the fixation of their broadcasts; the reproduction of such fixations; the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The Convention defines the term "performers" to mean actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.¹² The performers' protection covers the broadcasting and the communication to the public of their live performance; the fixation of their live performance; the reproduction of such a fixation if the original fixation was made without their consent or if the reproduction was made for

12 Art. 3a.

purposes different from those for which they gave their consent. In other words, the protection provided for performers by this Convention includes the possibility of preventing:

- (a) 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;
- (b) the fixation, without their consent, of their unfixed performance;
- (c) the reproduction, without their consent, of a fixation of their performance:
 - (i) if the original fixation itself was made without their consent;
 - (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;
 - (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

If broadcasting was consented to by the performers, it is a matter for the domestic law of the contracting state where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes.

The contracting states are at liberty to extend the protection provided for in this Convention to artists who do not perform literary or artistic works.

Under the Convention "phonogram" is defined as any exclusively aural fixation of sounds of a performance or of other sounds.¹³ "Producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds. Each contracting state is obliged to grant national treatment to producers of phonograms if any of the following conditions is met: (a) nationality criterion: the producer of the phonogram is a national of another contracting state, (b) fixation criterion: the first fixation of the sound was made in another contracting state, (c) publication criterion: the

¹³ Art. 3b.

phonogram was first published in another contracting state.

When a phonogram published for commercial purposes gives rise to secondary uses (such as broadcasting or communication to the public in any form), a single equitable remuneration must be paid by the user to the performers, or to the producers of phonograms, or to both; contracting States are free, however, not to apply this rule or to limit its application.

Members of the Convention have to grant national treatment to broadcasting organisations if either of the following two conditions are met (a) the headquarters of the broadcasting organisation is situated in another contracting state; or (b) the broadcast was transmitted from a transmitter situated in another contracting state. "Broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds.

It also allows exceptions in national laws to the rights as regards private use, use of short excerpts in connection with the reporting of current events, ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, use solely for the purpose of teaching or scientific research and in any other cases—except for compulsory licenses that would be incompatible with the Berne Convention—where the national law provides exceptions to copyright in literary and artistic works. Furthermore, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, the provisions on performers' rights have no further application.

The term of protection is 20 years computed from the end of the year in which:

- (a) the fixation was made, for phonograms and for performances incorporated therein;
- (b) the performance took place, for performances not incorporated in phonograms;
- (c) the broadcast took place, for broadcasts. (However, national laws ever more frequently provide for a 50-year term of protection, at least for phonograms and for performances.)

The Convention is open to states party to the Berne Convention.

The Convention indirectly gained new influence as a model for subsequent international treaties, in particular the TRIPS Agreement and the WPPT.

Geneva Phonogram Convention

Countries of the authors' right system with a strong authors' right tradition were principally reluctant to introduce neighboring rights. The Rome Convention with its coverage of the three groups of right owners did not appeal to a large number of countries which were not granting protection to performers and broadcasting organisations. Many copyright system countries were ready to protect phonograms domestically as well as internationally, despite their reluctance to introduce protection for the performers and broadcasting organisations. In these countries especially in USA the piracy of phonograms was widespread.

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971) is an additional treaty adopted in 1971 to deal with the growing problem of piracy of recorded music. It protects against unauthorised duplication of sound recordings, and against unauthorised import and distribution of such copies. It provides under article 2 for the obligation of each contracting state to protect a producer of phonograms who is a national of another contracting state against the making of duplicates without the consent of the producer, against the importation of such duplicates, where the making or importation is for the purposes of distribution to the public, and against the distribution of such duplicates to the public. Article 2, thus explains the scope of the Convention - Whom the contracting parties must protect and against what. "Phonogram" means an exclusively aural fixation (that is, it does not comprise, for example, the sound tracks of films or video cassettes), whatever be its form (disc, tape or other). Article 1(a) defines "phonogram" as any exclusively aural fixation of sounds of a performance or of other sounds; "Producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds. Protection may be provided as a matter of copyright law, sui generis (related rights) law, unfair competition law or penal law. Protection must last for at least 20 years from the first fixation or the first publication of the phonogram.

If, as a condition of protecting the producers of phonograms, a contracting state, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled, if all the authorized duplicates of the phonogram are distributed to the public or their containers bear a notice consisting of the symbol (P), accompanied by the year and date of the first publication, placed in such manner as to give reasonable notice of claim for protection; and, if the duplicates or

their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.

The Convention is open to any state that is a member of the United Nations or of any of the agencies belonging to the United Nations system of organizations.

TRIPs Agreement

One of the important obligations of World Trade Organisation (WTO) members is to protect intellectual property, including sound recordings, under the Agreement on Trade-Related Aspects of Intellectual Property Rights. TRIPS agreement mirrors the Rome Convention protections against unauthorised copying of sound recordings, and provides a specific right to authorise or prohibit commercial rental of these works.

Section 1, Article 14 deals with Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations. In respect of a fixation of their performance on a phonogram, performers have the possibility of preventing the following acts when undertaken without their authorization:

- Fixation in sound records without authorization
- Reproduction of such sound records
- Broadcasting by wireless means, and
- Communication to the public of live performances

Producers of phonograms are given the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

Broadcasting organizations are also given the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they have to provide owners of copyright in the subject matter of broadcasts with the possibility of preventing these acts, subject to the provisions of the Berne Convention (1971). This gives the freedom to confer these rights directly to broadcasting organization or provide through the authors of the works.

The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis*, to producers of phonograms and any other right holders in phonograms as determined in a Member countries law. If on 15 April 1994 a Member, has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

The term of the protection available under TRIPS to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place.

The term of protection for broadcasting organizations is to last for at least 20 years from the end of the calendar year in which the broadcast took place.

Any Member may, in relation to the above rights provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

WIPO Performances and Phonograms Treaty

In the WIPO Performances and Phonograms Treaty (WPPT) 1996, it is specifically recognized that there shall be exclusive rights of aural performers including moral rights with reference to:

- Right of fixation of unfixed performances
- Broadcasting & communication of unfixed performances
- Reproduction
- Distribution
- Rental
- Making available to the public

The Treaty in general deals with intellectual property rights of two kinds of beneficiaries:

- (i) performers (actors, singers, musicians, etc.), and
- (ii) producers of phonograms (the persons or legal entities who or which take the initiative and have the responsibility for the fixation of the sounds). They are dealt within the same instrument because most of the rights granted by the Treaty to

performers are rights connected with their fixed, purely aural performances (which are the subject matter of phonograms).

As far as performers are concerned, the Treaty grants performers four kinds of economic rights in their performances fixed in phonograms (not in audiovisual fixations, such as motion pictures):

- (i) the right of reproduction,
- (ii) the right of distribution,
- (iii) the right of rental, and
- (iv) the right of making available.

Each of them is an exclusive right, subject to certain limitations and exceptions. It includes: The right of reproduction - the right to authorize direct or indirect reproduction of the phonogram in any manner or form; the right of distribution - 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; the right of rental - 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 (except for countries that since April 15, 1994, have in force a system of equitable remuneration for such rental); and the right of making available to the public - 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. This right covers, in particular, on-demand, interactive making available through the internet.

The Treaty grants three kinds of economic rights to performers in respect of their unfixed (live) performances:

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

The Treaty also grants the performers moral rights: the right to claim to be identified as the performer and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation.

As far as producers of phonograms are concerned, the Treaty grants them four kinds of rights (all economic) in their phonograms:

- (i) the right of reproduction,
- (ii) the right of distribution,
- (iii) the right of rental, and
- (iv) the right of making available.

Each of them is an exclusive right, subject to certain limitations and exceptions including: The right of reproduction - the right to authorize direct or indirect reproduction of the phonogram in any manner or form; the right of distribution - the right to authorize the phonograms making available to the public of the original and copies of the phonogram through sale or any other means; the right of rental - 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 (except for countries that since April 15, 1994, have in force a system of equitable remuneration for such rental); and the right of making available - the right to authorize making available to the public the phonogram, by wire or wireless means, in such a way that members of the public may access the phonogram from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive making available through the internet.

As far as both performers and phonogram producers are concerned, the Treaty obliges—subject to various exceptions and limitations each contracting party to, accord to nationals of the other contracting parties with regard to the rights specifically granted in the Treaty the treatment it accords to its own nationals (“national treatment”).

The Treaty provides that performers and producers of phonograms enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms, published for commercial purposes, for broadcasting or for communication to the public. However, any contracting party may restrict or—provided that it makes a reservation to the Treaty—deny this right. In the case and to the extent of a reservation by a contracting party, the other Contracting Parties are permitted to deny, *vis-à-vis* the reserving contracting party, national treatment (“reciprocity”).

Beijing Treaty on Audiovisual Performances

The WIPO Performances and Phonograms Treaty (WPPT) 1996 does not extend protection to performers in respect of their performances fixed in audiovisual fixations. Hence, Beijing Treaty on

Audiovisual Performances, 2012 (BTAP) tries to develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniform as possible.

BTAP has been adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012. It has not entered into force yet. BTAP, as the preamble of the treaty states, has been adopted by recognizing:

- the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments;
- the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances and
- the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information.

BTAP defines 'performers' as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore¹⁴ and 'audiovisual fixation' as the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device.¹⁵ Under the treaty, 'broadcasting' is defined to mean the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also broadcasting; transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organization or with its consent.¹⁶ The phrase, 'communication to the public of a performance' is interpreted to mean the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation.¹⁷ This expression also includes making a performance fixed in an audiovisual fixation audible or visible to the public.

14 Art. 2 (a).

15 Art. 2 (b).

16 Art. 2 (c).

17 Art. 2 (d).

Contracting parties are required to accord the protection granted under BTAP to performers who are nationals of or having habitual residence in other contracting parties. The principle of 'national treatment' is incorporated under BTAP. Article 5 of BTAP creates moral rights, independently of economic rights and at least until the expiry of the economic rights, for performers as regards their live performances or performances fixed in audiovisual fixations, which shall extend.¹⁸ It includes the right:

- a. 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
- b. to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.

Under BTAP, the performers have the exclusive economic right of authorizing, as regards their unfixed performances:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

In respect of their performances fixed in audiovisual fixations, in any manner or form, the performers are entitled for:

- a. Right of reproduction
- b. Right of distribution
- c. Right of rental
- d. Right of making available of fixed performances
- e. Right of broadcasting and communication to the public

However, in the absence of once any contract to the contrary, once a performer consents to fixation of his performance in an audiovisual fixation, the exclusive rights of authorization provided for in articles 7 to 11 would be transferred to the producer of such audiovisual fixation.

18 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.

The term of protection to be granted to performers under this BPAS is at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed (article 14). BPAS requires contracting parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, which are not authorized by the performers concerned or permitted by law. Similarly, the contracting parties are obliged to provide adequate and effective legal measures concerning rights management information. BPAS mirrors the principle of automatic protection; no formalities are required to acquire the rights under the treaty. BPAS is open to all WIPO members.

National Law

Section 2(q) of the Indian copyright Act 1957 defines performance and section 2 (qq) defines who is a performer. Performance, in relation to performer's right, means any visual or acoustic presentation made live by one or more performers. As per section 2(qq), the term 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. A new proviso has been added to this definition clause which states that in a cinematograph film, a person whose performance is casual or incidental in nature and, in the normal course of practice of the industry, is not acknowledged anywhere including the credits of the film, shall not be treated as a performer except for the purpose of clause (b) of section 38B. Hence, among film actors, only those performers credited in cinematograph films would be entitled to the performer's right. However, all performers in cinematograph films, whether or not credited are granted the right under section 38 B, the moral rights of performers. This provision removes from the definition of performers a category of incidental performers in films, popularly called 'extras' in Indian cinema.¹⁹

The definition clause itself brought about another change with respect to the performers right by expanding the definition of the term communication to the public. The amended section 2 (ff) covers both works and performances within its ambit. Thus the rights of

¹⁹ Zakir Thomas, "Overview of Changes to the Indian Copyright Law" 17 *JIPR* 324-334 (2012).

communication to public limited to authors by 1994 amendment have been extended to performers by the 2012 amendment. Before the 2012 amendment, the definition covered communication to the public in whatever manner, including communication through satellite. The right of communication to public which is essential to protect the work on the Internet has now been extended to performances as well.

The amended section now reads:

Communication to the public means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

The definition now explicitly states that it does not matter whether the communication is simultaneous or at places and times chosen individually. As such, it appears to include multicasting, narrowcasting and unicasting.²⁰

Chapter VIII of the Copyright Act, 1957 deals with the rights of broadcasting organisations and of performers. Section 38 states that where any performer appears or engages in any performance, he shall have a special right to be known as the performer's right in relation to such performance. The performer's right subsists until fifty years from the beginning of the calendar year next following the year in which the performance is made.

2012 amendment has restructured the performers' rights. A new section, 38A has been inserted to confer affirmative and exclusive right to performers. Under the new Act the performers have right to do or authorize the doing of the following acts, namely:

- to make a sound recording or a visual recording of the performance or to certain acts in respect of such recording;
- to reproduce it in any material form including the storing of it in any medium by electronic or any other means;
- to issue copies of it to the public not being copies already in circulation;

20 <http://copyright.lawmatters.in/2012/06/the-performers-right-under-2012-act.html>.

- to communicate it to the public;
- to sell or give on commercial rental or offer for sale or for commercial rental, any copy of the recording and;
- to broadcast or communicate the performance to the public except where the performance is already a broadcast performance.

These amendments thus make the Indian copyright law compatible with the WPPT. Section 38A (2) states that once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film. However, the new Act enables the performers to earn continued royalties in case of making of the performances for commercial use.

One of the most important changes introduced by the 2012 amendment is the conferment of moral rights to performers by inserting section 38 B. In *Neha Bhasin v. Anand Raj Anand*,²¹ which was decided prior to 2012 amendment it was questioned whether performer is entitled to protection of her moral rights based on principles of equity and common law? In this case, by layering of the sound using software the performer was used as a back-up vocalist. Since more layers included other singers, others were mentioned as lead singers and not the plaintiff. The court stated that commercial aspiration as the reasoning to it to propound moral right of the performer - granted the performers moral right in equity since the current version of the Act does not provide for it. However, the 2012 amendment settles the matter forever by making provisions for moral right for performers in the statute itself. It is interesting to note that though the 1994 amendment uses the term 'special rights' in respect of authors under section 57, the new amendment uses the term 'moral rights' in respect of performers instead of special rights. Section 38B reads as under:

The performer of a performance shall, independently of his right after assignment, either wholly or partially, have the right,—

- (a) to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and

21 2006 (32) PTC 779 (Del).

- (b) to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

The explanation to this section clarifies that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performers' reputation. Sections 39 and 39A providing for fair dealing and applicability of certain other provisions in the Copyright Act, 1957 respectively are commonly applicable to performers and broadcasting organizations. (For a detailed discussion of these sections please refer Chapter V).