Entertainment Media and IP Rights: An Indian Perspective

by

Jagdish Sagar

India has large entertainment industries which share the same fundamental concerns as their counterparts elsewhere. At same time, as is only to be expected, there have also been peculiar Indian concerns and issues arising out of the local socio-economic, cultural and legal environment. In this paper we shall attempt to review only some of the issues that have arisen in the past as well as those which are currently in issue or seem likely to arise in future.

Definition of 'musical work': Indian classical music differs from that of the West in some important respects. Western classical music is created by composers who, conventionally, record their compositions in writing on paper, using an elaborate, well-established system of musical notation. Performers who can read the notation then perform their works: personal contact between composer and performer is not necessary and, even before the era of sound recordings, a composer's works could be performed long after his death. (Ludwig van Beethoven, one of the greatest composers, was able to compose many of his greatest works after going deaf.) This composer-performer dichotomy has become the paradigm in the conceptualisation of music as a form of copyrighted work, and of the different rights arising out of its creation and use, but it does not precisely fit the Indian situation. Indian civilisation gave birth to the only other classical form of music that has reached heights of sophistication comparable to that of the West, but on altogether different principles. Here the same persons both compose and perform simultaneously, improvising, within the framework of a highly developed discipline, on pre-selected traditional themes ('ragas') as they sing or play on musical instruments.

A related issue, which we may note in passing, is that of 'fixation'. The general principle in common law countries is that, as a prior condition for its being protected, the work must have been reduced to writing or otherwise fixed in material form. This is not explicitly laid down in our own statute, the Copyright Act, 1957, but in the light of the general common law understanding it is uncertain whether our courts would entertain a claim of copyright protection for, or for relief against the infringement of, a work that has not first been reduced to writing or fixed in material form. It may be added, under section 14, the right of reproduction of a literary, dramatic, musical or artistic work is limited to reproduction of the work in material form.

The definition of 'musical work' contained in the Copyright Act 1957, as originally enacted, limited the definition of a musical work to the composer's recorded graphical notation. The new definition inserted in section 2 (*p*) by the amending Act of 1994 sought to meet the requirements of Indian music while at the same time retaining protection for graphical notation in the Western form. It is not, it may be noted, necessary to define the well-understood word 'music'—we are concerned only with defining a musical *work*. The new definition reads:

'"musical work"' means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.'

However, while this amendment does remove an anomaly whereby our classical musicians were not credited with the creation of musical works, it may be considered whether it makes very much real, practical difference to their situation. Given the nature of their music, being composition and performance at the same time, the performer's right, also conferred by the amending Act of 1994, is likely to be of much greater practical value.

Performer's rights: The importance of performers' rights of course goes far beyond the issue of finding a means for conferring rights, with the means of their protection, on Indian classical musicians. We have very large cinema and recorded music industries with important performers, who are performers in the more conventional sense of performing the works created by authors; the 'authors' concerned under our Copyright Act include the producers of films and sound recordings, screenplay writers, composers and lyricists. The question of protecting the rights of such performers had arisen long before the amendments of 1994. In the case of *Fortune Films v Dev Anand* (AIR 1979 BOM 17) the Bombay High Court very rightly held what was obvious, that a performer is not an author, but what is significant is really the respondent's attempt to secure protection for his rights as a performer. He had secured an agreement to the effect that '...your [i.e. the performer's] work in our [i.e. the producers']...picture on completion will belong to you absolutely and the copyright therein shall vest in you and we will not be entitled to exhibit the said picture until full payments...are secured to you...' Having found that the words 'copyright therein' referred to the performer's role and not to the cinematograph film as a complete entity, the court reached the unavoidable conclusion that the performer's performance was not a copyrightable work; but the case did implicitly expose the need for a separate performer's right.

A few years later, in the case of *Indian Performing Rights Society v Eastern India Motion Pictures* (AIR 1977 SC 1443) the Supreme Court held that the producer's copyright in a cinematograph film extended to the music incorporated in its sound track, though not to the music when used separately; we shall discuss that issue later in this paper, but what is relevant here is Mr Justice Krishna Iyer's footnote:

'Strangely enough, "author" as defined in section 2(*d*) in relation to a musical work, is only the composer and section 16 confines "copyright" to those works which are recognised by the Act. This means that the composer alone has copyright in a musical work. The singer has none. This disentitlement of the musician or group of musical artists to copyright is un-Indian because the major attraction which lends monetary value to a musical performance is not the music maker, so much as the musician. Perhaps both deserve to be recognised by the copyright law...Of course, lawmaking is the province of Parliament but the Court must communicate to the lawmaker such infirmities as exist in the law extant...'

The judge here conceived of a performer's right without being aware of its existence

elsewhere in the world[1] as a related, or 'neighbouring' right (rather than as copyright properly speaking, which of course can vest only in the authors of *works*). His comment on the un-Indian nature of the law as it then stood would perhaps have seemed more apposite in the context of Indian classical, rather than popular, music; but we must give him credit for noticing and drawing attention to the need to protect the rights of performers.

The amending Act of 1994 introduced a performer's right into the Copyright Act, 1957 (sections 38, 39 and 39A) broadly on the lines required by the TRIPS agreement, which in turn generally followed the Rome Treaty of 1961: the rights provided are of the fixation (and reproduction of fixations made without consent) and the broadcasting and communication to the public, of live performances. These rights are subject to certain exceptions in the nature of fair use (section 39) and do not extend to a performer who has once consented to the incorporation of his performance in a cinematograph film (section (4)). In relation to the performer's right, the term 'performance' means 'any visual or acoustic presentation made live by one or more performers' (section 2(*q*)) and the performer's right accrues 'Where any performer appears or engages in any performance' (section 38 (1)). Our legislation goes beyond the minimum requirements of the Rome Treaty and of the TRIPS agreement in extending protection to variety artistes, and not merely to those who perform the works of others; the term 'performer' being defined inclusively as including 'an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, person delivering a lecture or any other person who makes a performance' (section 2(*qq*)). This should not, however, in the opinion of this author, be misunderstood to extend to such persons as sportspersons: a game or a sporting event is a real competitive event whose outcome is uncertain, and the object of which is to defeat or outscore an opponent; the existence of an audience is only incidental to the nature of a sporting event (whatever may be the commercial value of having such an audience) but is essential to a 'performance' in the sense in which the term is used here.

Performers' rights, phonograms producers and WPPT: Our conventional understanding of the scope of performers' rights has taken on an altogether new dimension with the WIPO Performances and Phonograms Treaty (WPPT), which was negotiated in December 1996 and has recently come into force. WPPT does not extend to audiovisual works and is, generally, limited to performances fixed in phonograms (i.e. sound recordings) but it has permanently changed our conception of the place of performers' rights in the whole scheme of copyright and neighbouring rights, putting performers virtually at par with authors in the quality of rights they exercise. Article 6 repeats the accepted rights of fixation, broadcasting and communication to the public of unfixed (in effect, live) performances in general terms. Articles 7, 8, 9 and 10 confer respectively the rights of reproduction, distribution (making copies available to the public, subject to the exhaustion principle if so provided in national legislation), commercial rental and making available to the public 'by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them'[2]. All these

[1] There was little litigation and little awareness of copyright issues in India in those days; in the same case, the judges themselves confessed to their lack of prior exposure to copyright law: 'The copyright law in our country being fairly complicated...and the case being of first impression, learned counsel for the parties have tried hard to help us...'

[2] This being the provision intended to cover the internet, an issue discussed later in this paper.

rights, conferred by Articles 7 to 10, relate to performances fixed in phonograms (i.e. sound recordings) and are parallel with the identical rights conferred on the producers of phonograms under Articles 10 to 14. For both performers and phonogram producers, Article 15 provides a right to single equitable remuneration in respect of broadcasting and communication to the public.

In addition, WPPT confers moral rights on performers for the first time. Hitherto moral rights were a concern only in respect of authors, it not being easily conceivable what damage could be done to a performance of such a nature as to affect the performer's honour and reputation. This situation has, of course, changed with the new possibilities of digital manipulation of performances.

Now, while phonograms producers globally are undoubtedly beneficiaries of this Treaty, which goes beyond TRIPS[1] in the range of rights conferred on them, the performers whose works are fixed in their phonograms are undoubtedly even greater beneficiaries. Generally speaking, performers are now on the same footing as authors. We may consider the implications of this for India. Obviously, the Copyright Act, 1957 will have to be amended further to take this new situation into account, if we are to adhere to WPPT. At present, under our law,[2] phonograms producers already enjoy a right of reproduction (in which the distribution right is implicit), a rental right and an inclusive right of communication that substantially meets the requirements of Article 14 of WPPT and exceeds those of Article 15 (there being no such compulsory licence in India, as envisaged in Article 15). Our phonograms producers will benefit from adherence to WPPT to the extent that it improves the protection of Indian phonograms abroad, but will have to concede some quite extensive rights to the performers whose performances are recorded in their phonograms.

In the opinion of this writer, it is very desirable that we should adhere to WPPT. Given the scale and importance of our copyright industries, it is appropriate and wholly consistent with our national interests to participate in all international treaties that generally strengthen and update the protection of copyright and neighbouring rights. Moreover, Indian performers should not be denied the level of protection that appears to be the norm of the future. The issues that arise are, therefore, matters of detail, viz. of the precise formulation of the amendments that we need to consider. Here, it is advisable to take the concerns of the phonographic industry into account. Two issues of legitimate concern to the industry arise from the conferring of moral rights on performers for the first time. The performer's claim to be identified on the work (commonly called the 'right of paternity') is, under WPPT, subject to an exception 'where omission is dictated by the manner of the use of the performance'[3] and any legislation that is enacted to give effect to this will have to be appropriately drafted. Again, the 'right of integrity' that is sought to be conferred ('to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation') should not be so construed as to affect normal processes of editing or modification required for purely technical reasons.

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[1] Article 14 of TRIPS confers on phonograms producers the rights only of the direct and indirect reproduction of their phonograms and a rental right that is subject to any right of equitable remuneration in lieu thereof that may be in force.

[2] Section 14 (e).

[3] Article 5, WPPT.

'Fair use' of phonograms and audiovisual works: Whenever the Act is next amended, whether for purposes of adherence to WPPT and the WIPO Copyright Treaty (WCT) or otherwise, it will be necessary to remove the present anomaly under which the fair use provisions applicable to literary, dramatic, musical and artistic works under section 52 of the Copyright Act, 1957 (in particular 52(1)(*a*) and (*b*)) are not applicable to sound recordings and cinematograph films, whatever the objections of the industries concerned.

Musical works and the film industry: That India has the largest film industry in the world is well known; however a peculiarity of the Indian situation has been that this film industry has also been the principal medium through which popular music has reached the public—indeed it has been the principal employer of the authors and performers of such music. Musical production independent of the film industry does of course exist and has been growing but, overwhelmingly, it is still the case that popular songs are identified by the film they were first used in—in fact—and that songwriters, composers and performers depend substantially upon the work provided by film producers; indeed the songs and the screen performances of them may have to be tailor-made to fit the requirements of the script. Nor is the audience familiar with the performing personality of the singer: singers do of course stage concerts but more often than not the audience first sees their performance on screen through the face and body of a film star -- the singers are called playback singers. Now the definition of "cinematograph film" has always -- both before and after amendment of the definition by the amending Act of 1994 -- specified that the film includes the soundtrack ("... includes a sound recording accompanying such visual recording..." in the language of the definition since the 1994 amendments). However, right from the time of the release of the film, sound recordings of the songs are also sold, performed in public and broadcast separately: there are therefore substantial economic interests both in the song as part of the film and as utilised independently.

The Supreme Court distinguished these interests conclusively in the well-known case of *Indian Performing Rights Society (I. P. R. S.) vs Eastern India Motion Picture Association.* Briefly, while upholding the right of the I. P. R. S. to lay down fees charges and royalties for the grant of licences for performers in public of works in respect of which it claimed to be an assignee of copyrights, the court confirmed the decision of the Calcutta High Court that where a composer had authorised the incorporation of his musical work in the soundtrack of a film, no further licence was required from him for the performance of the film along with the musical work as incorporated in the soundtrack. In his remarks concurring with the main judgment, Mr Justice Krishna Iyer added for the sake of clarity: "... beyond exhibiting the film as a cinema show if the producer plays the songs separately to attract an audience or for other reason, he infringes the composer's copyright."

'Cover versions': The non-voluntary licence provided for in section 52(1)(*j*) of the Copyright Act has long been a contentious issue, the continuance of this provision being strongly and even bitterly opposed by the mainstream phonographic industry. The intention is the laudable and wholly justifiable one of permitting new sound recordings of a work in respect of which sound recordings have already been made, subject to payment of a licence fee to the copyright owners. A song that becomes popular, is on everybody's lips, very rapidly becomes part of our common

cultural property; it is right that other performers should be permitted to make their own sound recordings of it. This is a common practice everywhere. It is true that provisions analogous to those in our Act survive only in a few other countries, but two of those countries are the United States and Japan, no less![1] Similar provisions—permissible under Article 13(1) of the Berne Convention—have gradually been repealed by some other countries only in the context of a situation where specific licenses for the same purpose are freely and conveniently available through the operation of collective administration systems. Until such a facility becomes conveniently available through a collective administration mechanism, it does not appear justified in principle to do away with the available alternative of the non-voluntary licence. It may be added, the industry's real objection is not so much to the principle involved as to the apprehension—by not means unjustified—that the provision is liable to misuse, by payment of the licence fee for a much smaller number of copies of the cover version than are actually made and put into circulation. The answer to this objection is surely not, so to speak, to throw the baby out with the bathwater, but rather to introduce controls to prevent misuse; the amendments of 1994 make a conscious attempt to do so

Audiovisual performers: It will not suffice to consider the question of protection of performers whose performances are fixed in phonograms. Admittedly, WPPT does not obligate protection of the performers of audiovisual works, but the latter issue has by no means been buried, and it is necessary to formulate our position in respect of it. In this writer's view, some protection of audiovisual performers is inevitable, howsoever strong the reservations of the film industry and, as in the case of sound recordings, our concern should be to strike a fair balance between the legitimate interests both of producers and of performers. Now on the question of moral rights of performers, what has been said above regarding sound recordings applies *mutatis mutandis* here also. The possibility of the cinematograph film producer's interests being affected, e.g. by a mischievous 'extra', is a very real concern to the industry and any legislation on the subject will have to take it into account. The same is true of the apprehension that an actor might have an opportunity for unreasonable obstruction of a film by objecting to editing that is done for essentially technical reasons. Both these issues would have to be addressed by very careful drafting. The film industry is also likely to insist on retention of 38(4), under which the performer's rights in his performance cease to have any application once he has consented to the incorporation of his performance in a cinematograph film, and it seems unlikely that any future international treaty would omit such a provision, which was also found in the Rome Treaty.

Copyright enforcement and the internet: The problem of infringement through the internet has yet to reach the magnitude that it has in some developed countries—we have had no Napster-like problem on anything like the same scale, audio cassettes still being the most common and most accessible form in which copies of sound recordings are stored, being much cheaper and more widespread than the digital alternatives. That situation will no doubt change, but developments on the internet are difficult to anticipate and prepare for. The issues that arise in this connection, including those of compliance with certain other requirements of WCT and WPPT, are complex and would take us away from the main themes of this paper, given the

[1] Ireland is the third.

present working of entertainment industries in India, hence are not being elaborated on here. It may, however, be noted that the definition of 'communication to the public' contained in section 2(*ff*) of the Act is wide enough to meet the 'making available' right required by the two new treaties.

Enforcement issues: It may be said in conclusion that, while some of what we have been discussing reflects peculiar local concerns, the basic concerns and issues affecting the protection of copyright and neighbouring rights are necessarily the same everywhere. With many other countries, India in the 1980s sought to address the problem posed by new technologies of analogue copying (audio and video cassettes). The amending Act of 1984 removed any possible doubt as to whether a video film was a 'cinematograph film' and made it compulsory for certain particulars to be displayed on video cassettes and sound recordings[1] by the insertion of sections 52A and 68A. Criminal penalties were enhanced and some powers of seizure were conferred on the police under sub-section (1) of section 64. In the 1990s, complying with TRIPS but also promoting the interests of our own film industry in particular, rental rights were introduced by the amending Act of 1994.[2] Yet it has also been the experience that merely strengthening the law is not enough. Something has, no doubt, been done to curb copyright piracy, but we cannot honestly say that it has been sufficient. The battle to protect copyright has to be fought in the courts—and police stations—and remains much more basically a matter of enforcing the law that exists than of further improving and refining the law.

[1] Still quaintly called 'records' until the 1994 amendments.

[2] An issue for future consideration will be whether we were justified in providing a right far in excess of the requirements of TRIPS, in the form of rental rights introduced into section 14 of the Act by the said amendments.