

# PERFORMERS RIGHTS IN INDIA UNDER THE COPYRIGHT ACT, 1957 VIS-A VIS INTERNATIONAL INSTRUMENTS: A CRITICAL ANALYSIS

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**Abstract:** *The main purpose of copyright is to grant the protection of creators and to uplift the same for the designing of new works, with the help of sweat of the brow. The copyright protection can be seen as a reward for the creative work. In the case of the cultural industries and the smooth functioning of the same, it can be observed that the copyright is the backbone of the cultural industries. The copyright protection enables that performers and the authors to get something back out of the creation of their own. In the era, that is dominated by the modern usage of technology, the unauthorized use of the works of the performers and the authors are very important to protect. Since, the longest time that is possible, the rights of the performers were not recognized in India and there was a through exploitation that happened as to the performers. The performers rights are directly proportional to the place that a country acquires in the international sphere and there needs to be subtle dealing in the protection that afforded to the performers right. In the Indian Copyright legislations, the rights of the performers though have been guaranteed, it is of question as to whether the term 'works' and the term 'performance' that is mentioned under Section 2 (q) of the aforementioned Act, is given the same footing and the importance. Under the International instruments, the performers rights and the protection of the same is extended though in the same certain fallacy can be found. There is a need as to the protection of the performers, in a extensive way because the protection that is awarded to the performers worldwide through the implementation of the certain legislations, gives the performers a motivation to originate a multiple amount of creative works. In this article, there is attempt to succinctly discuss the scope of the term 'performer' is thoroughly discussed and deliberated upon. Furthermore, it also delves in the protection that is granted to the performer and the rights in the instruments of international bearing. Lastly, the article is concluded by applauded the efforts that is undertaken by the world community at large in granting shelter to the rights of authors and performers to safeguard their intellectual investment.*

**Keywords:** *performer, performance, performer rights, copyright, international instruments, Copyright Act, 1957,*

## INTRODUCTION

*“To perform you need practice, to practice you need passion”<sup>1</sup>*

Under the Copyright Act, 1957, specific works are guaranteed protection. In the early days, it can be said that copyright protection was only extended to literary and artistic work.<sup>2</sup>but later, as time went, it can be said that the other forms of the works got protection under the same later stages dramatic works also got ample amount of the rights. The visual arts of the performers form an essential part of the creative process, and the acoustic performance of the artists demands a lot of the efforts on the part of the creators and hence that calls for the protection of specific rights.<sup>3</sup> It can be termed that for the first time, in the Rome Convention, the performer's rights were mentioned and that it dictated against the way works of the performers were used without authorization.<sup>4</sup>The Convention also mentioned that in case they use it without such authority, there needs to be compensation given to the performers.

In the Indian Scenario, the rights of the performers were granted a very late affirmation through the Copyright Act, 1957. In the same legislation, the performer's rights are guaranteed, and individual acts are penalized if it is committed without the permission of the performing artists.<sup>5</sup>

<sup>1</sup> Amit Kalantri, Wealth of Words

<sup>2</sup> Nikhil Kumar Tyagi, [Introduction](#), Impact of Copyright (Amendment) Act, 2012 on Performers Rights in India, (Nov 22, 2020, 12:49 AM)

<sup>3</sup> Nithin V. Kumar, Performers Rights Under Indian Copyright Laws, (Nov 20, 2020, 1:27 PM), <https://www.bananaip.com/ip-news-center/ip-blog-a-thon-performers-right-under-indian-copyright-law-part-i/>

<sup>4</sup> *Supra*, Note 1

<sup>5</sup> The Copyright Act, 1961 S. 38 (2020)

The term “neighboring rights” are given, and that includes the rights of the producers of the phonograms, the rights of the broadcasting organizations over the radio and the television shows, and the performances of the performing artists. The performers also put in a great amount of work, and they also become a part of the intellectual ecosystem. It has to be kept in mind that the copyright is not limited to the boundaries of a particular country and is something that concerns global involvement.

In the year of 1886, the Berne Convention was adopted that protected the rights of the copyright owners in a massive number of ways. In the Berne Convention, the creators are given rights as to how the works will be controlled by them.<sup>6</sup> The protection that is granted under the Berne Convention is threefold. Firstly, the works of a contracting state will be protected in the same manner as the works are protected in that particular state. Secondly, the protection that is guaranteed by the states should be unconditional and it will follow the principle of automatic protection and thirdly, the work will still be protected in the contracting state even though the work is still protected under the laws of the country from which the creator is originally from, in this scenario the principle of independence is followed. In the year 1961, the Rome Convention for the Protection of the Performers producers of phonograms and broadcasting agencies was brought about, which granted rights to the performers as well.<sup>7</sup> In the Rome Convention, the term ‘performers’ has been defined, and the fixation is also defined. The Rome Convention also elaborately defined the limitation and the exceptions that can be granted for the protection of the performer’s rights, producers of phonograms, and broadcasting agencies.

The WIPO that is the World Intellectual Property Organization, has been given the power for administration of the convention. The TRIPS also protect the rights of the performers to a certain extent, in the same agreement, the varied standards of protection that are stated aptly. In part, I of the Article, the general principles relating to the principles of national treatment are being talked about. Part II talks about intellectual property and the types of the same in detail.<sup>8</sup> In the case of the copyright under the TRIPS, it is stated that in the case of the copyright, there will be adherence to the Berne Convention. There were certain amendments that happened to the arena of the performer’s rights in the year 2012. In the amendment, the Indian law was given a par status with the WIPO administered treaties. The Copyright Act, 1957 with the amendment in 2012 was made in consonance with Article 14 of the TRIPS.<sup>9</sup> a significant amendment that was brought about is the powers and the role that is played by the copyright societies in the protection of the creations of the creators. In India, a copyright society is registered under Section 33<sup>10</sup> of the Indian Copyright Act, 1957. In the case of the copyright society, from a particular kind of work, only one society is allowed to register.<sup>11</sup> The amendments that happened in the year 2012 also suggested the regulatory framework of the copyright societies.<sup>12</sup>

## PERFORMERS RIGHTS AND THE NEED FOR THE PROTECTION OF THE SAME

Actors, circus performers, singers, and musicians have performing rights, and they are demanded to be protected under the various major legislations all around the world. When there were the early first recordings of the musicians and singers, it has been realized that there is a dire need to give rights to such kinds of performers.<sup>13</sup> These certain rights are also called the neighboring rights and they are the rights that are related to the copyright.<sup>14</sup> The neighboring rights are for the creation of the creator who cannot be treated as mainstream authors.<sup>15</sup> It has to be analyzed that the copyright law all around the major legislations worldwide and since the performers also put a lot of the efforts to place birth to the creations, there should be protection against the undue advantage that is taken by others. The performer’s rights were shortly introduced, and the protection of the same was granted after through the technological attitude the recording of the music and the performances were made possible.<sup>16</sup> It can be noted as the subject matter of the copyright when there is a demand for the protection of the works of the authors, the works need to be original and only original literary, musical and artistic work will be protected under the same. But in the case of the neighboring rights, the limit to the original subject matter is not required, and hence a wide range of works are protected under this, be it original or not original. It can be said that the authors in the copyright enjoy the same number of rights as the producers/music composers.<sup>17</sup> There are certain rights that are granted to the performers, be it the exclusive rights and the moral; some of the rights that are given to the performers are enlisted as follows.

<sup>6</sup> WIPO, Summary of The Berne Convention for the protection of literary and Artistic Work, (Nov 22, 2020, 11:52 AM), <https://www.wipo.int/treaties/en/ip/berne/>

<sup>7</sup> WIPO, Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting agencies (1961), (Nov 22, 2020, 11:58 PM), [https://www.wipo.int/treaties/en/ip/rome/summary\\_rome.html](https://www.wipo.int/treaties/en/ip/rome/summary_rome.html)

<sup>8</sup> WIPO, Agreement on Trade Related Aspects on Intellectual Property Rights, including trade in counterfeit goods, Legal Texts: the WTO agreements, (Nov 22, 12:25 PM), [https://www.wto.org/english/docs\\_e/legal\\_e/ursum\\_e.htm#top](https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#top)

<sup>9</sup> Selvam and Selvam, Recognition of the Performers Rights by Indian Courts, (Nov 22, 2020, 11:12 PM), <https://selvams.com/blog/judicial-recognition-of-performers-rights/>

<sup>10</sup> The Copyright Act, 1961 S. 33 (2020)

<sup>11</sup> Akash Gupta, Copyright Societies in India, Copyright Societies and The Copyright Amendment Act, 1957, (Nov 23, 12:07 AM), <https://www.mondaq.com/india/copyright/750676/copyright-societies-and-the-copyright-amendment-act-2012>

<sup>12</sup> Sarthak Tyagi, The Functioning of the Copyright Societies under the Indian Copyright Act, Pen Acclaims, (2018)

<sup>13</sup> WIPO, Performers’ Right-Background Brief, (Nov 25th, 2020, 1:20 AM), <https://www.wipo.int/pressroom/en/briefs/performers.html>

<sup>14</sup> *Supra*, Note 12

<sup>15</sup> About Copyrights and Neighboring rights, (Nov 25th 2020, 1:58 AM)

<sup>16</sup> Performers Rights, The Recorded Performances, (Nov 25th, 2020, 2:10 AM), <https://www.copyrightuser.org/educate/the-game-is-on/episode-3-case-file-26/>

<sup>17</sup> Angela D’Souza, Performers Rights in India, (Nov, 26th 2020, 7:31 PM), <https://5thvoice.news/legalnews/NzA2NA==/Performers-rights-in-India>

The economic rights of the performers are incorporated under Section 38 A<sup>18</sup> of The Copyright Act, 1957, the performer is allowed to make the visual recording of the performance that includes the reproduction of the performance, making copies, and selling to the public provided that the copies are not already made, communicating the same to the public and the sell for the same. The moral rights of the performers are the right of identity, that the credits as to the creator of certain performance, and that he can claim for certain damages in case of distortion, mutilation, and the like. It can be brought to notice that when the performer's rights are a point of discussion, it can be realized that they have received less attention than the traditional authors.<sup>19</sup> The major question that comes to the forefront is that if, the performers get the right as the authors, will there be a chance that they will get offered better protection that they are afforded under as performers.<sup>20</sup>

## SCOPE OF THE WORD 'PERFORMER' UNDER THE COPYRIGHT ACT, 1957

Copyright can be termed as a bundle of the rights that is granted to the creator of the various works. The basic purpose of a copyright is to protect the works of the creators against the unauthorized usage and theft.<sup>21</sup> there is a wide arena of the rights that are given to the copyright holders under the various legislations all around the world. Some of the rights that are granted are right to reproduction and right to broadcasting among the other wide arena of the rights. When a person spends a considerable amount of time in the creation of something the work should be protected in the widest sense of manner. The copyright is that kind of the rights that is granted to the original creation of the authors. As soon as the creator creates a work, the copyright law protects it.<sup>22</sup> It can be stated that the performer's rights that are mentioned under the Indian Copyright Act, 1957 even after the amendment even after the amendment in the year 2012, remains inadequate and the authors get visibly more protection than the performers. It can be said that in the aforementioned act, the term 'live performance' has been used in the widest way.<sup>23</sup> Under Section 2(q) of The Indian Copyright Act, 1957, the definition of the 'performer' is given and under that an acrobat, juggler, singer, musician and the like are given recognition.<sup>24</sup> The act says that anything that is created by the own sweat and the blood will be protected under The Copyright Act, 1957. The major question that arises is that weather the new age performances with the advancement of the technology is guaranteed under the acts. The rights of the performers can be termed as the neighboring rights as they have developed parallel with the rights of the authors. The rights of the performing artists are neighboring to that right of the copyright owners. It is very well known that although in the prese times there are protection that is afforded to the performers in lieu of the various legislations worldwide, the performers got legitimate amount of protection under the legislations only in the first half of the last century.<sup>25</sup> When the performers rights are being talked here, it can be said that the performers also put in ample amount of the hard work when they create a performance. In today's world it has been extremely easy to fix a live performance, even though it has not been traditionally staged.<sup>26</sup> Following the Uruguay Multilateral Trade Negotiations in 1993, the rights of the performers were recognized in the year of 1994. In the year of the 1994, a special right was attached known as performers rights.<sup>27</sup> A person shall not be treated as a performer if in a certain movie or play, the performance was casual or incidental and where the performance was not even included in the credit section. However, it cannot be said that person will not have any rights, he will have certain amount of the moral rights that is given under the Section 38(b).<sup>28</sup>

## INTERNATIONAL CONVENTIONS FOR THE PROTECTION OF PERFORMERS RIGHTS

There are certain conventions that protects the performers rights in a substantial form of the way and the conventions are a means as to how the municipal copyright laws will be framed the conventions that protect the performers rights are mentioned below.

- **Rome Convention, 1961:** as suggested by the name Rome Convention protects the rights of the performers and the phonogram producers. At international levels, the first move to the protection of the performer's rights came in the mode of Rome Convention, that is a subsidiary of the Berne Convention. In the Discussion in the Rome Convention, there was a hesitation so as to give the rights to the performers, but suggested that the member of the Berne Convention, that there should be some guarantee of the rights of the performers and the phonograms producers. The Rome Convention defines the performers in the most comprehensive way that is possible giving the wide angled connotations like deliver, declaim and play in. Under the Rome Convention, the performers have a sumptuous amount of the rights. The problematic area in the convention can be that in case a performer of a certain work has consented that his work will be included in the

<sup>18</sup> The Copyright Act, 1961 S. 38 A (2020)

<sup>19</sup> Mary LaFrance, Performers Intellectual Property Rights Under Domestic law, Are we serious about Performers Rights?, (Dec 4th, 2020, 6:49 PM), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2204&context=facpub>

<sup>20</sup> *Supra*, Note 18

<sup>21</sup> Shreya Pandey, Introduction, Importance of Copyright Legislation in India, (Dec, 5<sup>th</sup>, 10:33 PM), <https://blog.ipleaders.in/importance-of-copyright-registration-in-india/>

<sup>22</sup> Selvam and Selvam, why copyright in India is considered as an important asset? (Dec 5<sup>th</sup> 2020, 10:01 PM), <https://selvams.com/blog/copyright-india-considered-important-asset/>

<sup>23</sup> Nandita Saikia, The Performers Rights Under the 2012 Act, (Dec 4th, 2020, 7:40 PM), <https://copyright.lawmatters.in/2012/06/the-performers-right-under-2012-act.html>

<sup>24</sup> *Supra*, Note 1

<sup>25</sup> VK Ahuja, Law of Copyrights and Neighboring Rights, 149 (2<sup>nd</sup> edition, LexisNexis)

<sup>26</sup> *Supra*, Note 24

<sup>27</sup> *Supra*, Note 24

<sup>28</sup> The Copyright Act, 1961 S. 38 (b) (2020)

audiovisual films there has to be forego of the rights that has to happen. A problem can be directed in this scenario, because the performer in case he has consented that his work will be included in the film, he has to completely forego his rights.

- **WIPO Performers and Phonograms Treaty, 1996:** the WIPO Performers and Phonograms Treaty, 1996 were enacted to respond to the new marketplace and the technological development through which there were huge amount of distribution of the digital works in the digital form.<sup>29</sup> The WPPT is called as the internet treaties because it protects the rights of the performers and the phonograms producers over the arena of internet.<sup>30</sup> Though the WIPO Copyright treaty and the WIPO Performers and Phonograms Treaty (commonly referred to as the WIPO internet treaties) came out in the year of 1996 with the advent of internet, it was not until recently India came into accession with the with the internet treaties in the year of 2018.<sup>31</sup> India had not until before the year of 2012, formally acceded to the terms and condition of the WPPT, but in the year of 2012, it thoroughly amended The Copyright Act, 1957. It can be stated that though there is, a lot of benefits that can be attached if India becomes a party but on the other hand, it can be said that the amendments will see a bleak light.<sup>32</sup> Under the Indian Amendments there were criteria as to carry forward the 'communication to public' and this included the prerequisites of technology protection measures, digital rights management and the safe harbor principles. Technology protection measures can be said as the software, device or any other technological aspect that will restrict the open access to a certain kind of the work.<sup>33</sup> Safe harbor principle, will be such that there will be certain security measures when the works of certain persons are accessed and certain security measures need to have been taken for the same.<sup>34</sup> There is a fear among the Indian Creators and performers there will be certain dominance by the US/EU on the same.
- **TRIPS Agreement, 1999:** in the wider sense, it can be said that, copyright has also included rights of the related works, that is the performer's rights, phonograms producers and broadcasting agencies.<sup>35</sup> Under Article 14 of the TRIPS Agreement, the detailed of the related rights are mentioned. There is a subtle hint of difference when the relationship between the Rome Convention and the TRIPS agreement, in some cases the protection that is granted in the Rome Convention is more and in certain cases the protection that is afforded by the TRIPS agreement is on the increasing terms when it comes to the 'related rights. But it can also be said that the TRIPS Agreement is inspired from the Rome Convention. The TRIPS agreement provides some sort of flexibility that can be attached with the TRIPS agreement, with respect to the balance of the provisions in respect to the framing of the domestic laws.<sup>36</sup>

## CONCLUSION

The Copyright Act, 1957 in the year of 1994 had granted the rights to the performers and the rights that are attached to the performances for the same. Under the certain international instruments also there has been through elaboration of the rights that are needed for the protection and the benefits of the performers. The important issue that that can be pinpointed and reviewed is the adequacy of the same. It has been generally found that the municipal legislations, along with the legislations of India that cover performers rights, being The Indian Copyright Act, 1957, has failed to develop itself in the terms of the technological development. Even though the grant of copyright protection to authors were given long back, the performers rights had not been recognized but recently. The analysis has to be made that why did India as well some other countries take to so long to recognize that the performers have certain rights and that they are needed to be protected. When the performers rights are protected, the performers get a boost to excel in the certain field and that places a country in the world map and directly proportional to the fame that a certain country gets in the world arena. The definition of the performers that is given under The Copyright Act, 1957 can be seen as an inclusive definition at the first glance, there are new age performers that has evolved with the with the development of the internet and they have not been given justified rights that are need for the performance to flourish. There are certain reasons as to why international instruments are undertaken, there can be traditionally two reasons that can be achieved as a rationale to it. The first reason is that, there is a need to be standardization as to the protection that is granted, it can happen that a certain country protects the citizen performers and does not give rights to foreign performers. the second reason that can be perceived is the assumption that the developing nations will not grant the rights to the performers unless the seriousness of the protection can be aggravated with an implementation of a treaty. Often, it can be seen that the municipal laws and the international instruments have clashed when it came to the safeguard of the laws. In the scenario, of the protection that is levied to the performer's rights, there was a differentia of opinion with regard to the access to the works and the protection of the same. The unauthorized access to work can be protected in the form of technology protection measures, digital rights management and safe harbor principles. While the EU/ US wants the access to work kept free and unrestricted till some extent. Nevertheless, even though there has been drawback in the grant of the rights to the performers it can be said that there also has been substantial amount of the efforts that are granted to the protection of the performer's rights in India and worldwide. To what extent as to there will be problem as to the safeguard of the laws will occur, only time can tell.

<sup>29</sup> Techopedia, Definition-what does WIPO Performers and Phonograms Treaty mean?, WIPO Performance and Phonograms Treaty, (Dec 8<sup>th</sup>, 2020, 7:50 PM), <https://www.techopedia.com/definition/28161/wipo-performances-and-phonograms-treaty-wppt>

<sup>30</sup> Sumedh Sahasrabudde, India: India signs up the internet copyright treaty, (Dec 8<sup>th</sup>, 2020, 7:58 PM), <https://www.mondaq.com/india/copyright/729312/india-signs-up-the-internet-copyright-treaty>

<sup>31</sup> *Supra*, Note 30

<sup>32</sup> Seemantani Sharma, India approves accession to WIPO internet treaties, (Dec 8<sup>th</sup>, 2020, 10:00 PM), <https://thewire.in/diplomacy/india-approves-accession-to-wipo-internet-treaties>

<sup>33</sup> Definition, Technological Protection Measures, (Dec 8<sup>th</sup>, 2020, 10:27 PM), [https://itlaw.wikia.org/wiki/Technological\\_protection\\_measures](https://itlaw.wikia.org/wiki/Technological_protection_measures)

<sup>34</sup> Safe Harbor Privacy Principles, Direct/indirect Relevance, (Dec 8<sup>th</sup>, 2020, 10:52 PM), <https://www.enisa.europa.eu/topics/threat-risk-management/risk-management/current-risk/laws-regulation/data-protection-privacy/safe-harbor-privacy-principles>

<sup>35</sup> Introduction, Copyright and related rights, (Dec 9<sup>th</sup>, 2020, 7:46 AM), [https://www.wto.org/english/tratop\\_e/trips\\_e/ta\\_docs\\_e/modules2\\_e.pdf](https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules2_e.pdf)

<sup>36</sup> Petroula Vantsiori, Rome Convention, Module 2: The International Framework, (Dec 9<sup>th</sup>, 2020, 9:00 PM), [https://cyber.harvard.edu/copyrightforlibrarians/Module\\_2:\\_The\\_International\\_Framework](https://cyber.harvard.edu/copyrightforlibrarians/Module_2:_The_International_Framework)

**REFERENCES**

- [1] Herbert T Silverberg, Authors And Performers Rights, Duke University School of Law, 1958
- [2] Aaron X Fellmeth, Introductory Note To The Beijing Treaty On Audiovisual Performances, Cambridge University Press, 2012
- [3] Sanhita Ambast, Protecting Performers Rights: Does India Need Law Reform? Journal Of Intellectual Property Rights, 2008
- [4] Shweta S Deshpande, Copyright Protection of Performers Rights, DESIDOC Journal of Library & Information Technology, 2008
- [5] William W. Fisher, Reconstructing The Fair Use Doctrine, Harvard Law Review, 1988

