

# **Copyright and Related Rights Law**

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**WEEK - 07**

**LECTURE – 31**

## **Statutory Definitions of Performance**

Welcome back to this course on copyright and related rights law. Over the last six weeks, we have discussed six categories of subject matter: literary works, artistic works, dramatic works, musical works, sound recordings, and cinematographic films. Of these, we understood that the first four literary, dramatic, musical, and artistic works need to satisfy originality, wherein a minimal degree of creativity will be considered in order to see whether copyright subsists in such work or not. We have also seen that sound recordings and cinematograph films will have copyright subsisting in them despite not satisfying originality. This week, we are looking to begin with the second component of our title-related rights. In related rights, we are going to look at performer rights, and in this particular session, we are going to understand what the various definitions of performances are in various statutes around the world.

How this will help us is that it will give us a bird's-eye view of how performances are seen in these jurisdictions, what are its components, and in what manner are any issues that seem to be arising with respect to their interpretations. No doubt when I say "performer," one or two types of performers must have immediately come to your mind. A singer and a musician are two performers with whom we immediately connect when we think about a performer. This person in this image is both singing and playing the guitar, and in that sense, he is playing the music and singing the lyrics.

What we see is that from this image we can observe a wholesome performance, but in terms of differentiating the performance, we can link it to a particular type of work. So when we consider this person playing the guitar, we consider a performance of the musical work. When he is singing the lyrics, we are saying that it is a performance of the literary work as well as a performance of the musical work because of the composition that is tied to the lyrics. What about this image? Again, something that is clearly in our minds, clearly etched in our minds is what a performance is. This is a dance performance.

Similar to how we discussed in the previous segment, performance can be linked to some kind of work. Here as well, it is possible that we can link a performance such as this to a work. You would recall that if there is a work of choreography, then we can say that this performance is a performance of a work of choreography, which is, otherwise, a dramatic work. Let us now look at some definitions of performance. First, let us look at what "performance" means under the UK Copyright Act.

Under this Act, Section 180 states that performance means a dramatic performance, which includes dance and mime, a musical performance, a reading or recitation of a literary work or a performance of a variety act, or any similar presentation which is, or so far as it is a live performance given by one or more individuals. What we can see from this definition is that our understanding of a performance, in some way connected to a work, is expressed by saying what kind of work is connected to that performance. So this is a dance or, otherwise, a dramatic performance. This is a person playing the guitar. Or, in other words, a musical performance.

The difference you would recognize between a dramatic performance and a literary performance is: As we had discussed, you would recall in the *Institute of Inner Studies* versus *Charlotte Anderson* decision that performances that are action-oriented are dramatic works, and where there is no such action, they are literary works. There are some other important works that we find in this particular definition. For instance, you can see the use of the term variety act. A variety act or a variety show is something that we can understand. We will also understand a very important qualifier here, which is that, in order for a performance to be considered a performance according to this definition, it must be a live performance.

So what do we mean by "live" in live performance? Let us first look at what a variety act or a variety show means. A variety act, by its very terminology, literally means the distinguishability of performances. Therefore, in this definition, where it says a theatrical entertainment of successive separate performances, such as songs, dances, skits, and acrobatic feats, we see that a variety act is not just an act of a single kind of performance, there is a variety of performance. And we can see this in a kind of show in which several types of performances need to come together in order for that whole performance to be completed. Let us now look at what the meaning of "live" in "live performance" is.

You can see it says, "of or involving a presentation such as a play or concert in which both the performers and an audience are physically present." 'Of or relating to an event that is broadcast or reported as it is occurring', 'involving or relating to communication over the internet that occurs in real time', 'being in play'. A common theme among these meanings is that the presentation is something that is happening as we speak. In recording this particular lecture, the delivery of which I am making is live. Or is it? These recordings will reach the audience after they have been recorded.

But is it not live when it is being recorded? You can see that these definitions point to the fact that in a concert where there is a physical presence of an audience and the performer, that is something that can be considered live. There is also the consideration of time here, which is a matter of perception. In terms of perception, this is something that is happening in real time. And therefore, with respect to something being live, can we say that the audience's perception of the performance is an inherent aspect of the performance? This is a question that we will answer once we look at the provisions within the Indian Copyright Act as well. But before we come to that provision in the Indian Copyright Act, let us understand what "presentation" would mean.

Present means to bring to someone's attention. Therefore, in considering the question of whether the perception of the audience should be something that is instant. So when the singer sings, the audience is able to immediately appreciate this particular performance. Either it is physically at a concert or sitting in front of computer systems and watching it through live streams. Or is it possible that the recording of such a presentation, which was effectively a live presentation, could be something that is perceived by the audience at a later point in time? And such a contemporaneous perception is perhaps something that is not necessary.

Also, what do we mean by "perception" here? What kinds of perceptions will we have to consider? With respect to performance specifically, there is no such consideration in the UK Act as to what kind of perception we are referring to when we refer to a performance as a presentation. Let us now look at the provisions within the Indian Copyright Act. First, let us take a look at Section 2(q). It says, Performance in relation to a performer's right means any visual or acoustic presentation made live by one or more performers. What do we see immediately? The Indian Copyright Act provides for two types of perceptibility.

One type of perception is visual. The other type of perception is acoustic or by way of sound. Second, the Indian Copyright Act also prescribes that such a presentation must be live. Just like the UK Copyright Act, the Indian Copyright Act also doesn't address the requirement of an audience or not. Should there be contemporaneous perception or not? This is something that is not answered.

In Section 2(qq), the Indian Copyright Act illustratively explains who a performer is. and it says 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, provided that in a cinematograph film a person whose performance is casual or incidental in nature and, in the normal course of the practice of the industry is not acknowledged anywhere including in the credits of the film shall not be treated as a performer except for the purposes of Section 38(b). We will first consider an important case that arose before the Delhi High Court, which seeks to answer whether the recording of performances done

without any audience being present at that time can be considered performances. And once we are understood, then we will move to section 2(qq) and its proviso's understanding of what is meant by this exclusion of certain types of presentations from the ambit of performances. But in appreciating the case that has come before the Delhi High Court, we must understand that performances in the industry such as the sound recording industry, the music that we hear on account of a sound recording being communicated, performances are recorded in studios.

As you can see in this image, in a studio setting, audiences are not present. In fact, catering to the audience is done through the communication of the sound recording in which the performance is incorporated. But reasonably speaking, if the only consideration is that a presentation has to be live in order for it to be considered a performance. Then, when this lady is singing in a studio, is she not presenting live? The same is true for any kind of performer who you can see mentioned in section 2(qq). The same kind of situation in which this lady finds herself in a studio is the situation in which I find myself.

In delivering this lecture, I am engaging in an act of recording but because this recording is of a presentation which is live, does it require any presence of an audience because if an audience is required, then this presentation will not amount to a performance. And therefore, neither this lady nor I would have any performers' rights to exercise under the copyright framework. This interesting question arose before the Delhi High Court. In the case of Neha Bhasin versus Anand Raj. What the Court stated is that while the definition of performer in section 2(qq) includes within its sweep a singer, section 2(q) defines performance in relation to the performer's right to mean any visual or acoustic presentation made live by one or more performers.

Every performance has to be live in the first instance, whether it is before an audience or in a studio. The logical consideration and the reasonable stance that must be taken into account in line with what this definition states in plain terms is that there is no requirement for an audience at the time of presentation. If indeed such a requirement were to be mandated, as I was explaining, this lady, on account of a recording that is done in the studio, would not be able to claim performer rights. The court then says, "If this performance is recorded and thereafter exploited without the permission of the performer, then the performer's right is infringed." Following this, we can now say confidently that even if a performance is recorded in a studio setting where there is no audience present, Performer rights will vest with the performer because that presentation was made live.

If the recording was done without the singer's permission and if it is commercially exploited without the singer's permission, then that would amount to a violation of the performer's rights. We will now come to the second component of our understanding of the Indian Copyright Act definition of performer and performance. We have noted that a

proviso to section 2(qq) which interprets "performer" is saying that - where a performance is casual or incidental in nature and, in the normal course, the practice of the industry is considered to be something that is not credited or acknowledged, then such a presentation would not be considered as a performance. What are they talking about? This particular proviso was first inserted in the 2012 amendment to the Indian Copyright Act. If this particular scene were taken from a film, the people present in this particular scene would be referred to as junior artistes or extras.

This particular usage is demonstrative of the industry's understanding that a performer such as an extra need not be directed in any particular sense. There is wholesale replaceability of such a performance. Meaning that any one of us could be in this particular scene, and still the scene would be fine. This is very different from considering senior artists who are playing specific character roles. There would be a dialogue; there would be a certain kind of direction for that individual role.

And such extras' performances, as you can see, are considered casual or incidental in nature, and in the normal course of practice in the industry, they are not acknowledged. Therefore, we understand that performances are those that are live, the perception of which is visual or acoustic in nature. They need not be performed before an audience, and there is a difference between a casual presentation and a non-casual presentation. The casual presentation is something that will not be considered a performance, whereas the non-casual performance will be considered a performance. The use of the term "extra" is in effect a usage that shows that apart from the performances necessary for a particular script, these performances are extra and in a way also reflects that Any person could play such a role, even devoid of any particular acting skill.

A junior artiste is another term, as I said, that is used to indicate some kind of lack of skill. Let us now look at the Canadian Copyright Act and how it interprets performance. It says, "Performance means any acoustic or visual presentation of a work, performer's performance, sound recording, or communication signal, including a representation made by means of any mechanical instrument, radio, receiving set, or television receiving set." In a very interesting interpretation, you can see that the performance seems to have a dual understanding. Where one side explains that performance is something that relates to a performer's performance, which has also been interpreted, and we'll take a look at it.

And it also says that performance refers to a sound recording or communication signal. This application of the term performance, is in fact something which we will discuss in great detail when we are looking at economic rights, and then we will make a distinction between the right to perform a work in public, and the right to communicate a work to the public. But keep in mind that for now, we are focused on performance as a performer's performance under the Canadian Copyright Act. And this is how a performer's

performance is interpreted. It says, a performer's performance means any of the following when done by a performer.

A performance of an artistic work, dramatic work, or musical work, whether or not the work was previously fixed in any material form. And whether or not the work's term of copyright protection under this Act has expired. (b) A recitation or reading of a literary work, whether or not the work's term of copyright protection under this Act has expired. Or an improvisation of a dramatic work, musical work, or literary work, whether or not the improvised work is based on a pre-existing work. A very interesting interpretation in which we see that there is a de-linking that the Canadian Copyright Act makes between a work and a performance.

Something that we will look at in greater detail in the next session. But because we are taking a look at this particular provision, you can note that if a work is not fixed in any material form, then there can be a question of whether copyright can subsist in such a work. Despite any such consideration of whether a copyright is subsisting in the content or not, the performance will be considered a performance. Therefore, the copyrightability of the content, which could be based on a requirement of fixation, has nothing to do with the existence of a performance. Similarly, whether a work has a term of protection or the term of protection has expired.

That, again, does not lead to a conclusion that a performance does not exist. The performance has existed; the only question is whether, in a scenario where a copyright exists, the copyright holder has authorized such performance or not. Another important consideration here is the issue of improvisation. Where a performance improves upon a work, we are thinking about some kind of modification. And this says, an improvisation of a dramatic work, musical work, or literary work, whether or not the improvised work is based on a pre-existing work.

Such improvisations, even if based on a pre-existing work, would lead to a performance's existence. The content itself, which is generated, can be the subject of a different issue that is more connected to the derivative nature of the copyrighted work and not so much a question of the existence of the performance itself. But, very importantly, the Canadian Copyright Act adds to our discussion an understanding of performance that is dual in nature. One reflecting a performer's performance and another reflecting a type of usage of works and performances.

Let us now look at another Copyright Act. This is the Australian Copyright Act. Under this Act, performance means a performance including an improvisation of a dramatic work, or part of such a work, including such a performance given with the use of puppets, or a performance including an improvisation of a musical work or part of such a work or the reading, recitation or delivery of a literary work or part of such a work, or the

recitation or delivery of an improvised literary work or performance of a dance or a performance of a circus act or a variety act or any similar presentation or show, or a performance of an expression of folklore being a live performance that is given in Australia whether in the presence of an audience or otherwise, or that is given by one or more qualified persons even if it is also given by one or more persons who are not qualified persons, whether in the presence of an audience or otherwise. Let us consider two very important inclusions in this provision. The first important inclusion is the phrase - expression of folklore. We have understood that a westernized understanding of intellectual property seems to focus on creative expressions generated by individuals.

Therefore, critical race theory suggests that community-based expressions must be given their due importance. And what we see here, is that a reference to an expression of folklore is a reference to the cultural relevance of presentations, that have their background in content that is otherwise in the public domain. The inclusion of an expression of folklore, is also reflective of the great amount of stress that is placed on such cultural protection found in Australia. The second phrase, which is of crucial importance, is a specific mention in the statute itself that a performance would be live even if it is not in the presence of any audience. In saying so, the Australian Copyright Act has removed any requirement for clarification that would otherwise be required in provisions where there is no mention of an audience or not.

Let us then also look at the French IP code, which states, "save for ancillary performers considered such by professional practice." Performers shall be those persons who act, sing, deliver, declaim, play in, or otherwise perform literary artistic works, variety, circus, or puppet acts. What we have seen in the proviso that is added to section 2(qq) of the Indian Copyright Act is that the French IP code calls such presentations and such performers ancillary performance. We can say that such performers are extras or junior artists or the kind of performers who can be replaced very easily by any individual, and no particular skill is required. Let us also look at the Senegal Copyright Act, in which an interpretation of performers reads as follows.

Performers mean actors, singers, musicians, dancers, and other persons who act, sing, deliver, play, or otherwise perform literary and artistic works, including variety, circus, or puppet acts or expressions of folklore. We have seen that definitions of performance and interpretations of performance vary to some extent in the various acts that we have considered, but one thing is clear: there is a clear connection between works and performances. In other words, where there is a work in existence, a performance of the work is something that would be related to the work. In other words, a performer's right is a related right to the author's right in the work. We will discuss this in much more detail in the next session, where we are going to make a comparative distinction between a work and a performance.

Thank you for joining me. See you all in the next session. Thank you.