

Copyright and Related Rights Law

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WEEK - 07

LECTURE – 32

Work v Performance

Welcome back to this course on copyright and related rights law. This week, we are discussing performers' rights. In the last session, we discussed certain definitions of performances and an understanding of who a performer is according to different copyright acts in different parts of the world. What we will look at today is the connection between work and performance, and the clear distinction between work and performance. In this image, we can see an actor on stage. Ask yourselves, is an actor an author? In answering this question, you must be reminded that an author is the creator of a work, and therefore you must be asking yourself, "If an actor is an author, what is the work?" In answering this question, if you say that acting is based on a script, then the script is a dramatic work.

But is an actor the author of a dramatic work? If a script is written by the scriptwriter, the scriptwriter is the author of the script. Whereas a performer, such as an actor, is presenting the script through his acting. A specific character that would be present in that script is what this actor is presenting. So in considering the distinction between a scriptwriter and an actor, there is a script that is being presented by an actor.

We can say that, in this situation, this actor is not an author. Let us look once again at what the definition of performance is under the Indian Copyright Act. Section 2(q) defines performance as performance in relation to the performer's rights, which means any visual or acoustic presentation made live by one or more performers. The word we've highlighted is "presentation." Let us ask ourselves, what is an actor presenting? As we considered in this example, a script is a dramatic work, and the performer presents the script and the portions in the script that pertain to his character.

We can say that the actor is presenting a work, which, in this case, is a dramatic work. We must also keep in mind the basic differences between the two words. One is an artist without an "E." And an artist with an "e." The use of "artist" without an "e" refers to the

author of an artistic work. A painter is an artist. A person who makes a drawing is an artist. A person who makes sculptures is an artist. An artist, with an "E," as you can see, is a professional entertainer, especially a singer or a dancer. The difference in these terms is effectively a difference between work and performance.

A painter who is the author of an artistic work is an artist without an E, and an actor who is performing or presenting a dramatic work, such as a script, is an artiste with an E. In our usage of these terms, we must be careful because to call an actor an artist without an "E" suggests that the actor is the author of a work. And that, as we attempt to understand, is problematic. Let us consider: if an actor is not an author, what does that mean? Does that mean that the actor does not have copyright protection for his performance? When we considered this question, in your mind, you must have also thought that an author is someone who is connected to a work. What we have understood over the many sessions we've had in this course is that copyright subsists in a work.

If we are saying that a performer is not an author, or in this specific case that the actor is not an author, then does it mean that there is no copyright protection over acting? Let us look at Section 14 of the Indian Copyright Act. It says, "For the purposes of this Act, copyright means the exclusive right, subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work or any substantial part thereof." You can see that Section 14 uses the term "copyright" only in respect of a work. There is no reference to performance in Section 14 at all. In terms of the reference that we find, that is an authorization that can be made by the author of a work.

And not that a performer has copyright. This is something that I will explain in the following slide. For now, we must remember that section 14, which provides the meaning of copyright, attaches copyright only to a work and not to a performance. In other words, only a work can be authorized for use by copyright under Section 14. Just as we considered the question of whether an actor is an author.

Consider this question: Is the singer an author? Are you better equipped to answer this question now? How are you answering this question? Are you thinking about what the work is? Is the singer the author of that work? How is a singer a performer? Let us go back to the definition of performance. A singer is primarily an acoustic performer. As an acoustic presenter, a singer is presenting either a literary work or a musical work, or it could simply be a musical work by way of humming. Humming would be a kind of presentation in which there is no use of words; therefore, there wouldn't be any application of literary work, but because humming involves a tune, we can say that there is a musical work being presented. You would also remember from our discussion in the previous sessions.

That a singer who is making an acoustic presentation in a studio would still be considered a live acoustic presentation, as per the requirement under section 2(q). To re-emphasize, remember that when a singer performs, the singer is performing a particular piece. It could be a literary and musical work together, or it could be simply a musical work. But there is a presentation of something. In other words, the content of the singing being presented is the work.

The creator of the work is the author, and the presenter of the work is the performer. I hope now we are able to make a clear distinction between work and performance. To supplement our understanding, let us consider Section 14 once more. In section 14, we saw in the earlier slide that copyright applies only to a work. With respect to literary, dramatic, or musical works, what the Copyright Act provides in section 14 is a type of copyright that allows for the public performance of the work.

Performing the work in public would mean that there is a live presentation of the work, and such a performance is something that must be authorized by the holder of copyright. Therefore, we see that performances must be authorized by the holder of the work. So not only are work and performance different, but the content, which is the work, is something that the performer is presenting. Because the content is under copyright protection, the performer's performance will have to be authorized. We say that to sing is to perform, and if a literary or musical work is to be performed, then copyright authorization must be sought from the owner of that work.

The owner could be the author, as we discussed in our previous sessions. Ownership could vest with another person depending on transactions that may have occurred between the author and another person, or it could simply be a consideration of first ownership based on a certain type of contract. Let us also consider Section 38A of the Indian Copyright Act, which talks about the exclusive right of performance, something that we will discuss in great detail in the next session. But you can see how this provision begins. It states, without prejudice to the rights conferred upon authors, that.

It continues. The performer's right, which is an exclusive right subject to the provisions of this Act, is to do or authorize the doing of any of the following acts in respect of the performance. Therefore, with these provisions, Section 14 and Section 38A, we can clearly say that where there is a work in which there is a copyright, the performer's right will be a secondary right. In fact, if a performance is not authorized, what that means is that the performer's rights would be contested. Because we are saying that a performance will lead to the performer's rights. Are we considering whether there is a qualifying threshold that a performance has to meet in order for performer rights to attach? Let us first consider Section 2(q).

An objective assessment of Section 2(q) tells us that in order for a presentation to be considered a performance, it must be a visual or acoustic presentation made live. Therefore, there are two objective considerations. One fact is that it is perceptible either visually or through sound. And second, that it is live. Apart from this, there is nothing else that Section 2(q) tells us.

Therefore, in considering the question of whether there is any qualification, such as originality, that works must satisfy in order for copyright to subsist in such works, is there a similar kind of qualification for performances? That's the question we are asking. Let us take a look at Section 38. Section 38 talks about performers' rights, and it states that where any performer appears or engages in any performance, they shall have a special right to be known as the performer's right in relation to such performance. That is the extent of what the Copyright Act tells us about performers' rights. What that means is that, unlike Section 13, which spoke about originality with respect to certain works, it skipped such usage with some other types of works.

In Section 38, there is no mention of the term "original." See Section 13. You will recall that our discussion of subject matters had focused to a great length on how originality would be considered with respect to literary, dramatic, musical, and artistic works, and not with respect to cinematographic films and sound recordings. Is that the same consideration as Section 38? Those performances are similar to sound recordings, and that is why they are not considered original. Is that the reason? Let us recall the basic difference between a literary, dramatic, musical, or artistic work and a sound recording or a cinematographic film.

We have understood that there can be systems, such as the system of copyright in India, wherein the author of a cinematograph film and a sound recording is the producer. The producer, not being a creative professional who brings out a creative expression in the making of a cinematographic film or a sound recording, There is a clear distinction between creative expressions such as literary, dramatic, musical, and artistic works, and cinematographic films and sound recordings. That is why originality is attached to only some types of work and not to others. But are we saying that an actor or a singer is not a creative professional? We know of many singers, we know of many actors, and surely the consideration in our minds that makes these performances stand out is the creative potential for such performances. Therefore, we cannot say that a performance is in some way like a sound recording, and that is why the term "original" has not been used in section 38.

What could then be the reason that the original has not been used in section 38? Let us consider the basics of originality. We discussed that a basic consideration of originality is that there must be independence in creation. In other words, a work must not be copied from another work, and if that can be shown, then at a very basic level, originality can

exist. On account of the nature of performances, can we not say that every performance is different from the others? Individual personalities are unique. The way I present a particular script will not be the way you, the listener, are going to present that script.

Our presentations will be distinct because of our personalities. And therefore, can we not say that individual presentations, because of their attachment to personality traits, are always going to be independent creations? And therefore, while a work can be copied from another work, a performance cannot be copied from another performance. The content could be the same, but the performance itself would be different because of the differences in personalities. Therefore, we can say that one performance cannot infringe upon another performance.

I hope you are getting this point. Thus, because two performances by two separate performers are independent and definitely not copied from each other, We can say that this consideration of originality does not arise with respect to performances. Therefore, every performance we can say carries a unique touch and by that logic every performance is original. But is there any need for the satisfaction of some minimal degree of creativity for performers' rights to attach to performances? Just like it is with work. On this point, there is no understanding, and we can say that because there is no originality requirement for performances, the question of applying the context of a minimal degree of creativity does not arise. Are there any exceptions to who a performer can be, or is every performer considered a performer under the Copyright Act?

We can see that a specific exclusion has, in fact, been made by the 2012 amendment to the Copyright Act which introduced a proviso to section 2(qq), something that we saw yesterday in the last session as well. Let us look at this proviso once more. It states that in a cinematograph film, a person whose performance is casual or incidental in nature and who is not acknowledged anywhere, including in the credits of the film, shall not be treated as a performer except for the purpose of Clause (b) of Section 38B. We will discuss in the later sessions what the purpose of Clause (b) of Section 38B is, but let us focus on the exclusion of certain kinds of presentations as envisaged in this proviso. What we can see is that based on an industry assessment of whether a presentation is casual or incidental and is not something that is acknowledged, such a presentation would be considered not a performance.

Therefore, within the Copyright Act, we find only this specific exclusion and no other exclusions. What do we understand? That is where copyright in works can be determined based on originality; performances, because they are by nature original, are not a consideration that can be applied to distinguish between protectable performances and unprotectable performances. Rather, a specific exclusion has been carved out against extras and junior artists who would fall within the proviso of section 2(qq). Such an exception that we have seen is also present in the French IP Code, which specifically

excludes ancillary performances. Having understood these important points with respect to performance, are we able to answer this question? Can a performance be made without a pre-existing work? What if there is no script for actors to follow? What if there are no literary or musical works for a singer to sing? Can a singer still sing? Can an actor still act? We are thinking, yes, it is possible.

It is possible for an experienced actor, for example, to simply come on stage and play a character. It is possible for a singer to come on stage and make up lyrics and create a tune to attach to those lyrics as they sing. In doing so, are we saying that a performer is creating a work with their performance? Is that a possibility? Because a performance is severable from the content that is being presented. If there is no pre-existing work and a performer is presenting particular content, can the content so developed be copyrighted? In other words, is the performer who creates a work also the author of the content that he is presenting? This is possible, provided that fixation is not a requirement. We have understood that fixation would mean that there is some level of permanence of perception possible with respect to that particular expression.

Therefore, when a work is written, there is permanence to that perception. When a painting is made, there is a permanence to that expression. But we have also seen that with musical works, there is a specific exception that has been carved out: where fixation has been diluted. We can then say that with certain kinds of works in which fixation is not a requirement, it is possible for a performer to create work while they perform and claim authorship over such work. With this understanding of the difference between work and performance and the interaction between work and performance, in the next session, we will see what the economic rights are that a performer has within the Copyright Act.

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