

Copyright and Related Rights Law

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WEEK - 07

LECTURE – 33

Performer's Economic Rights

Welcome back to this course on copyright and related rights law. This week, we are looking to discuss performer rights. In the title of this course, which reads "Copyright and Related Rights Law: Performers' Rights," we have understood that it falls within related rights. We have understood the difference between a work and a performance where there is a pre-existing work that has copyright in it. The performance of such a work would have to be authorized by the copyright holder. In today's session, we are going to discuss what the economic rights granted by the Copyright Act are to performers.

But before we look at these economic rights, we must understand the background of performer rights. Performances as creative expressions were not considered in the original international agreement on uniformity among countries with respect to copyright, also called the Berne Convention. The Berne Convention, which is an international instrument that came about in the 1880s and has undergone several revisions, is concerned with literary and artistic works. In other words, the subject matters we have discussed under copyright.

Performers and performances have later been understood as subject matters of intellectual property because of their similarity to expressions that are considered subject matters of copyright. Because of the creativity attached to such performances, they have found their place within the international copyright universe. And therefore, even though copyright protection has been around in many countries since the late 1800s, performers' rights have come much later. In fact, this particular initiation of performer rights could be attributed to a movement that started with the 1961 Rome Convention. In any case, if we consider a specific jurisdiction such as the one we are considering - India.

In India, it was only in 1994 that performer rights were introduced for the first time. Prior to 1994, the Copyright Act effectively extended protections to subject matter such as the ones we have discussed. That is literary, artistic, dramatic, musical, cinematographic

work, and sound recording. Another element that we will discuss under related rights, which is broadcasting, deserves its own discussion and is something that we will take up in future sessions after we discuss performer rights. Let us then, in understanding the economic rights of performers, look back once again to section 14 of the Indian Copyright Act.

We have seen, that copyright is defined as an exclusive right to do or authorize the doing of any acts that are prescribed under section 14, and one such act that section 14 prescribes is the performance of the work in public. We have understood that performances of works that have copyright require the copyright holder's authorization. The content of the performance in such a case is not the performer's. Could it be the performer's? It could be. But in a situation where it is not, any such performer has to be careful about taking the requisite permission.

Let us also gain a fundamental understanding. How many performances can there be of a single work? Let us see what Section 14 is saying. Section 14 states that if a performance of the work must happen, then such a performance must be authorized. What does that tell us? What if the work is a musical composition? Is there a limitation on how many performances of that musical work there can be? I'm sure, as you must be realizing, there can be an infinite number of performances based on a single work. Therefore, the importance of the copyrighted work is significant when we consider performances.

Each performance, which is going to have its own distinctive trait and uniqueness, is going to present that work in a slightly different manner than it has been presented by another performer. But that does not take away the fact that a performance right towards such performances, which a copyright holder has, can be licensed to an infinite number of performances. But the fact that a performance right has been authorized and a performance has been made is significant. What right does the performer who has performed have regarding that specific performance? I hope you are getting this. Let me repeat.

If there are a hundred performances of a single work, which is a musical work, then each of these hundred performers can exercise performer rights over his or her individual performance, though the work is the same. And these rights that the performer will exercise over his performance are what we are referring to as performer rights. Now we will look at section 38A, which provides for the economic rights with respect to performers. It's called the exclusive right of performers; that's the title, and the provision reads: Without prejudice to the rights conferred on authors, the performer's right, which is an exclusive right subject to the provisions of this Act, allows for the doing or authorization of any of the following acts in respect to the performance or any substantial part thereof, namely: In Section 38A, we have already seen that the provision has been drafted in a manner that performer's rights cannot be prejudicial to the rights of authors.

Which means that if there is a copyrighted work being performed, then there is no way that such a performance can happen without the authorization of the copyright holder.

Now, there could be exceptions to the general norm of authorizations. Exceptions are something that we will discuss later when we discuss exceptions in terms of section 52 of the Copyright Act and the general understanding of exceptions to copyright internationally. For now, let us focus on the economic rights of performance, and as we can see: Section 38A provides certain types of rights, and what we will do is take a look at each of these rights individually so as to understand them best. The first right we are going to take a look at talks about the right of the performer to do or authorize the doing. Making a visual recording, you must understand, is an act of fixation.

The live presentation, the live visual presentation that we have understood, constitutes a performance under section 2(q): The fixation of that live performance in a visual medium is something that the performer can authorize. Why is this important? You might realize that performances that happen live, for example in concerts, the recording of such a concert performance is something that, according to this provision, a performer can authorize. You would be thinking - but the audience present at such concerts is recording the performance. What about them? Is the performer going to stop them? Like I said, certain types of usage and certain types of acts can be considered exceptions to performer rights. For example, an act that is being done primarily for personal use is something that will not affect the commercial nature of such performers' rights.

And this understanding of exceptions is something that we will look at in future sessions. For now, let us understand that because we are discussing economic rights, let us try to figure that out. The acts that can cause some kind of economic harm to the performer would be something the performer would be incentivized to prevent from happening. And this incentive is in the form of an exclusive right. This particular exclusive right, which we have discussed, is the making of a visual recording, or in other words, fixating the live performance, which is a visual presentation, in a visual recording.

Now visual recording is only one kind of fixation possible for a performance. What we have seen in section 2(q) is that performance is a visual or acoustic presentation. Acoustics refers to sound. So not only can a live presentation be fixed through a visual recording, but it can also be fixed through a sound recording. Therefore, this provision states that fixation in the form of a sound recording is also something that the performer can authorize.

With respect to these recordings, the kind of utilization of these recordings is a separate control that vests with performers. Please understand that what we have discussed at this point is simply the act of fixation. The recording has happened, but how will that recording be utilized? That is something that is within further control of the performer.

Let us look at the first of such further controls. It states that reproduction of it in any material form, including storing it in any medium by electronic or other means, is prohibited.

Where this recording has happened, its reproduction in a specific material form, such as you can see in the form of a cassette, is evident. Such a reproduction of that recording is something that the performer can authorize. As you can understand, there can be reproduction in many such material forms, including as has been stated within this provision. Even storing it in a medium by electronic means is something that will be considered reproduction. Therefore, reproduction, and just the act of reproduction, can lead to the utilization of these reproductions.

That is another application of performers' rights. But reproduction is something that performers can control. The second kind of control of such recordings, is the issuance of copies of the recording to the public that are not already in circulation. Issuance of copies is a reference to the distribution of the reproductions, and you would realize that distributions are happening because distributions are connected to geography. This can be something that has a lot of potential for commercial utilization for creators such as performers.

And therefore, this is something that is a separate set of exclusive rights granted to performers. You will note a very important phrase that is used in this particular provision, which is - not being copies already in circulation. What this means is that a performer who has an exclusive right to control distribution only has that exclusive right until the point of first sale. Once a unit, consider a cassette, for example. Once a cassette has been sold, the further sale of that cassette is not something the performer can control because that particular unit has now entered circulation.

This is what this provision says. In other words, control over the issuance of copies is lost the moment a sale of this unit occurs. Let us understand this illustratively. Supposing I were a performer. My cassette, the recording of my sound, was bought by you.

There will be, say, a thousand of such cassettes, one of which is bought by you for which there has been valuable consideration. Now that I have received this valuable consideration, I cannot control the further distribution of the unit purchased by you. If you go ahead and sell it yourself, then that is not something I can stop. But what this also means is that this particular limitation is only applicable to the distribution or issuance of copies specifically. It will not include reproduction.

Just because you have bought this unit doesn't mean that you can create more units from it. The limitation is only with respect to further distribution. The third kind of control is the communication of the recording to the public. Now what we have seen in terms of the issuance of copies is that we were referring to physical copies. But especially over the

last decade, we have seen improvements in technology and the mass availability of smartphones.

The rise of broadcasting. We have been able to hear new releases of sound recordings, with the help of our smartphone without purchasing any cassettes. This kind of communication is referred to as communication with the public. And communication to the public is a separate, exclusive right; separate from issuance of copies. The fourth type of control you can see is selling or giving it on commercial rental or offering for sale a copy of the record. What this is a reference to is that the presence of libraries, the presence of video libraries, or cassette libraries that are engaged in the business of providing these copies, such as for lending and renting; Then, because a specific unit is being used repeatedly.

It is capable of generating a higher amount of revenue. And this kind of usage is also something that a performer can control. Let us now come to another right. What we discussed in the first phase of our discussion was the fixation on the live performance and dealing with that fixation. The second right is about the broadcasting of that performance, broadcasting, or communicating of the performance, except where the performance is already broadcast.

How is this different from what we discussed earlier? In the earlier discussion, what was being communicated was the recording. In this particular instance, we are discussing the communication of the live performance. Where communication of the live performance is happening, that is different from fixed communication. That specific control is what is governed under this right, and you can see it makes an exception by saying "except where the performance is already broadcast." In saying so, it brings in the consideration of broadcasters' rights, another type of related rights wherein the question will be whether a performer can control any rebroadcast of the broadcast.

As we will understand in the later sessions of this course, when we discuss broadcasters' rights, that rebroadcasts are broadcasters' exclusive rights. But the initial performance communication, the live performance communication, is something that the performer controls. Let us now come to another segment of 38A, which talks about the incorporation of performances in cinematograph films. Now this is something that all of us have seen: films are incomplete without performance. But what kind of control do performers have over such performances in cinematographic film? What this provision says is 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.

What this means is that once the performance is incorporated into a film with the consent of the performer and through a written agreement, Then the performers' rights we have discussed, those performers' rights will now be carried forward by the producer. Therefore, the rights we had discussed will not be used by the performer to create any kind of obstruction in the film's communication by the film producer. Now there is an important provision that is attached to this particular provision, and which is, Notwithstanding anything contained in this subsection, the performer shall be entitled to royalties in case of making the performances for commercial use. What does this mean? If we look at the copyright rules 2013, under rule 68 explanation 2, commercial use is defined. It mentions commercial use as stated in the proviso that we just read - means the exploitation of performers' rights by way of reproduction, issuance of copies or distribution, communication to the public including broadcasting, and commercial rental of the cinematograph film.

What this provision is saying is that, while the rights that are provided under 38A(1), which we had discussed, include reproduction rights, issuance of copies, and communication of performance. While these rights cannot be used by the performer to create an obstruction for the film, a certain royalty must come to the performer from the revenue generated by such use of the performance. This is what this particular provision is saying, and you can see the wording is - shall be entitled to royalties, and therefore this is a mandatory form of payment that must occur with respect to performance.

Having understood the economic rights of performers in the next session, we are going to take a look at what the performers' moral rights are. And with that, we will touch on a very important facet of copyrights, which is that copyright law not only serves the economic interests of the creator but rather also some of his more natural interests, that is with respect to acknowledgment and any kind of damage to such work. How does this play out with respect to performance? This is something that we will look at in the next session. Thank you for joining me. See you all in the next session. Thank you.