

Copyright and Related Rights Law

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WEEK - 07

LECTURE – 34

Performer's Moral Rights

Welcome back to this course on copyright and related rights law. This week we are looking to understand performers' rights. We have already seen statutory definitions of performance in different acts in different parts of the world. We have also seen the distinction between works and performances. In the previous session, we looked at what performers' economic rights are. In today's session, we are going to focus on the moral rights of performances.

Let us look at the specific moral rights provisions within the Copyright Act before proceeding. Let us take a look at whether works that have been used in a performance are, in fact, severable in terms of the connection they have with copyright. You would recall that we had a similar discussion with respect to composite works. When we discussed Section 13 of the Indian Act, we discussed how even if a cinematograph film or a sound recording were considered works in which copyright subsists, it would not affect the separate copyright in the underlying works.

Similarly, in Section 39A, the second clause states that performers' rights shall not affect the separate copyright in any work in respect of which the performance is made. Therefore, just because a performance carries a particular work, it does not mean that there is any kind of ownership that the performer can claim on the content itself. Always remember that the content is a work for which there is an author, and that author is exercising rights under section 14. Can it be possible for a performer to own the content? Yes, it can. But that will be based on how that transaction occurred.

Has the author transferred the content to the performers? If yes, then the performer can also control the content. Otherwise, the performance and the content are severable. With respect to moral rights now, we must first understand that, just like performers' rights, which are economic rights, were introduced much later into the copyright framework in India and other parts of the world as well. In India, they were introduced in 1994, but at

that point when such rights were introduced, moral rights were not introduced. Moral rights were introduced only in 2012 with the amendment to the Indian Copyright Act.

The fact that there is content that a performer performs and that content is a work, It would mean that both the work and the performer enjoy moral rights over their specific expressions. Which is why it is important to understand that just because there is a performance of a content, it doesn't reduce the relevance of the author's connection to that performance. Authors too have moral rights, and the moral rights of authors have been taken up in judicial considerations on several occasions, which is why this is a deeper study. A foundational distinction based on theory between economic rights and moral rights is also something that we will take up later when we look at the economic rights and moral rights of authors in more detail. In today's session, we are simply going to make a brief distinction between economic rights and moral rights.

And that distinction is: the justification for moral rights for performers or authors, in very brief terms, is that certain rights claim their origin in terms of a natural existence. To explain this, let us understand that when an author creates a work or when a performer creates a performance, a part of that author or performer is attached to that expression. In other words, a person's personality is reflected in that particular expression. Which would mandate, then, that because there is a bond between that expression and its author or performer, that person should be readily acknowledged for that expression. Also, any kind of damage that usage would pose to the reputation of such a performer or author should fall within this natural realm.

But more on this later. Let us focus on the provision itself, which talks about the moral rights of performers. Let us look at Section 38B. 38A, you would recall, we had discussed with respect to economic rights. 38B states moral rights of the performer and it says the performer of a performance shall independently of his right after assignment either wholly or partially of his right, have the right, and then it prescribes what the specific moral rights of performers are.

But before we look at those specific rights, let us focus on the language in 38B, which states that independently of his right after assignment, what do we recall about assignments? We recall that when an assignment is made by the right holder, ownership over that particular right is transferred to the assignee. This is different from licenses because, in a license, no such transfer of ownership occurs. Therefore, when an assignment occurs, say for example, if the performer is the assigner, then the assignee becomes the owner of the right, and no claim to economic rights can be made by the performer. What section 38B is saying is that the moral rights prescribed under 38B will exist despite an assignment having taken place. On that point, because we are looking to understand what an assignment is and what it would entail, let us look at the format of an assignment that has been provided within the Copyright Act.

What this will help us understand better is how transfers of ownership can occur in cases of performances. And once we have understood that, we will come back to this provision on moral rights. Let us look at Section 39A of the Indian Act. It states that certain provisions apply in the case of performers' rights. It says section 19 and section 30A shall, with necessary adaptations and modifications, apply in relation to performers' rights in any performance as they apply in relation to copyright in a work.

Let us understand that the majority of the provisions within the Indian Copyright Act are concerned with works. In fact, in Section 39A, the provisions I have cited, 19 and 30A, are only two of the many provisions that have been inserted within 39A. The Parliament has deemed it appropriate not to repeat provisions that are otherwise applicable to performance with necessary modifications. And therefore, two very important provisions, Section 19 and Section 30A, with modifications, are applicable to performances just like how they are applied to works. What is Section 30A? Section 30A is saying that the provisions of section 19 shall, with any necessary adaptations and modifications, apply in relation to a license under section 30 as they apply in relation to the assignment of copyright in a work.

Section 30, which we have discussed earlier, is a provision that refers to licensing. Section 30A, on the other hand, is saying that the modality for assignments that has been laid out under Section 19 will, with modification, apply to licenses. Therefore, section 19 is very important for all of us because it lays out this modality, which is applicable not only to assignments but also to licenses with respect to performances. Let us then understand the components of Section 19. Section 19, the title of this is "Mode of Assignment."

Section 19, clause 1 says, no assignment of the performer's rights in any performance shall be valid unless it is in writing signed by the assigner or by his duly authorized agent. When we read section 19 of the provision, wherever it says "assignment," you can also read "assignment" as "license." Please keep that in mind. Second, for the purpose of convenience, I have replaced, wherever necessary, "author's right" and "work" with "performer's right" and "performance." In understanding these provisions, you can also understand that these provisions will be applicable with respect to works as well.

There are many occasions in the professional life of creative professionals when they may be faced with the situation where a person is telling them to incorporate their expression into a larger work, a composite work, without any agreement. When I say without any agreement, I mean without any written agreement. You can see that in order to protect the interests of authors and performers, it is mandated under section 19. That any such transaction must be in writing, and it must be signed. According to this provision, if no such written agreement exists, then the assignment shall be invalid.

Let us look at the second provision. The assignment of copyright in any performance can be read as the assignment of the performer's rights in any performance. Shall identify such performance and shall specify the rights assigned, as well as the duration and territorial extent of such assignment. It says that there must be clarity in the written agreement on what performance is being assigned. Not only that, but it should also clarify the duration and territorial extent.

What does that mean? We had understood that it be a license or an assignment because the right holder is the one who is initiating the transaction. He has every right to restrict that usage in duration and territorial extent. Meaning: The right to issue copies, for example, to a particular assignee can be restricted to three years. The territorial extent for which the assignee has the right is two states in India. This is up to the rights holder to decide and can therefore be modified upon negotiation.

Let us look at the third provision. It says the assignment of performer's right in any performance shall also specify the amount of royalty, and any other consideration payable to the performer or their legal heirs, during the currency of the assignment, and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties. This says that the amount of royalty, you will recall, refers to future payments. The amount of royalty that a performer, will be eligible for on account of the use of that performance, must be clearly specified in the written agreement itself. It is also stated that the assignment shall be subject to revision, extension, or termination on terms mutually agreed upon by the parties.

This is a reference to the effect that the assigner and the assignee, the performer and the person to whom the ownership is being transferred upon mutual agreement, They can decide how questions of revision, extension, or termination will be addressed with respect to such an assignment. Therefore, it could be possible that the nature of the assignment and such a transfer will require the least amount of intrusion into the assignee's enjoyment of his rights. And therefore, it could be possible that the performer is engaging in an assignment agreement that seems one-sided, and that is something that is permissible under this particular provision.

Let us look at the next provision, which says that if the assignee does not exercise the rights assigned to him under any of the other subsections of this section within a period of one year from the date of assignment, The assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment. What is this provision saying? If there has been no exercise by the assignee of the rights that have been assigned, and if the performer has assigned the issuance of copyright to a particular person, And within one year, if no issuance of copies has happened, then such an assignment deed will lapse.

In other words, the right to the issuance of a copy will come back to the performer. But this is subject to a limitation that you can see in this provision, which is that: If the assignment deed clearly provides that even if the assignee does not issue copies within a year, it will not lead to a lapse of the agreement, then that is something which is permissible, and it will not lapse. Let us look at the next provision, which says, "If the period of assignment is not stated, it shall be deemed to be 5 years from the date of assignment." As we discussed in a written agreement, all considerations pertaining to that particular assignment or license must be mentioned. And one very important consideration will be: what is the time period for which the agreement will be in place? What this provision says is that if no duration has been prescribed, then it will be taken to be a period of five years.

The next provision is that if the territorial extent of the assignment of the rights is not specified, it shall be presumed to extend within India. Because performer rights are rights that can be exercised across the world. Unless it is specified to what extent the assignee gains a particular right, it will be India. Now that we have understood the effect of an assignment, And how this assignment deed must be framed.

Let us now return to moral rights. What this provision 38B is saying is that even if there is entire control of a performer's rights that has been given to another person. This control by another person will not take away the moral right of the performer. That will remain. Let us then look at what this moral right claim is. The first claim is that to be identified as the performer of his performance, except where omission is dictated by the manner of the use of the performance.

What does this mean? Every performer has the inherent right, irrespective of any assignment, that when his performance is used, he should be acknowledged, credited, and identified for his performance. We have all seen films, and in films, when the content of the film is finished, we can see the credits roll. In these credits, you must have seen acknowledgment of all the performers who have contributed their expressions to the film. At the start of the film, it is also a practice to give due attribution to the most significant performance. The principal actors, for example, are attributed right at the beginning of the film.

But there is an important limitation that you can see with respect to this right, which is except where omission is dictated by the manner of the use of the performance. This exception can be taken to mean that if the format of usage of a particular work is such that giving attribution or identifying the performance is impractical, then it is permissible. What could such a situation be? There is not much clarity in this provision itself as to what such a situation could be. Because such a situation has also not been raised before

the court, It is not clear what is the scope of this limitation. But one thing is certain: this is a perception of the industry.

Therefore, certain kinds of usage, which, in the industry's understanding, make attribution impractical. Then such an attribution may not be made. But what exactly this could be is not something that is very clear. Let us look at the second right. The second right is to restrain or claim damages in respect of any distortion, mutilation, or other modification of his performance that would be prejudicial to his reputation.

Let us look at some of these terms. To distort is to give a misleading or false account or impression. Mutilation is the act of inflicting a violent and disfiguring injury. Reputation is the belief or opinions that are generally held about someone or something. Imagine a performer who has delivered a performance while keeping in mind a particular script. But say the script is altered in such a situation that the performer, had they had access to this modification, would never have agreed.

It could be something vulgar, and therefore, any such misleading impression, or in other words, distortion. What about a situation in which the performance itself is disfigured? Say with some kind of alteration. A performance, after all, is being visually perceived by the audience, and therefore any visual editing to what was otherwise performed—through morphing, for example—would be something that would be captured within this provision. What this provision states is that such a modification, such a distortion, or such a mutilation should be prejudicial to the reputation of the performer. Reputation, as we can understand, is the belief that is held by the public about such a person.

And therefore, it's a question of whether the public will perceive this particular act done on the performance to be prejudicial to the performers' reputation. In this provision, there is also an explanation. This explanation reads as follows: For the purposes of this clause, it is hereby clarified that the mere removal of any portion of a performance for the purpose of editing or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation. It is a practice in the film industry, for example, that performances which were otherwise captured for the purpose of the film would undergo cuts. And these cuts, as has been mentioned in this explanation, could be purely for technical reasons.

And these cuts are not going to be considered prejudicial to the reputation of the performer. This is what the explanation says. It prevents this provision from being used against technical practices that are being followed in the industry and, therefore, is an important exception to the right granted against distortion, mutilation, and modification. At the end, let us look once again at Section 2(qq) and its proviso. We had discussed that certain kinds of presentations would not be considered performances.

The proviso to Section 2(qq) states that where a presentation is casual or incidental in nature and the normal course of the practice of the industry would not be credited, it is not a performance. But what is important for us is the last line; it says, "except for the purpose of clause (b) of section 38B." Even though an extra or a junior artiste and their performance will not have any economic rights, they will not have any identification rights as a moral right. Such an extra and such a junior artist will still have the right of 38B(b), which is the right of integrity. No such presentation, whether by a performer whose performance has economic rights or by a performer whose performance does not have economic rights, It is without the protection of 38B(b) that the presentation cannot be used in a way to prejudice his reputation.

With that, we will close this understanding on moral rights. In the next session, we will look at the distinction between performers' rights and personality rights. Thank you for joining me. See you all in the next session.