

## **Copyright and Related Rights Law**

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**WEEK - 08**

**LECTURE – 40**

**Right to Receive Royalty – 2**

Welcome back to this course on copyright and related rights law. In the previous session, we discussed what the right to receive royalties is. We had seen it in relation to authors of literary and musical works. These authors had long demanded, that certain practices being followed in the industry be changed, because the recognition of first ownership of producers, with respect to their works was prejudicial to their interests. Accordingly, as a solution, the 2012 amendment to the Indian Copyright Act introduced the right to receive royalty under section 18, which deals with assignment. This curious inclusion within this provision raised a question as to whether this can be considered a substantive right.

Without it being included in section 14, which seeks to define what copyright is. We had seen how it can, in fact, be considered a substantive right. Moving forward, in this particular session, we are going to see how the right to receive royalties can be extended to performers for their performances. Let us recall what we discussed in our earlier discussion regarding the economic rights of performers.

I am referring to Section 38A of the Indian Copyright Act, which provides for performers' rights. Under this particular provision, let us consider Clause 2 and what it says with respect to a producer enjoying performers' rights. As you can see, this provision reads 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 rights in the same film. This means that the producer will enjoy the performer's rights where the performance is incorporated into the film. In continuation, this provision then states that notwithstanding anything contained in this subsection, the performer shall be entitled to royalties in the case of making performances for commercial use.

We understood that commercial use has been interpreted within Rule 68 of the Copyright Rules 2013. Under Rule 68, explanation 2 explains that commercial use, as mentioned in

the proviso to subsection 2 of section 38A, 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 cinematograph films. What we understand is that under this provision, Under the main provision, it is stated that the producer will enjoy performers' rights where the performer has consented to the incorporation of the performance in the film by way of a written agreement. But despite the producer enjoying such performers' rights, the performer will be entitled to royalties. Royalties would be a certain share of the amount that is being collected by the producer with respect to certain kinds of usage of such performances.

Let us then understand whether this is a right of the performer that we can call a right to royalty. And whether this right to royalty is something that is unassignable or unwaivable. Because the producer realizes that there is a provision within Section 38A that places a limitation on the exercise of the commercial utilization of the performances incorporated within the film, then wouldn't the producer get this right waived or get it assigned in his favor? And is that something that is possible? Let us consider the case that arose before the Madras High Court. This case is Veeramani Kannan versus Super Audio Madras Private Limited. Let us see a clause within the agreement between Veeramani Kannan, who is the singer and performer, as well as the composer and author, along with the record label.

In this particular agreement, you can see clause 3.3, which states: Further, and without prejudice to the above assignment, and in consideration of this agreement, in regard to any audio-visual recording and or sound recording of any performance made by assigner in pursuance of this agreement, the assigner releases, relinquishes, transfers and assigns all its rights to royalty under Section 38A clause 2 absolutely to the producer, In exchange for a lump sum royalty payment as mentioned in this agreement under clause 4. The assigner you would note is the performer. What does this provision say? It states that the performer is willingly relinquishing, meaning that he is not looking to claim his right to royalties and is also assigning it away. In this sense, the right that is prevailing under clause 38A, paragraph 2 is being given to the producer.

Therefore, what limitation 38A clause 2 proviso would have had on the producer's commercial utilization? And in turn, meaning a royalty right or consideration that should have gone to the performer, has now been discarded. So the question that the court considered is whether this particular right can, in fact, be assigned away, as the judge had said. Having relinquished and transferred his right to royalty under Section 38A, Clause 2, specifically on the receipt of a lump sum payment, the plaintiff cannot seek relief from royalty under this section. Section 38 and Section 38A are the provisions that confer special rights exclusively upon the performer to claim royalty when the performance is commercially used. However, by contract, if the performer relinquishes the said right

upon receiving a lump sum consideration, thereafter he cannot enforce the right conferred under the proviso to section 38A clause 2.

For the judge, in consideration of this particular provision, there is nothing to indicate that this right cannot be assigned away. You can see for yourself; this proviso simply says that a right to royalty shall arise in the name of the performer. But it does not say anything about whether such a right can in fact be relinquished or given away. This is not stated, and therefore, in having given it away in exchange for a payment that supposedly includes the royalty as well, In the case of authors, the Supreme Court decision in 1977 used Section 17 provisions to provide first ownership to producers with respect to underlying work copyrights. With respect to performers' rights, clause 38A, paragraph 2 is very clear - That once performances are incorporated within cinematographic films through a written agreement, then unless there is anything in that agreement, the producer will enjoy all performers' rights.

Can we say that a similar issue has arisen with authors and can arise with performers as well? If so, how can this issue be resolved? Can we apply a similar solution as we have seen being applied with respect to authors, wherein a right to receive royalties was introduced within the Copyright Act for authors? Can such a right also be introduced for performers? The concern that we see is that in Section 18, in which the right to receive royalties has been introduced, it specifically refers to authors of literary and musical works in its terminology. So even if the right to receive royalties has to be extended to performers, it must be done in such a way, that this provision is either modified or a separate provision which talks about the right to receive royalties for performance is included within the Copyright Act.

It is the first option that we see has been followed concerning the Copyright Act. Section 39A, which talks about certain provisions that would apply to performers' rights upon necessary modifications and adaptations, talks about section 18 being the subject of such a necessary adaptation and modification, which means that now the provision that was inserted specifically for authors of literary and musical works, can now be read as talking about performers' rights and performances. In line with this understanding, I have modified the set provisos that talk about the right to receive royalties under section 18 by including performers' rights and performances.

And this is how the provisos read. It would say, provided also that the performer of the performance included in a cinematograph film shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of the performance for the utilization of such performance, in any form other than for the communication to the public of the work along with the cinematographic film in a cinema hall, except to the legal heirs of the performer, or to a performer's society for collection and distribution and any agreement to contrary shall be void. Provided also that the performer of the

performance included in a sound recording but not forming part of a cinematographic film, shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of performance, for any utilization of such performance, except to the legal heirs of the performer or to a collecting society, for collection and distribution and any assignment to the contrary shall be void.

Upon this modification, what we see is that, similar to the application of the right to receive royalties with respect to authors whose works were incorporated in cinematograph films or sound recordings, we can now consider performances as included, within cinematograph films or sound recordings which are not part of cinematograph films. What is beneficial for performers is that, unlike section 38A clause 2 proviso, which talks about a right to royalty but does not mention whether such a right can be assigned or not.

Under section 18, these provisos very clearly state that the right to receive royalty cannot be assigned, nor can it be waived. This is a mandatory form of royalty that will arise for performers despite there being some kind of relinquishment or assignment of the right contained under clause 38A, section 2. Please understand. When we took a look at this case, we saw that the performer had, through agreement, relinquished, transferred, and assigned the right contained under Clause 38A, Proviso 2, which is the right to royalty. Even if such an assignment agreement is in force, the right to receive royalties will still be applicable.

In a matter that arose before the Delhi High Court in 2016. This is ISRA versus Chapter 25 Bar and Restaurant. ISRA, or the Indian Singers' Rights Association, is a performers' society. It stated that Section 39A(1) of the Act inter alia states that Section 18 shall, with necessary adaptations and modifications, apply in relation to the reproduction right in any broadcast. And the performers are right in any performance as they apply in relation to copyright in a work.

Therefore, the court is following the line of reasoning that we had understood, in which the court is first focused on whether the right to receive royalties can be made applicable to performers' rights in the first place or not. And how will it see that? By seeing whether the right included within section 18 is in fact applying to performances. And just like we had seen, section 39A clause 1 extends, with necessary adaptations and modifications, section 18 to performances. And therefore, the Court says the plaintiff has been able to prove the infringement by the defendant of the right to receive royalties. Of the members of the plaintiff's society in the performances, as recorded in the series prepared by the plaintiff's investigator.

The playing of songs by the defendant in its restaurant without payment of royalties to the plaintiff is a violation of the right to receive royalties of the performers who are

members of the plaintiff. Therefore, we can see that the Delhi High Court has used section 39A in applying the right to receive royalties to performers' rights and performances. and therefore has stated that where section 18 would apply and sound recordings have been played in an establishment, Without the payment of royalties to performers, it will be considered a violation of the right to receive performance royalties. Let us now consider the question of how the right to receive royalties for performers will be calculated. In a similar line of understanding to what we had taken in the previous session, Because there is no course of assessment that has been charted out objectively within the Copyright Act, All that it says under section 18 is that sharing must be on an equal basis.

This makes us understand that, on an equitable consideration of what constitutes a fair share for the contribution of that performance in that particular sound recording or film, such a royalty must arise. Eventually, what this means is that the right to receive royalty calculations is an industry assessment. In rounding up this consideration of the right to receive royalties, specifically with respect to performers, We must keep in mind, as was the case that came before the Madras High Court with respect to this performer, Veeramani Kannan, that contractual practices in the industry can be such as to take away all rights that are existing within the copyright Act. It is then the onus on the performer to be vigilant, to ensure that certain rights, such as the right to receive royalty, which are unwaivable, Even if there is a provision within that agreement that says the performer will not lay a claim to any right to receive royalty. You should understand that such a provision will be invalid, and the right to receive royalties will subsist.

In the next session, we will take a look at the importance of registration, publication, and terms connected to copyright, followed by terms connected to performers and broadcasting. Thank you for joining me. See you all in the next session. Thank you.