

Copyright and Related Rights Law

Dr. Rohan Cherian Thomas

Faculty of Law

NALSAR University of Law, Hyderabad

WEEK - 10

LECTURE – 47

Communication and Performance of Work to the Public

Welcome back to this course on copyright and related rights law. In the previous sessions, we have looked at some of the rights under section 14 of the Indian Copyright Act, which provides the meaning of copyright. We have understood that although copyright is used in a singular sense, it, in fact, represents a plurality of rights. In other words, a copyright holder receives a bundle of rights. We have discussed reproduction rights, issuance of copies rights, adaptation rights, and translation rights. In today's discussion, we are going to take a look at the communication of work to the public and the performance of work in public.

There is a distinction in usage between these, but also a kind of similarity. Let us move ahead. If you recall an earlier discussion, that we had in which we discussed the statutory definitions of performance, we saw how different copyright Acts interpret performance. Of specific relevance to our discussion today is the meaning of "performance" provided within the Canadian Copyright Act.

Section 2 of the Canadian Copyright Act provides a meaning of performance that combines two components. One, it combines the performance of the performer. And second, it also includes sound recordings of communication signals. In other words, it goes beyond what we understand to be a performance under the Indian Copyright Act, doesn't it? If you look at the Indian Copyright Act, we find that it is different because it only provides for the act of performance, which is a visual or acoustic presentation made live by one or more performers. Now, if we consider this interpretation with Section 2 of the Canadian Copyright Act, we see that the Canadian Copyright Act is, in fact, broader in scope.

It involves the communication of a work that is a separate component different from the performer's performance. This distinction between what is an act of performance and what would be a process of delivering a work for the purpose of display or diffusion to

the public. This is what forms the core of our discussion today. Consider an exhibition. For example, an art gallery has opened its doors for members of the public to come and see the paintings that are on display at its premises.

Such an exhibition is a direct display of those paintings. Is this not different from what we understood as the issuance of copies? I'm sure all of you are nodding your heads. You're saying, yes, it is different. Communication to the public involves a display of such work that happens in an exhibition. And as you can see, the meaning says a public display of works of art or items of interest held in an art gallery, museum, or at a trade fair.

You would notice that there is no act of performance as discussed in the Indian provision. Clearly, a performance under the Indian Act would not include the display of a work. Let us consider our earlier discussion on broadcasting. Do you remember that we had discussed broadcasting as communication to the public? In other words, when we consider performances, an act of performance, which is a visual or acoustic presentation made live, can be carried out by broadcasting. Therefore, it can be communicated to the public.

We can say that the broadcasting of a performance is, in fact, communication of the performance to the public. I hope we are able to make this distinction, between performance in the Indian Act, and what we understand as communication of the work or communication of the performance. Let us consider still another example: when you watch a film in a cinema hall or theater, is the film not being communicated to the public? Is this not completely different from one, the issuance of copies, and two, performance? Is it not? Is the film not being played because it is a recording? Is it not? Because a film is a recording, it is played. And through such playing of the recording, it is communicated to the public. It is incapable of being performed.

Let us look at Section 14 and what the specific right is that we are looking to understand. We had seen during our study of performances, that Section 38A very clearly states, that performances cannot be prejudicial to the author's rights. In fact, under section 14, we find this connection wherein performing the work in public is a copyright. Therefore, if a singer has to sing the lyrics as well as the underlying composition, such a performance will need authorization from the copyright holder. You can see that under 14(a), which talks about literary works, musical works, and dramatic works.

The copyright is, in fact, provided as a kind of set. It says to perform the work in public or to communicate it to the public. Now, in terms of whether the performance of the work is also communication, you can say that it is. But the distinction being made is that performance is a distinct way of communication, whereas there are other ways of communication that are not performance. But are purely communicative.

For example, the broadcasting of a work does not necessarily require performance, and therefore we can make a clear distinction between communication and performance. If you can see in respect to cinematograph films, this first portion of a set that seems to be present under 14(a) is absent in 14(d). With respect to films, the right is phrased as the right to communicate the film to the public. As you understand, this is because cinematographic films, being recordings, are incapable of performance. What can be performed are the underlying works, such as the musical works.

In the original Copyright Act, the unamended form of the original 1957 Act, it is curious to note that communication to the public was, in fact, not a right provided under Section 14(a). At that time, Section 14(a) provided for the right to publish the work instead of the issuance of copies. Performing the work in public and communicating the work to the public, it provided for the work to be performed in public only. Let us take a look at how performance was defined in the original Copyright Act. It read, performance includes any mode of visual or acoustic presentation, including any such presentation by the exhibition of a cinematograph film or by means of radio diffusion.

Or by the use of a record, or by any other means, and in relation to a lecture, includes the delivery of such lecture. We must understand that the meaning of performance that we have now, and as we have understood it to mean visual-acoustic presentation made live by one or more performers, is only a component within this definition. In fact, this definition is very similar to the Canadian definition of performance. It would then make perfect sense to include a right called the right to perform the work in public because it would also include communication to the public. In 1983, an amendment made to the Copyright Act introduced the phrase "communication of work to the public" in terms of a definition for the first time - it was introduced in Section 2(ff).

But interestingly, Section 14(a) did not include this insertion. And therefore, performing the work in public remained the way it was. Performance remained the same. Section 2(ff) reads that communication to the public means communication to the public in whatever manner, including communication through satellite. This insertion of communication to the public is more a reflection of the growing technological improvements in terms of the commercial utilization of works.

It has little relevance in terms of any specific change that was considered or made under section 14(a). It was only in 1994 that the need for shifting performance, as we understand it today, from its combination with communications arose because of the insertion of performer rights in the Indian Copyright Act. In 1994, with the recognition of performers' rights, performance found a new definition, which is the definition we have discussed of a performance being a visual or acoustic presentation made live by one or more performers. Communication to the public also found a different interpretation, and

this read: Communication to the public means making any work available to be seen, heard, or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work. Regardless of whether any member of the public actually sees, hears, or otherwise enjoys the work made available.

We can see that this particular definition would include any kind of display of the work and would technically also include, as we would understand, communications. We see that this definition talks about display and diffusion. The term diffusion here is a reference to communication that happens through signals. And therefore, just like its predecessor from the 1983 amendment. Section 2(ff), which spoke about communication, talks about a specific type of technological consideration for commercial utilization and therefore is distinct from the act of performance itself.

Section 14, therefore, was amended to keep in line with this distinction to now include the copyright to perform the work in public or communicate it to the public. The right to publish the work was also amended to now read as issuing copies of the work to the public. The definition of communication to the public that we find in the Copyright Act today is a further refinement that was made through the 2012 amendment. In this particular amendment, communication the public now reads, Making any work or performance available to be seen, heard, or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it. Whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears, or otherwise enjoys the work or performance made available.

We can see that section 2(ff) clearly makes a distinction between the performance of the work and the communication of the work and the communication of the performance. As has now been provided under Section 2(ff), communication to the public means making a performance available for being seen or heard. Performance, as we understand it, can include work, and therefore the work can be communicated through performances. This would be a kind of direct perception. Perception through diffusion would occur through the use of signals.

In keeping with tradition, this particular amendment also considers the technological improvements in terms of commercial utilizations, wherein it recognizes that such Diffusions amounting to communication need not only be simultaneous; they could be at a time and place chosen individually. We find that there are certain kinds of rights that are used in the industry but do not find mention under section 14. I am referring to these rights because they have a direct connection to communication and performances as well. I am referring to mechanical rights and synchronization rights. Let us see what these rights are and whether performing them is any different.

The standing committee of the Rajya Sabha, which had considered the Copyright Amendment Bill 2010, provided that film music rights were a bundle of rights in themselves. To explain what kind of rights fell within this bundle, the Standing Committee explained that there would be synchronization rights, mechanical reproduction rights, performing rights, and sound recording rights. Of these, performing rights and sound recording rights are something that we find specifically within section 14. But mechanical and synchronization rights are not something that we do.

Let us understand what they mean. A synchronization right is, as the committee explains, when a music piece or song is synchronized to a film, video, television show, or commercial. Synchronization means the operation or activity of two or more things at the same time and rate. What we therefore understand synchronization to be is the placement of a soundtrack onto a visual medium. The visual medium may have an existing soundtrack that can be supplemented with an additional soundtrack, so to speak. This action is called synchronization, and this is a right that is specifically covered under a right referred to as the synchronization right.

You would see that now, when the film is communicated to the public, the music that has been synchronized with the visual recording is also being communicated. Let us consider what performing rights are. According to the Standing Committee, performing rights are the rights to perform music in public, especially in broadcasting by TV or radio, restaurants, airlines, auditoriums, or public functions. We find that performing rights, which would be interpreted as rights of performers, are rather rights that vest with authors. And as we have understood, an author's right to perform the work in public would, in fact, be the right to have a visual or acoustic presentation of the work made live.

But that is not what this particular explanation of what performing right means. Therefore, the industry's meaning of performing rights is different. From what we understand performing rights to be under the Indian Copyright Act. Mechanical reproduction rights are royalties paid to a songwriter whenever a copy of one of their songs is made. In that sense, mechanical reproduction rights are a kind of reproduction of a work in material form.

And it is not specifically connected to communication or performance. Sound recording rights, as we understand them in the Copyright Act, are rights over which ownership vests with the sound recording producer or the author, and in that sense, they match the industry's understanding. In the next session, we will take a look at rental rights, technological protection measures, and rights management information. Thank you for joining me.

See you all in the next session. Thank you.

