Protecting Performers’ Rights: Does India Need Law Reform?

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The rapid growth in technology combined with an increased awareness of intellectual property has led to many countries recognizing the importance of a well-developed performer protection regime. Such regimes, involving a combination of legal policy making and pragmatic placation of myriad interest groups, have resulted in a nebulous, but growing body of jurisprudence in different domestic jurisdictions. India, for one, has large stakes in creating strong performer protection laws, given the quantum of Indian entertainment exports and folklore which must be protected.

Indian law today protects rights of performers through the mechanism of copyright law. This article critically evaluates this regime, and demonstrates that the performer protection regime in India today is inadequate in the context of what performers’ rights purport to protect and accomplish. This article begins by understanding the terminology of the jurisprudence of performers’ rights. It then compares prevailing American, English and international performer protection regimes to existing Indian law, and concludes by arguing that reform in the nature of sui generis protection for performers’ rights in India is essential.

Keywords: Performers’ rights, copyright law, sui generis, economic rights, moral rights, non-tangible rights

The law on performers’ rights is in its formative stage, and there is still no consensus on what the terms ‘performance’, ‘performer’ and ‘performers’ rights’ mean. A clear understanding of these terms is essential to meaningfully engage with the legal questions confronting the protection of performers’ rights.

A layman’s understanding of a performance would include within its ambit anything from a classroom lecture to a theatre performance. Hence, at the outset this paper restricts the scope of this term by understanding a ‘performance’ to be a transitory activity of a human individual that can be performed without the aid of technology and that is intended as a form of communication to others for the purpose of entertainment, ritual or education.¹

More specifically, this article engages with performances that have come before courts in the context of the protection of performers’ rights, which may be classified into four categories. First, performances may be unfixed and unscripted. This would include acts in fairs and carnivals, where the work is live, and entirely created and directed by the performer.² Secondly, performances may be unfixed and scripted. This refers to performances of dramatic works, live dance performances, etc as distinct from the underlying scripts or work.³ Thirdly, performances may be fixed and unscripted. These performances are usually fixed in some tangible medium, but not scripted. Improvisational music, like Indian classical music, is an example of such a performance.⁴ And finally, performances can be scripted and fixed, which is the most common type of performance. This includes a performance in a song, film, or advertisement where the performer is given a role, script or instruction to perform.⁵

Secondly, while national laws and international treaties offer some guidance on the question of who can be called a ‘performer’, existing definitions are open-ended and there is large scope for interpretation and debate.⁶ Defining a ‘performer’ is an important policy question and requires treading a fine line between the equities of major and minor performers. While identifying a performer on the basis of commonly used criteria of quality or quantity, a legislator runs the risk of ignoring smaller performers, or granting them rights that potentially vitiate the rights of major performers.⁷ This paper avoids this debate, and defines a performer in the widest sense possible, as anyone who takes part in a performance, and would therefore allow legal protection to any individual who has been a part of a performance, regardless of the importance, duration or distinctiveness of the performance.

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Finally, the phrase ‘performers’ rights’ comprises all the rights that may accrue to a performer by virtue of his performance. They are hence, a bundling of three distinct types of legal rights: Economic rights, moral rights and non-tangible rights. Economic rights include property rights of reproduction, adaptation, distribution, rental, lending, remuneration and communication. Moral rights are the rights of attribution and integrity over the work performed. Non-tangible rights are the most difficult to define. They include the right over the persona of the performer, the right against use of likeness or name of the performer, rights over the performer’s creativity in execution of the performance, over his unique and distinct expression and style. This three-pronged understanding of performers’ rights ensures that the complete value of the performance is protected; its commercial worth through economic rights, its moral worth through moral rights and its creative worth through non-tangible rights.

Performers’ Rights in India – Scope and Lacunae

An examination of the Indian legal system in the context of this matrix of performer jurisprudence makes it clear that performers’ rights are only protected under Sections 38 and 39 of the Indian Copyright Act.

While a right in the performance accrues to the performer when he engages in a performance, as per the basis of performer protection in Indian law, once performances of any kind, visual or vocal, are recorded, broadcasted or communicated with the permission of the performer, his rights over the performance cease to exist. All rights vest in the owner/author/director of the recording, broadcast or communication. No performance can however be recorded, broadcasted or communicated without the performer’s consent. A performance recording cannot be reproduced if it was recorded without the consent of the performer, or if it reproduced for different purposes than those for which the performer gave his consent. These rights last for fifty years, but if a performer agrees to make his performance part of a film, these protections are not available to him.

A summary reading of these provisions evidences the sparse protection afforded to performers’ rights in India. The economic rights of performers in their performances are protected in India, only until the performance is fixed. Once fixed, performer has no right in the performance independent of the owner of the copyright in the fixed performance. Performers in scripted fixed works have no rights over their performances, nor do actors in scripted unfixed works, or in unscripted fixed works.

There has also been a dearth of litigation on this point, thus preventing the judiciary from filling the lacunae. The earliest case on performers’ rights in Indian courts was in 1979, when Sections 38 and 39 were not a part of the Copyright Act. In so and so case, the Supreme Court pronounced that an actor had no claim over his performance in a film as this performance did not fall within the five categories of artistic work contained in the Copyright Act. After the inclusion of Sections 38 and 39, in 2003, Super Cassettes Industries v Bathla Cassette Industries was decided by the Delhi High Court. It established that performers’ rights were essentially different from copyright, and held that re-recording of a song without permission from the original performer constituted an infringement of performers’ rights, thus taking a large step forward in creating performer protection jurisprudence in India. No other cases of note have been decided by the higher judiciary in India.

The fundamental failure of the Indian performer protection regime is that it looks to copyright law to protect performers’ rights, a system that is conceptually incapable of protecting all performers’ rights. Copyright law protects creative and original expression of ideas, and leaves the ideas themselves freely accessible in the public domain, thus balancing the competing interests of ensuring incentivisation and encouraging creativity. Copyright law also necessarily requires that these expressions be ‘fixed’ on tangible media, and fall within the category of ‘work’.

While the economic rights of performers’ may be protected by copyright, it is difficult to categorize the persona, identity, style or celebrity status of a performer as his/her copyrightable ‘work’, and performer cannot be called ‘author’ of this work. These elements are simply ideas, and are excluded by definition from the scope of copyright protection. Critics also emphasize the insufficiency of copyright law because often performers seek rights in performances that are inherently not copyrightable - sports persons who seek rights over their performances in a game, or stage actors who seek their rights in their stage performances are examples of this trend. A system of copyright will, therefore,
never be capable of effectively protecting performers’ rights, as performers’ rights fall outside the scope of copyright law.

Recently, there has been an attempt to amend provisions of the Copyright Act and extend the protection given to performers. This includes measures to grant performers clear moral rights over their work, irrespective of prior assignment so they can ‘claim damages in respect of any distortion, mutilation or other modification’ of the performance. However, while this has its benefits, it does not protect the intangible rights performers have over their performances.

While the law governing performers’ rights in India is under developed, equivalent legal regimes in the UK and the USA are older and more elaborate. Moreover, many international treaties today govern performer protection. It is therefore useful to examine these laws – both, to study their approach to protection, and to learn lessons from any shortcomings.

Lessons from the Protection of Performer Rights in the USA

England has the oldest tradition of performer protection, beginning from the Performer Protection Act, which was passed in 1925. This act has been repealed and replaced many times, each successive act keeping the scheme of performer protection abreast with changing technology. In *Rickless v United Artists,* the Queen’s Bench deliberated on the nature of performers’ rights in the context of whether these rights impacted a film maker’s copyright. A mildly confused conclusion resulted. Hobhouse J declared on one hand, that performers rights are of the same genus as copyright, as both sought to protect the economic concerns of the performer. On the other hand, he ruled that performers’ rights do not impact the right of any film maker, as the right asserted by the performer was not in the nature of copyright.

While this case was decided under the Performer Protection Act 1958, the understanding of the nature of performers’ rights in England is similar today. Today performer protection is a part of the Copyright, Designs and Patent Act, 1988. Part II of this act specifically deals with rights in performances, granting economic rights to performers, specifically over non consensual recordings and exploitation of their performances, which is similar to the Indian system. Performers are granted economic rights in England, and inadequacy in the English system is primarily with respect to unprotected moral rights and non-tangible rights. As in the Indian system, this is primarily because England uses a system of copyright to protect performer interests.

Lessons from the Protection of Performer Rights in the USA

The USA has no specific legislation governing protection of performers’ rights. While USA’s copyright laws protect the economic rights of performers is a manner similar to Indian copyright laws, their principal mechanism for the protection of performers’ rights is the law of torts. Unfair competition, unjust enrichment and defamation are oft-used arguments. However, performers’ rights in USA are predominantly protected by the right of publicity, a tortious doctrine evolved by American courts in direct response to claims of infringement of performers’ rights. This makes the American system distinctly different from the English and Indian regimes, and warrants a closer look at American performer protection law and policy.

The right of publicity is defined as a person’s right to ‘own, protect, and profit from the commercial value of his or her name, likeness, activities, and identity’. It is premised on the idea that persons have some commercial value attached to their name, likeness and persona, and if this property is put to commercial use by others, then the owner must have the right to control the same.

Initially, the right of publicity was a narrowly defined tort, only protecting the name and likeness of celebrities and performers. However, over time, courts have began to read publicity rights more widely and in many states in America today the test is *identification,* irrespective of the means use to identify the individual. The identification of a performer by some distinctive trait in any subsequent work – be it by name, likeness, voice or mannerism – would result in an infringement of his right of publicity. The right of publicity, therefore, protects performers against persons who use any aspect of their personality for commercial advantage. It has its foundations in the same philosophy that underlies economic torts, its purpose being protection of commercial and economic interests, not ideas and expression.

Certain performers’ rights fall squarely within the rubric of publicity rights. When the likeness, persona or identity of a performer is used by another for some commercial purpose, the performer is entitled to enforce his publicity rights. For example, in *Midler v*
performers were protected against imitations of their voices, which had copied their distinctive styles of singing and intonations, as the defendants in both cases were using the imitations to sell particular products. Courts in many other cases have granted protection in cases where persona, identity and likenesses have been appropriated.

The legal regime in the USA is clearly superior to the Indian system - both the economic rights of performers (through copyright laws) and some non-tangible rights of performers (through the right of publicity) are protected – thus providing protection to scripted fixed performances, scripted unfixed performances, unscripted fixed performance and unscripted unfixed performances. There is, however, little protection offered to the moral rights of performers, and non-tangible rights remain subject to two important limitations. First, because of the emphasis on identification of the performer in the right of publicity, unique and distinctive styles are not protected if the original performer cannot be identified in an imitation. Second, the cause of action in any publicity rights claim must involve the commercial exploitation of identity. Therefore, performer protection will always be limited to the infringement of rights that lie at the intersection of the performers’ personality interests and commercial interests.

The absence of clear policy has led to the ad hoc development of laws protecting performers’ rights, creating many roadblocks and hurdles to their further evolution. The primary problem is that the current system makes a conflict between publicity rights and copyright law inevitable. Courts have clearly held that publicity rights are rights that are not covered by copyright protection, thus avoiding confusion that exists in the English system. A claim for publicity rights cannot be pre-empted by a copyright granted over the same work. Therefore, people with copyright licenses to reproduce works or sell merchandise or make sequels and spin-offs of artistic works may now be prevented from doing so simply because it violates a performer’s publicity right. An associated concern is the scholarly opposition to publicity rights, as they are almost entirely judicial creations, and equivalent rights are protected under copyright statutes. Some scholars argue that copyright laws in America have expressly said that some things cannot be copyrighted and must hence remain in the public domain. Others, who see inherent value in publicity rights, argue that publicity rights today are too wide in scope and must be restricted.

The American experience, thus, simultaneously instructs a fledgling performer protection regime about the importance of clearly stated policy, and warns against a mechanism designed to protect economic interests entering the realm of protection ideas like persona and identity. However, while the right of publicity is a useful judicial innovation, its applicability is limited in a country like India, where the judicial system has not developed a jurisprudence of publicity rights.

International Regime for Protecting Performers Rights

While no one treaty completely encapsulates international protection for performers, the regime governing performers’ rights internationally may be found through a harmonized reading of specific provisions contained in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), the WIPO Performances and Phonograms Treaty (WPPT) and the TRIPS. While not concerned with the details and modalities of performer protection, they lay down the foundation on which individual countries have later built their laws. These instruments are significant for having negotiated some knotty policy questions which have hindered the development of performer protection in most countries. Notably, they have attempted to solve the quandaries of overlapping rights and differential treatment and are thus pillared on the principles of copyright priority, independence of similar rights and national treatment.

The problem of overlapping rights stems from different right holders laying claim over different aspects of the same performance. For example, copyrights exist in literary and artistic works, which comprise most performances. The principle of copyright priority mandates that no performer’s right may be exercised to the detriment of copyright holders. Similarly, economic and moral rights over the performance may be owned by different persons. The independence of related rights is important while negotiating these different rights stipulates that all must be recognized as original and not derived from one another. Secondly, while these treaties grant great leeway to national legislatures to frame the modalities
of performer protection laws, they embody the principle of national treatment, which ensures that no performer is discriminated against by virtue of his nationality.7

Economic rights are granted to performers by Article 7 of the Rome Convention, chapter II of the WPPT and Article 14 (1) of the TRIPS Agreement. These provisions provide performers the right to fix their unfixed performances, rights against the unauthorized broadcasting of their performance by wireless means, rights to the communication to the public of their live performance, and the rights of reproduction, distribution, rental and making available fixed performances.36 The WPPT, in Article 5, also gives performers the moral right of attribution over their performance. What is conspicuously absent, however, is any protection for the non-tangible rights of performers, against imitations of distinctive styles, or the use of persona and identity.

Despite this lacuna, the international landscape of performer protection has its strength. Primarily, the regime is strengthened by its foundation in the principles of copyright priority, independence of similar rights, and national treatment. This initial consensus on policy has helped develop a regime which is both, coherent and consistent. Given these advantages, developing performer protection regimes, like India, would do well to emulate policy firmness of international model.

Justifications for Protecting Performers’ Rights

Before offering alternatives to the performer protection regime in India, this article dwells on the importance of protecting performers’ rights. While developing a performer protection regime, experience shows that it pays to be jurisprudentially firm and ensure that newly created rights and entitlements are justified in law and policy. Performers’ rights aim to give the performer complete control over his performance - not merely the words, costumes, song, music, lyrics and other elements ancillary to the performance, but over the cohesive unit that is the input of performer. Any law protecting performers’ rights has justifications in both, the utilitarian arguments that justify all intellectual property rights,37 and the natural justice discourse, which sees an individual’s performance as being a part of his body.37

It is important at the outset to note that the jurisprudential basis for the protection of performers’ rights is different from the rationale that underlies similar protective regimes like copyright law, unfair competition and the right to publicity. Performers’ rights, in addition to protecting economic and moral rights of the performer, protect the unauthorized use of his persona, identity and style. These are abstract ideas, not the expressions of an idea, and copyright law protects only the latter. Similarly, performers’ rights are not based in arguments of commerce and economics, and must protect a performer’s interest regardless of any monetary or commercial loss caused to the performer. The laws dealing with unfair competition and the right to publicity, however, are premised on a cause of action arising out of some economic detriment to the individual concerned.

Utilitarians justify the protection of performers’ rights by demonstrating the greater public good that results from protecting these rights, and not leaving this material in the public domain.38 Proponents of this school argue that greater protection leads to greater economic gains, which leads to greater incentivisation for performers, greater development of the arts and thus, greater public good.39 In case of India, it would be hypocritical for a legal system that appreciated this argument in the context of patents and copyrights, to ignore it in the context of performer protection. Some theorists would consider this internal consistency within the legal system as being an absolute good in itself, hence automatically supporting performer protection.39

A second jurisprudential basis is the argument based in natural justice and equity.20 A performance is seen as an extension of the performer’s personality and a part of his property, the control over these rights being natural right of humans.7 Equitable reasoning is inextricably linked with technology as the need to grant performers’ rights grows proportionally with the increased development of technology. From a time when tickets to a performance gave performers all the control they needed, today technology has created problems like technological employment and bootlegging.7 The former refers to performers’ losing revenue by virtue of technology – while earlier everyone who wanted to see circus acts would have to go to the circus and watch a live act, today they can simply watch a recording. The latter refers to the inability of performers to capture the complete market benefits of their performance. The demands for legal protection have grown correspondingly. In many countries, this natural justice approach is formalized and constitutionally guaranteed rights over life and
property are seen as the basis for performers’ rights.\textsuperscript{40} In India also these arguments may be used, as the right to property is a constitutionally guaranteed right, and the right to life is a fundamental right.

More specifically, in the context of India, performer protection has the added dimension of protecting folklore and large entertainment exports. A large aspect of community art and culture in India today is unprotected as it does not fall under the ambit of existing intellectual property laws. This is susceptible to imitations and commercial exploitation, leaving the developers of local art forms with no legal recourse.\textsuperscript{41} Entertainment exports, like Bollywood, are also on a steady rise due to which there is, both, an increased international scrutiny of the Indian intellectual property regime, and an increased susceptibility to imitations of performances.\textsuperscript{42} This has added to the need for better protection.

There has been some legal opposition to the recognition of performers’ rights. It is argued that public interest will be better served by leaving performances in the public domain, given their intrinsically amorphous and indefinable nature. The strongest opposition to recognizing performers’ rights, however, has come from the film and recording industry, which sees its monopoly over performances threatened. With the recognition of performers’ rights, production houses and broadcasting agents will no longer have full control over any performance that they have filmed or broadcasted. For production houses especially, performer protection will not bode well as it will fetter their independence using their copyrighted material in revenue earning activities - like creating sequels to movies and publicity material like theme parks, dolls and games. These arguments however, are only aimed at protecting the economic interests of these industries, as well as their monopoly over performances, and do nothing to diminish the legal basis of performer protection.

\textit{Sui Generis Protection for Performers Rights in India}

The need for performer protection in India having been established, the challenge of fashioning a legal regime capable of accommodating these concerns remains. Existing models, employing the mechanisms of copyright protection and tortious liability have proved insufficient. This article proposes that performer protection will be best ensured by recognizing performers’ rights as an independent category of intellectual property, and granting performers \textit{sui generis} protection.

Such protection implies that performances hitherto in the public domain are now protected against their free and unrestricted exploitation. Such a creation of new rights has traditionally required a demonstration of clear benefits that accrue from limiting the access of public to these materials,\textsuperscript{20} and this article has argued in favour of the benefits, legal justifications and practical necessity of the protection of performers’ rights in detail. To recapitulate, performer protection forms a coherent and integral part of any legal system that recognizes individual’s rights over life and property. Practical justifications for the recognition of performers’ rights can be found in the benefits that accrue from greater performer protection, given the threat of easy imitations due to technological advances today and the quantum of unprotected folklore in India.

Providing \textit{sui generis} protection also requires delineating the boundaries of new rights. Drawing from the lessons learnt through the analysis of existing performer protection systems both, in the international arena and in other countries, this article endeavors’ to propose a scheme for performer protection in India.

Economic rights already exist in India, and the system of moral rights as given in the WPPT may be adopted with ease. The challenge lies in the protection of intangible rights, and rights in unscripted and unscripted performances.

Both, the American system and international treaties, evidence the importance of a clear underlying policy stipulating the extent to which performers must be given rights. At the outset, copyright protection must be de-linked from performer protection, and performers’ rights must be treated as independent intellectual property rights.

As the basis for performer protection is the right of the performer over parts of his person and property, no performers’ right can infringe on the creative property of another person. Performers must only have right over that part of the performance in which they alone have uniquely and distinctively contributed something- their voice and intonation, method of dialogue delivery, etc. This may be tested by investigating whether the subject matter would have been tangibly different if another performer had performed the same performance.\textsuperscript{20} Hence, performers can have no rights over scripts, directions,
costumes, music arrangements, et al. These materials are the creative property of other artists, but moreover would not have tangibly changed if the performer in question had not performed them. This will contribute in reducing the overlap between copyright and performers’ rights.

A shortcoming of the American system is that performers’ rights are linked to economic detriment, and the extent to which the performer can be identified. However, in the Indian context, where the protection of folklore is an important concern, these tests prove insufficient – folk artists are rarely individually identified, and often do not gain economically. Performers’ rights must protect not just economic considerations, but also the interest the performer has in the work being part of his person. Hence, protection must exist irrespective of economic or commercial disadvantage, and clarity in identification. Similarly, performers’ rights must exist independent of the fixation or mode of fixation of the performance. It is appreciated that the enforcement of such a right would be difficult, but a solution to that problem would be the stipulation of sufficient evidentiary requirements. The right must also be assignable, thus preventing pragmatic objections. Contracts for hire with performers can contain a clause that assigns performers rights as well, if the performer wishes to.

This regime has two obvious advantages. It immediately prevents confusion between the sphere of copyright and performers’ rights, and allows for the protection of non-tangible rights. More importantly, it pre-empts debate on the question of how much protection minor performers and extras should get. Since a performance rarely differs with the identity of minor performers and extras, as per the test laid down, such performers would rarely have rights over the performance.

Hence, a performer protection regime in India may be premised on the following three pronged model:

- Performers’ rights are given *sui generis* protection, and all economic, moral and non-tangible rights are protected;
- These rights protect even the non-commercial, community interests of performers, hence ensuring that folk culture is preserved;
- Performers rights are granted over only that part of the performance in which a performer has uniquely and distinctively contributed something, thus preventing any conflict with copyright laws.

**Conclusion**

The legal landscape in India has proven inadequate in protecting the myriad rights performers have in their performances. Today, rapid technological change, interconnected entertainment markets, and the quantum of unprotected folklore in India have made the need for this protection more imminent. This article has argued, through a detailed analysis of four existing performer right regimes, that providing *sui generis* protection is preferable to the alternatives of protecting performers’ rights through copyright and tort laws. While the modalities and details in this scheme warrant deliberation, accepting both need for reform and policy of *sui generis* protection, is the first step forward towards giving performers in India their due. A stronger and more all-encompassing performer protection regime.

**References**

2. One of the seminal cases dealing with performers rights in America - *Zacchini v. Scripps-Howard Broadcasting Co* 433 US 562 (1977) – had a fact situation of this nature. Here, the plaintiff was the performer of a human cannon ball act at a fair - unscripted and unfixed. This was recorded and broadcasted by a TV station, and the performer went to court for infringement of his rights. The Court stated that while dissemination of information was allowed by the First Amendment, it did not warrant a reproduction of the entire act. Zacchini clearly had publicity rights in the act, which could not be appropriated.
3. Section 13(1)a of the Indian Copyright Act states that copyright protection will be extended to dramatic works. But this does not cover any of the performances that flow out of the work.
4. The cases that have come before courts in this category usually involve sports persons and notable sporting performances – like *Ettore v Philco Television Broadcasting Corp* 229 F.2d 481 and *Baltimore Orioles Inc v Major League Baseball Players Association* 805 F.2d 663. In the former case, a previously televised boxing match was replayed on television, after some editing. The editing omitted some of the best fighting scenes of Ettore. He argued that this was defamatory, and it was unauthorised reproduction. While the Court recognized his property right in his performance, it said that he had given this right away when he agreed to the first television. In the *Baltimore Orioles* case, players were agitating for their rights in their sporting performance. It was held that these rights were held by the broadcasting companies and that the publicity rights claim was pre-empted by copyright law.
5. Examples of cases where rights have been sought in scripted fixed works include *Booth v Palmolive* 362 F.Supp. 343,
where a singer sought rights in a previously televised song separately from the person who owned the copyright in the song; Davis v Transworld Airlines 297 F.Supp. 1145, where the defendants imitated the plaintiff’s recorded performance in a song in a commercial; Presley v Russen 513 F.Supp. 1339, where action was based on the defendant’s using the image and likeness of the deceased singer and names associated with him while rendering his own musical services.

Performers are defined in the following ways –Article 2(a), WPPT – ‘performers’ are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore. Article 3(a) of the Rome Convention, 1961 – ‘performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works; Section 2(qq) of the Indian Copyright Act – A performer includes an actors, singers, musicians, dance, acrobat juggler, consumer, snake charmer, a person delivering a lecture or anyone else making a performance.


The economic rights mentioned here may be found in the Indian Copyright Act, as well as the WPPT and TRIPS. For a broader discussion on the economic rights that performers want to enjoy, Hays T, Intellectual Property Law in Practice (W Green Publishers, United Kingdom), 2004, p. 204.


Onassis v Christian Dior, 122 Misc.2d 603. Here, the case was based on the defendant employing a ‘look alike’ of the plaintiff who encapsculated the persona of the plaintiff.

Presley v Russen 513 F.Supp. 1339, where action was based on the defendant’s using the image and likeness of the deceased singer and names associated with him while rendering his own musical services. The court here decided in favour of the estate of Presley, who had brought the suit about.

Booth v Palmolive 362 F.Supp. 343, and Sinatra v Goodyear Tires, 435 F.2d 711. In the latter case, the defendant’s commercial contained a singer who sang the same song as the one the plaintiff was famous for – ‘These Boots Are Made For Walkin’. She also imitated the unique voice and style of the plaintiff while singing. Similarly, in Waits v Frito Lay 978 F.2d 1093, action lay for appropriation of unique style. The Court defined style to be - Style is how a song is sung, how the music is delivered, how the words of a song are expressed. Style includes mood, phrasing, and timing, whether a selection is performed loudly or quietly, whether the song is expressed in singing, talking, or a combination of the two. And then stated that the same could not be protected.

Section 38(3), Indian Copyright Act, 1957.

This means if another performer sings in the distinctive style of an existing singer, or imitates an actor’s distinctive mannerisms; the original performers have no recourse in law to protect their rights even though all these styles, persona, mannerisms and acting techniques are their creative product and labour.

For an example of the former, if a theatre performs a scripted play in a specific way, he is not protected against people imitating his style in other stage performances. If a musician plays an instrument in a unique way that produces a unique sound, the style is not protected, only the musical tune and recording.


Section 2(y), Indian Copyright Act – “work” means any of the following works, namely – (i) a literary, dramatic, musical or artistic work; (ii) a cinematograph film; (iii) a sound recording. Section 13 of the act states that copyright subsists in these works.

Arnold R, Performers’ Rights (Sweet and Maxwell, London), 2004, p. 7. There is a debate surrounding whether sports performances and other impromptu performances deserve any protection at all. Everyone agrees that such performances cannot be copyrighted – there is no authorship in the same. With respect to whether these should be protected at all, one school of thought states that ‘Recognizing an athlete’s right of publicity in his or her actual performance provides an incentive for the investment of the time, effort, and energy that is required to become highly skilled and successful in a particular sport. This right also provides a foundation for the development and protection of the other valuable aspects of an athlete’s persona-recognition values.’ A second point of view believes that they shouldn’t be protected at all, and a third view believes that certain sports – like ice skating - have enough aesthetic value to warrant protection.


Motschenbacher v R J Reynolds Tobacco, 498 F.2d 821 – here advertisers tried to evoke the persona of the plaintiff by the car he usually drove. The courts held this was enough to identify him, and decided that his publicity rights had been infringed; Hirsch v S C Johnson & Son 90 Wis. 2d 379 – here, the plaintiff was a sportsman who had a nickname, Crazylegs, which was later used without his permission to endorse pantyhose. Given that the ad campaign was set in a sports context, the court held that his publicity right was violated even though his name and likeness was not shown; Carson v Here’s Johnny Portable Toilets, 698 F.2d 831–here, the phrase ‘Here’s Johnny’ was held to be sufficient identification of the plaintiff.

849 F.2d 460. The defendant here asked actress and singer Bette Midler to re-record her song ‘Do You Wanna Dance’ for musical accompaniment to its commercial. When she refused, the defendant instructed a Midler sound-alike to
mimic her performance of the song. The court here agreed that this compromised Midler’s publicity right and awarded her compensation.

29 300 F.2d 256. In a commercial, a cartoon duck was alleged to have spoken with the same voice as that of Lahr who was a famous professional entertainer. Here, the court pointed out that the plaintiff had achieved stardom, ‘in substantial measure because his style of vocal comic delivery which, by reason of its distinctive and original combination of pitch, inflection, accent and comic sounds, has caused him to become ‘widely known and readily recognized as a unique and extraordinary comic character’ and that by copying the same, the defendant was stealing his thunder. Lombardo v Doyle, Dane and Bernbach, 396 N.Y.S.2d 661, where the plaintiff won a lawsuit simply because another band sang ‘Auld Lang Syne’ on New Year’s Eve. The commercial contained the same musical beat and choice of music with which Lombardo was associated in the public’s mind. The court found that there was a cause of action for appropriation of ‘personality’ under the common law.

30 In the case of Reeves v United Artists, 572 F.Supp. 1231, the widow of a famous professional boxer brought an action against a motion picture corporation, alleging that it misappropriated the name, identity, character, ability and performance of the boxer, thereby depriving the boxer’s estate of a property right and violating boxer’s right of publicity. The Court acknowledged that the publicity rights encompassed all these claims, but decided against the widow on the grounds that the right was not descendible, which is a different issue.

31 USA’s failure to provide complete and seamless protection to performers is not merely due to an ineffective legal system. Extraneous non legal and policy factors that have led to status quo today include lobbying power of the broadcasting industry and writers’ groups who fear loss of revenue if performers’ rights are recognized, the ‘free air time argument’ in the recording industry which claims that public performance of sound recordings is good publicity and thus free advertising for record sales (it may be applied to other industries as well), the belief that performers are already well paid, and the fear that performers’ rights would be difficult to administer, police and enforce if granted, as the lines between copyright protection and performers rights are slim. Teller B, Towards a Better Protection of Performers’ Rights in the USA, Columbia Journal of Transnational Law, 28 (1990) 775.


33 Rothman J, Copyright publicity and the right to pre-emption, U.C. Davis Law Review, 36 (2002) 199. This article argues that the system of performer protection in America does more harm than good. It harms the copyright holders and their licensees because they can be prohibited from exercising their legitimate right as per copyright laws. This includes the right to commission derivative works, prequels, sequels, spin-offs, use of fictional characters in different stories, the re-recording of musical compositions, and production of merchandise related to the original work. For example, in the case of Wendi v Host International, the plaintiffs wanted to prevent the defendants from developing robots based on the characters of Norm and Cliff from the show ‘Cheers’ even though they had a license for the same. It will also harm the rights of public because they will have access to less songs and creativity, as more expressions and ideas will be protected by the law.


36 Articles 8 and 9 of the Convention also protect performers’ rights. Article 8 states that any Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connection with the exercise of their rights if several of them participate in the same performance. Similarly, article 9 states that Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works.


39 The writings of Dworkin state that consistency in a legal system is an absolute good in itself, and this forms a basis for a lot of his legal writing. Law and the legal system must help guide human behaviour, and this can only be successfully done if the law is certain. The principle of consistency makes the legal system more certain, allows people to mould their behaviour to the law because it can be predicted, etc. Hence, Dworkin’s analysis of adjudication mandates a judge to pass decisions that are in consonance with the prior existing law in that system. Dworkin R, Law’s Empire (Oxford University Press, London), 1986.


41 In the words on a commentator on the issue – ‘the protection of artistic expression, if not a part of copyright law, could be seen as being an interest of society in general as it protects the finer cultural basis of a society from derogatory exploitation that could undermine that basis.’ D Baird, Human Cannonballs and the First Amendment, Stanford Law Review, 30 (6) (1978) 1185-1209.