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# **POSITION OF MORAL RIGHTS OF PERFORMERS IN INDIA: ARE THEY PROTECTED ENOUGH?**

SUBMITTED BY: ANSHUMAN BISARYA

## **ABSTRACT**

It is etched in the pages of history that India has a rich culture and heritage. India's culture and heritage has been subject of admiration of many nations and civilizations. One of the contributors to this rich heritage and culture has been the literary works and the film/entertainment industry. India is among the highest producers of literary works around the globe and has a long-standing reputation of fine-quality and rich literary works. Indian authors and poets have captured the imaginations of countless people not just in India but around the globe.

Since, both the literary works and film/entertainment industry has such a wide footprint, the question of Intellectual Property Rights and its protection for the creators/professionals inevitably arises.

This paper would be examining one such aspect of Intellectual Property Rights called 'the moral rights' of performers as categorised and encapsulated in the Indian Copyright Act, 1957.

## **INTRODUCTION**

The origination of moral rights flows from French Jurisprudence (whereunder moral rights are referred to as *droit moral*). It stems from the belief that great artists can become prey to the copyright industry and hence protection for their creative work and expression should be afforded some protection so that authors do not get dissuaded from engaging in literary and creative works. Later, Kant put forth his idea on moral rights on the aspect of printing of an author's work without their consent as unauthorized and thus unlawful. This laid the seed of idea of author's right as personality right<sup>1</sup> which is on some notes similar to today's moral rights understanding and protection in relation with right of association of an author/performer with their work.

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<sup>1</sup>J.A.L Sterling, *The World Copyright Law* (3<sup>rd</sup> edn. Sweet and Maxwell, 2004) 1594.

As per World Intellectual Property Rights, another important authority, it defines moral rights of authors as those rights that can only authors have and can solely exercise in respect of any artistic work of the said author which includes right to prevent distorted reproductions of the work.<sup>2</sup> Moral rights enable authors and performers to take the respective legal steps to protect and preserve their 'association' with their respective work.

Furthermore, moral rights are further compartmentalized into Right of paternity, Right to Integrity of Work, Right to Create work, Right of Divulcation, Right to Withdraw work, Right to prevent excessive criticism, Right against destruction, Right to waive the moral rights, Right to transmit Moral Right.

In Indian context, performer's rights got very late recognition in 1994 and afforded very basic protection. It is only after 2012 amendment that performer got their moral rights' recognition via the introduction of Section 38B into the Act.

As discussed above, in context of recognition of moral rights in India for both authors and performers, there are 2 moral rights that have been given legal recognition under the Act, namely Right of paternity and Right of Integrity and paper shall discuss the 2 rights in performer's context.

## RESEARCH QUESTIONS

1. Is there enough impetus for Indian Judiciary and Legislature to follow US's identity test and publicity doctrine?
2. Has Indian Intellectual Property Rights regime struck a fine balance between commercial and moral rights of performers?

## PERFORMER'S MORAL RIGHTS IN INDIA

Performer's rights are a new iteration of moral rights. As per WIPO, they are also referred to as related rights or neighbouring rights. These rights emanate to protect the legal interests of particular people and entities whose work are in the public domain but necessarily do not qualify as copyrightable works under some copyright regimes but contain a certain degree of creativity or

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<sup>2</sup> World Intellectual Property Organisation, *Understanding Copyright and Related Rights*, WIPO [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_909\\_2016.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_909_2016.pdf) (last visited on 5th February).

technical and organisation skill for it to be able to justify a claim of copyright-like property right.<sup>3</sup>

India was not the quickest to adopt performer's rights, in fact, in *Fortune Films International v Dev Anand*<sup>4</sup>, performer's rights were brought in front of the Indian Judiciary, much to the dismay, the Supreme Court categorically refused to decide whether in a cinematographic film, whether there could be different owners of a film because there are different performers who have played roles in the said motion picture. More crucially, the Supreme Court answered in the negative to the contention raised that whether performance of an artist would come under the ambit of work under the Copyright Act or not. This judgement amply shows the next to nothing recognition of performer's rights in Indian context till the 1980s.

Then came the 1994 amendment which gave recognition to performer's rights but the protection offered was very sparse. The amendment brought in sections 2(q) and (qq), section 38 for the protection of performer's right. It is important to note that the said protection was for performer's rights, moral rights of performers did not come under the ambit of this protection yet. Performers are defined in section 2(qq) under the Act included actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture and a person who makes a performance.<sup>5</sup> Performance is defined in section 2(q) in relation to a performer's right as any presentation made live by 1 or more performers in any visual or acoustic medium.<sup>6</sup>

Internationally, moral rights of performers were recognised in WIPO Performances and Phonograms Treaty (WPPT) and WCT (often collectively called as Internet Treaties) adopted in 1996. Then by the 2012 amendment which was somewhere in tune with WPPT<sup>7</sup>, moral rights of performer's were finally given their due recognition in form of right of paternity and right of integrity. Section 38B was introduced titled moral rights of the performers. India became part of the Internet Treaties in 2018.<sup>8</sup>

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<sup>3</sup> Supra Note 5.

<sup>4</sup> *Fortune Films International v Dev Anand* AIR 1979 Bom 17.

<sup>5</sup> The Indian Copyright Act, 1957 § 2 cl.(qq), No. 14, Acts of Parliament, 1957 (India).

<sup>6</sup> The Indian Copyright Act, 1957 § 2 cl.(q), No. 14, Acts of Parliament, 1957 (India).

<sup>7</sup> Juhi Senguttuvan & Saushriya Havelia, *Performers Rights in India: A critical analysis of performers and performance under the Indian Copyright Act 1957* Indian Journal of Law, Polity and Administration (2019).

<sup>8</sup> Motion Picture Association, *India Joins WIPO Internet Treaties: A Major step forward*, Motion Picture Association, [https://www.mpa-apac.org/2018/07/india-joins-wipo-internet-treaties-a-major-step-forward/#:~:text=On%20July%204%2C%20the%20Indian,Treaty%20\(WPPT\)%2C%201996.](https://www.mpa-apac.org/2018/07/india-joins-wipo-internet-treaties-a-major-step-forward/#:~:text=On%20July%204%2C%20the%20Indian,Treaty%20(WPPT)%2C%201996.) (last visited on 5<sup>th</sup> February).

The 2012 Amendment added a proviso which stated that any person whose performance is 'incidental' in the film and in ordinary course of practise of film industry, such performance is not given any credit shall not be regarded as performer under section 38(b) of the Act.

Before the advent of 2012 Amendment, performer's rights had right to prevent unauthorized non-consented use of their work but after 2012 amendment, performers were conferred 'exclusive' positive rights.<sup>9</sup>

It is pertinent to note that like section 57 Amendment post *Amar Nath Sehgal* which excluded author's dissatisfaction in respect of exhibition of their as non-injurious to their moral rights, section 38B also categorically excludes such dissatisfaction component on part of performers by way of adding that if any performance for purposes of editing, for fitting a recording in a stipulated duration or for purely technical reasons would not be considered as violation of performer's moral rights.

One of the leading authorities in protection of right of paternity in context of performer's is *Neha Bhasin v Raj Anand*<sup>10</sup> case

The Court observed that the singer's voice if being commercially exploited has the right to associate herself and prevent others from establishing an association and link with her voice. In this case, the plaintiff, Neha Bhasin, was stated as the backup vocalist rather than the lead singer, the Court in this case recognised the right of integrity and association of the singer and stated that such an act is seriously detrimental to her aspirations as she would be perceived as a backup vocalist and this inevitably would harm her reputation.

In the Indian context, moral rights protection was offered very late to performers and more so, very sparse protection has been offered to them. In US, for instance, the main proponent of protection of rights of performers is the doctrine/right of publicity which has deeply embedded itself in the US Jurisprudence. Although, it is crucial to note that this doctrine protects rights from an economic perspective meaning to protect the economic rights and prevent economic harm to the performers.<sup>11</sup>

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<sup>9</sup> Supra Note 30 at pg. 166.

<sup>10</sup> *Neha Bhasin v Raj Anand* MANU/DE/1729/2006.

<sup>11</sup> Supra Note 37 at pg. 6.

The Doctrine of Publicity talks about a performer's rights in relation to their image, identity, likeliness etc and to prevent economic harm to the said performer by way of an injurious act. Later, this doctrine got evolved into the identity test. Through this test, a performer is identified by a trait, routine or style that is unique to them which curates a distinct and unique identity for a said performer. In *Midler v Ford Motor Co*<sup>12</sup> the US Courts have given performer's protection in event their voices are being imitated. There is another case of *Bert Lahr v Adell Chemical Co Inc*<sup>13</sup> that is along the same lines as the *Midler* case.

In Indian context, this doctrine has gained some traction, in *Shivaji Rao Gaikwad (aka Rajnikant) v Varsha Productions*<sup>14</sup> a film by name of *Mai Hoon Rajnikant* was to be released, Rajnikant, the actor in order to prevent undue association in eyes of the public between the picture and him brought the case in front of the Court. The Madras High Court accordingly ruled that a film basing the premise on Rajnikant's image and name would result in undue association as he does not have any control over his identity, likeness or persona in the film and put a stay on the release of the said film.

In *Titan Industries Ltd. V M/S Ramkumar Jewellers*<sup>15</sup>

The Delhi High Court observed that "When the identity of a famous personality is used in advertising without their permission, the complaint is not that no one should not commercialize their identity but that the right to control when, where and how their identity is used should vest with the famous personality. The right to control commercial use of human identity is the right to publicity."

Although, there is growing evidence that Indian Judiciary has followed in the footsteps of US Jurisprudence whilst also maintaining an independent stand that there not be necessarily only economic injury that would trigger any remedial action, undue association which is prejudicial to reputation and harm which would cause undue embarrassment and association with a work that is under no control of the aggrieved amounts to violation of their rights, however, critically, it is to be noted that all this has been dealt under Constitution of India and not the Copyright Act, 1957. Also, this jurisprudence vis-à-vis protection of an image or identity is in a nascent stage and no authoritative decision has been laid down by Supreme Court nor has the legislation come up with

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<sup>12</sup> *Midler v Ford Motor Co.* 849 F.2d 460 1988.

<sup>13</sup> *Bert Lahr v Adell Chemical Co Inc.* 300 F.2d 256 (1<sup>st</sup> Cir 1962).

<sup>14</sup> *Shivaji Rao Gaikwad (aka Rajnikanth) v Varsha Productions* 2015 (62) PTC 351 (Madras).

<sup>15</sup> *Titan Industries Ltd. V M/S Ramkumar Jewellers* CS(OS) 2662/2011 (Delhi High Court).

anything to address the same.<sup>16</sup>

With the wide outreach of Indian film and music industry all around the globe, there seems to be sufficient evidence that should warrant consideration from the Legislature to plug in the gaps and provide more sufficient and adequate protection to performer's moral rights against distortion, mutilation, alteration or undue association of their persona, likeness, voice, routine, style etc that would be prejudicial to their honour and reputation.

Additionally, much is left to be desired for protection of moral rights in performer's context.

In today's digital world, it is easy to imitate a performer's persona, likeness, voice, distinct traits etc, parodies for example have come in vogue across many social media platforms and have become part of amusement of many. However, it also raises a question that needs to be answered, do parodies which show performers in poor light under the garb of joke or sarcastic banter also amount to injury of their moral rights as their distinct identity, persona, routine or style is invariably being shown in poor light for sake of few laughs and jokes, the interplay of free speech under Article 19(1) and Article 19(2) and moral rights of performers needs to be examined. As of now, nothing has emanated from the Judiciary and it leaves with an open-ended question in the paper for now.

Due to the advent and spread of social media technology, it is easy to imitate, this particularly leaves folklore that exists in India exposed and vulnerable to such imitations that can be passed off as their own creation. This would be a huge blow to India's cultural prestige and regional cultural prestige under the current IPR regime, no protection would be afforded to such important yet 'unprotected' folklore.<sup>17</sup>

## CONCLUSION AND SUGGESTIONS

While there is no doubt that Indian Copyright regime has moved with the times, the pace and the integration and recognition has been not that desirable. From a time when moral rights of authors was at par with Berne convention to it being curtailed and tapered down so as to protect

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<sup>16</sup> Prakash Sharma and Devesh Tripathi, *Celebrities' Agony: Locating the Publicity Rights in the existing IPR framework*, Indian Law Institute Law Review, 2019 41

<sup>17</sup> Sanhita Ambast, *Protecting Performer's Rights: Does India need Law Reform?* 13 Journal of Intellectual Property Rights 574 (2008)

commercial interests that may be involved. This may seem like Indian Intellectual Property Right regime in context of moral rights moving in tandem with the global stance on moral rights and recognition to be able to attract investment and new opportunities by providing a more friendly intellectual property regime that strikes a balance between keeping in mind the commercial interests and duty and liabilities of parties that maybe involved and at other hand protecting author's and performers' moral rights such as right of paternity and integrity. Much credit to growth and development of moral rights' should be accredited to Indian Judiciary who with their judicial invention sought out to carve out a distinct jurisprudence and regime which gave importance to protection of author's and performers' creative interests, reputation and expression and afforded them protection whenever such reputation or honour was in jeopardy. What could have been a distinct and unique jurisprudence was curtailed by way of amendments to comply and fall in line with global stance on moral rights however this does not mean that the scales should tip in favour of commercial interests as has been the case by way of amendments and sparse protection being offered to authors' and performers' alike. Lack of litigation thereby leading to lack of jurisprudence has acted as a handicap but the Indian judiciary nonetheless took the challenge well and came up with global first interpretations on moral rights of author's and quickly caught on with performer's moral rights protection as well. Despite moral rights of author's being tapered down, the position seems to be stabilised and with not many calls from the industry to come up with something that affords more protection. However, in the context of performer's moral rights protection, much is left to be desired. The folklore that is important part of culture and prestige remains unprotected and vulnerable, rights in relation with persona, likeness, identity, specific routine etc of performers needs to be incorporated into the protection ambit.

It is the author's suggestion that Indian legislature should consider a fresh and renewed focus on protection of performer's right as the Indian film industry in particular has a wide outreach both nationally and internationally and the current IPR regime does not offer any authoritative or substantive protection to them. Their primary resort is Constitution of India under Article 19 and 21 which raises a question as to why should that be the primary resort to remedy when there already exists a statute for the same who has afforded protection to some degree in case of undue association of performer who has no control over the source of undue association which can cause serious detriment to their honour and reputation in the public domain. It is the author's suggestion that protection envisaged under the current scheme either should be broadened or the Indian legislature should pave way for *sui generis* protection net for performer's moral rights and protection.

This also presents the Indian Judiciary or legislation with a unique opportunity, while US doctrine is triggered only in event of an economic harm, there is already substantial evidence that in Indian context, reputation and honour also holds a significant footing that runs parallel and not completely dependent on economic injury being accrued. This presents Indian legislation and Judiciary with an opportunity to incorporate the identity test which would afford protection to author's right of paternity and integrity which would not be necessarily triggered in event of economic harm but when there is undue association or distortion or mutilation of said work or persona that is prejudicial to their honour and reputation in the public domain.

While there have been hits from Indian Judiciary, there have been misses from the Indian legislature, partially, under pressure to fall in line with global position but that should not leave performers' rights under protected as that has its own challenges and risk such as creating a non-lucrative non-incentivised environment. This would inevitably lead to under creativity which would frustrate the tenets of Intellectual Property Law. It is the author's suggestion that Indian Legislation picks up the baton and comes up with adequate and sufficient protection to all the players involved.

