PERFORMER'S RIGHTS IN INDIA – A STUDY WITH SPECIAL REFERENCE TO THE AUDIOVISUAL INDUSTRY

THESIS SUBMITTED TO THE
COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY FOR
THE AWARD OF DOCTOR OF PHILOSOPHY BY

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UNDER THE SUPERVISION OF

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SCHOOL OF LEGAL STUDIES
CUSAT
KOCHI
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CERTIFICATE

This is to certify that this thesis entitled "Performer's Rights in India – A Study with Special Reference to the Audiovisual Industry" submitted by Jayadevan.S.Nair for the Degree of Doctor of Philosophy is the record of bona fide research carried out under my guidance and supervision in the School of Legal Studies, Cochin University of Science and Technology. This thesis or any part thereof has not been submitted elsewhere for any degree.

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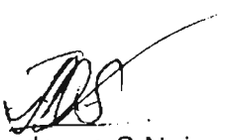
DECLARATION

I do hereby declare that the thesis "Performer's Rights in India - A Study with Special Reference to the Audiovisual Industry" is the record of original research work carried out by me under the guidance and supervision of Dr .G. Sadasivan Nair, Professor, School of Legal Studies, Cochin University of Science and Technology and it has not previously formed the basis for the award of any degree, diploma, associateship, fellowship or other similar title or recognition.



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Certified that the important research findings included in the thesis have been presented in a research seminar at the School of Legal studies, Cochin University of Science and Technology on 7th December 2005.

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PREFACE

I am thankful to the Ministry of Human Resource Development (MHRD), Government of India, for providing a scholarship for pursuing a PhD course of study on any topic of Intellectual Property Rights (IPR) at the School of Legal Studies, Cochin University of Science and Technology (CUSAT). I became eligible for the PhD course of research study in IPR after fulfilling the eligibility criteria as I had accomplished my LL.M Degree from the CUSAT with a first class with specialization in Constitutional Law and Commercial Law which included Intellectual Property Rights and I had also qualified for the UGC –NET in the year 2000. I passed the entrance and the subsequent interview for the PhD research in 2001. I chose the topic of 'Performer's Rights in India - A Study with Special Reference to the Audiovisual Industry' after giving much thought to several topics in the realm of Intellectual Property Law that I considered. Finally after much study, thought and deliberation about the pros and cons of endeavoring on this area of research, I submitted a synopsis for submission and registration to the CUSAT. This was despite forewarnings about the perils of indulging on an unexplored area of study particularly related to Intellectual Property Rights where angels feared to tread. But as destiny and my acumen beckoned, no mortal can deny its will and I decided to do as it bid me to.

However, the perils of the subject matter were lighter in the face of the perils of life as during the course of the PhD study I had to overcome vicissitudes on the personal front - a near debilitating accident left me completely immobile and confined to the bed for nearly five months. With recuperation being a painful transition, being on two feet did not mean being comfortably mobile but despite this I focused and renewed my research and began to execute all my travel schedules. The major segment of the Indian audio-visual industry lay strewn between three states – Kerala, Tamilnadu and the Maharashtra (the Western sphere) Bollywood and therefore inevitably travel to these centers became unavoidable. I must express my gratitude to the several personalities whom I met for the purpose of research and who reciprocated with utmost warmth, humane compassion and enthusiasm to answer my queries particularly on an area they had infrequently thrown their thoughts on.

During the course of my research I have had the occasion to visit around thirty-six (36) institutions in order to collect information and refer material relevant to the topic of my research. The institutions that I visited included Kerala State Chalachitra Academy, Trivandrum, Center for Development Studies, Trivandrum, C-DIT, Trivandrum, Indira Gandhi Center for Performing Arts, Bombay, University of Bombay, Library, National Film Archive of India, Ministry of Information & Broadcasting, Pune, Film and Television Institute, Chennai, Roja Muthiah Memorial Library, Chennai, Malayalam Chalachitra Parishad, Chennai, American Center Library, Chennai, Federation of Indian Chamber of Commerce &Industry (FICCI), N. Delhi, Indian Law Institute, N. Delhi, National School of Drama, Delhi, British Council Library, Delhi, Indian Council of Research in International Economic Relations (ICRIER), New Delhi, South Indian Film Chamber of Commerce, Chennai, South Indian Film Artistes Association, Chennai, Film Employees Federation of South India(FEFSI), Chennai, Cine Musicians Union, Chennai, Kerala Film Chamber of Commerce, Ernakulam, Association of Malayalam Movie Artists (AMMA), Trivandrum, Malayalam Cine Technicians Association(MACTA), Ernakulam, Association of Voice Artists (AVA), Murnbai, All India Film Employees Confederation(AIFEC), Mumbai, Cine Dancers Association, Mumbai, Cine Singers Association, Mumbai., Cine Musicians Association, Mumbai, Junior Artists Association, Mumbai., Movie Stunt Artistes Association, Mumbai, Indian Film Directors Association, Mumbai, Cine and Television Artists Association, Mumbai, Sangeeth Natak Academy, N. Delhi, Indian Performing Rights Society (IPRS), Mumbai, Indira Gandhi National Center for Arts, New Delhi, American Institute of Indian Studies, Archives Research Center for Ethnomusicology, Gurgaon, Haryana.

I am immensely grateful to several personalities who gave me their time and information that was from a reservoir of experience over several decades in the audiovisual industry. The respected names (for the whole list of personalities interviewed and contacted, see List of Personalities and Institutions Visited, p. XXXVI) include Sri T.E.Vasudevan, Veteran Film maker – Producer, who headed several organizations and welfare activities in the film industry, who coincidentally was the first to be interviewed by me. I am grateful to him for the useful discussions with him, which gave me a comprehensive understanding of the film industry – a holistic perspective. I should mention the initial encouragement from

Srimathi Dr. Uma J. Nair, a senior academic in Economics who as a fine gesture sent me her published work on *Economic Aspects of Film Industry in Kerala*. She also happens to be the daughter of yester year superstar, director, producer and actor Sri Madhu. Sri Madhu himself gave me three hours of his time for answering all the questions during the interview. Sri Devananad, whose name still is synonymous with the flavor of Indian cinema, was generous with his time in the midst of the work on his forthcoming film. I perhaps could have the distinction of informing him that a case law in his name occupies much of the attention in Intellectual Property Law (he was oblivious of something reported called *Fortune Films* v. *Devanand,* A.I.R. 1978 Bom. 17 though he remembered the litigation). My respects to the soul of Late Srimathi P.Leela whom I interviewed in Chennai and whose life is the very example of the sacrifices that an artist has to overcome in professional and personal life. Sri Jos Prakash, Sri Selvaraj, Sri Himanshu Bhatt, Rajeev Menon (CINTAA), Shivlal Suvarna, Jaisheel Suvarna, Vishnu Sharma and others at AVA (Association of Voice Artists), Rashid Mehtha, Sri Sambathan and other officials at the various unions and other offices. I must specially mention Sri Haripad Soman, Sri Viswas Nkjarackal, Sri Shibu S. Kottaram & Sri Louis Mathew (Kerala State Chalachithra Academy). I must thank all the staff at all the offices who were gracious with their hospitality. I must particularly mention Sri V.K. Ravikumar (CEO Cera Chem Pvt Limited, Chennai), Sri C.P. Surendran (Resident Editor, Times of India, Pune), Smt. Prabha Narayana Pillai (W/O late M.P. Narayana Pillai, author & columnist, Mumbai) who provided me accommodation at these places respectively during the course of my research.

I am thankful to Dr. N.S. Gopalakrishnan for having been my guide for a considerable period. The depositary of Intellectual Property Rights materials set up by the MHRD at the School of Legal Studies was of immense help as it exposed me to the finest commentaries in the realm of Intellectual Property Law. I am extremely grateful to Dr. G. Sadasivan Nair for taking over as my research guide and encouraging me with persistence and patience. I should in particular mention Dr.A.M. Varkey, Dr.V.S.Sebastian, Dr.Valsamma Paul, Dr. P..LeelaKrishnan and Dr. D. Rajeev who with their enquiries about the state of my work and well-being, always kept up my spirit. I am thankful to Dr. K. N.

Chandrasekharan Pillai who always wanted me to focus on the research and complete my work at the earliest.

I am indeed grateful to my mother, my sister and near relatives for having been beside me and nursed me during a time when I was unable to budge from my bed to attend to anything to keep me going. Finally despite adversities on several fronts if I have finished this work, it is solely because of the spirit of rational enquiry, fortitude, integrity and a sense of aesthetics sown in me by my uncle late Sri C.P. Ramachandran and my father late Sri C.P. Sreedharan as I grew up. This thesis is a step towards what they always used to remind me about what the purpose of life should be - to make the world a better place for future generations.

I have devotedly researched and authored this thesis and I have also rendered the entire task of typesetting my manuscript into the computer. I hope that this thesis will make a difference to the life of the performer in the future.

Jayadevan.S.Nair

CONTENTS

School of Legal Studies

LIST OF ABBREVIATIONS

1. A.I.R: All India Reporter.
2. A.C.: Appeal Cases (L.R).
3. ADAMI: *Société civile pour l'administration des droits des artistes et musiciens interprètes.*
4. AFTRA: The American Federation of Television and Radio Artists.
5. AIFEC: All India Film Employees Confederation.
6. AIR: All India Radio.
7. ALL ER: All England Reporter
8. AVA: Association of Voice Artists.
9. ALAI: International literary and Artistic Association
10. AMMA: Association of Malayalam Movie Artists.
11. AMPTP: Association of Motion Pictures and Television Program Producers.
12. ASCAP: American Society of Composers, Authors and Publishers.
13. BECS: British Equity Collecting Society.
14. Bull. Copr. Soc'y U.S.A: Bulletin of Copyright Society U.S.A.
15. Ch.: Chancery (L.R.)
16. Ch.D: Chancery Division (L.R.).
17. CINTAA: Cinema and Television Artists Association.
18. Circ.: Circuits.
19. CISAC: *Confederation Internationale des Societes Auteurs & Compositeurs.*
20. Comm.& L: Communications and the Law.
21. CONTACT: Confederation of Television Artists Commercial Operators and Technicians.
22. D.: *Recueil- Dalloz.*
23. DMCA: Digital Millennium Copyright Act, 1998.
24. DPRA: Digital Performance Rights in Sound Recordings Act, 1995.
25. DTH: Direct to Home.
26. E.C.: European Community.
27. E.I.P.R.: European Intellectual Property Review.
28. E.R.: English Reports.
29. EMLR: Entertainment and Media Law Reports.
30. FEFSI: Film Employees Federation of South India
31. FWICE: Federation of Western Indian Cine Employees.
32. F.S.R.: Fleet Street Reports.
33. F.: Federal courts.
34. G.P.: *Gazette du Palais.*

35. IDBI: Industrial Development Bank of India.
36. ILO: International Labor Organization.
37. IMI: Indian Music Industries.
38. IMPPA: Indian Motion Picture Producers Association.
39. IPLR: Intellectual Property Law Review.
40. IPRS: Indian Performing Rights Society.
41. ITV: Independent Television
42. J.C.P.: *Semaine Juridique*
43. JOUR. COPR. SOC'Y U.S.A.: Journal Copyright Society of the U.S.A.
44. K.B.: Kings Bench.
45. Law & Contemp. Probs. : Law and Contemporary Problems.
46. MACTA: Malayalam Cine Technicians Association.
47. NFDC: National Film Development Corporation.
48. P.R.S: Performing Rights Society.
49. PACT: Producers Alliance for Cinema & Television.
50. PAMRA: Performing Artists' Media Rights Association.
51. PPL: Phonograms Performances Limited.
52. PTC: Patent & Trademark Cases.
53. RIDA: *Revue Internationale du Droit d' Auteur.*
54. SAG: Screen Actors Guild.
55. SC: Supreme Court.
56. S.ct: Supreme Court.
57. SCC: Supreme Court Cases.
58. SIFCC: South Indian Film Chamber of Commerce.
59. SPEDIDAM: *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse.*
60. TRIPS: Agreement on Trade Related Aspects Intellectual Property Rights, Marrakesh, 1994.
61. UCC: Universal Copyright Convention
62. US: United States Reporter.
63. UNESCO: United Nations Educational and Cultural Organization.
64. USPQ: United States Patents Quarterly.
65. WCT: WIPO Copyright Treaty, 1996.
66. WIPO: World Intellectual Property Organization.
67. WPPT: WIPO Performances and Phonograms Treaty, 1996.
68. WTO: World Trade Organization.

INTRODUCTION

There are few occasions when the topic of a racy review, a popular chat show or documentation is about the life of a performing artist rather than his artistry, his indulgences and an account of the swagger of his heady success. The story of a performing artists' life is not in the cushioned success of star kids or the lucky ones who made it on top of the charts but of those who need a call sheet the next day to keep them living the day after. A casual scan of the entertainment industry would reveal the least entertaining truth about the life of an artist - the uncertainties and insecurity in the life of the artist is as unenviable as it is enviable when the world reaches out to them. While the performers' face-off with adversities have been the same all over the world there is a merciless equity in failures and bad tidings for the artists – for did we not hear an artist speak about dropping culture and switching to agriculture or a sitar maestro who later converted dope addicts with his sitar strings contemplate suicide due to starvation or dancers dying in destitute old age homes penniless. All the while when the radio next door is blaring their melodies, the television is popping their hits and internet sites are streaming their music for the on demand clientele with their pictures free for screen savers. The onslaught of technology, the fickle tastes of the market and the rigors of time and age have dented the secure environment of the artist. This travesty of life is glaring in India while the world around has begun to take stock by making amends and making life better for the creative performing artist.

The performer is the disseminator of works of literary, dramatic artistic and musical authorship. The performer has also distinguished his art form as a separate creative discipline. Despite the painstaking demands of the performing art form, the performer has not been treated down the ages with the same respect as literary authors. They inhabited the fringes of the society that was considered disrespectful. Even when playwrights such as William Shakespeare gave the world the best of their muses, the performers of their plays were treated as rogues and vagabonds. There is a surprising similarity in these perspectives towards the performer in different civilizations across the world. This trend can be

discerned both in times when art was fused with religion as also when professional theater began to take roots.

The onset of affixation brought forth both a change over from the patronage dependent artist to a market savvy artist but at the same time it ushered in problems of a different kind. The avenue of live performance as a means of livelihood was threatened by recorded performances and this ate away into his employment and consequently his survival. The recorded performances and the possibility opened up by its mechanical reproduction and broadcasting further made the hapless artist enter into unfair bargains without a thought about future profits. While this was sought to be addressed by resort to mutual and collective bargaining contracts, there was little he could do against the piracy and bootlegging engaged in by third parties. Further cross border activity made it difficult even for producers to keep track of the pilferage of music and additional profits.

The term "Performers' rights" is used to mean the rights of the performer in his performance as an intellectual creator in the same manner as copyright protection is granted as recognition of the intellectual property in the efforts of the literary, artistic and other copyright recognized entities. The grant of these rights will cushion the performer against unauthorized and unlimited exploitation similar to the secure environment that entities like literary and artistic authors protected by copyright enjoy. The performers' desire for rights arose in the face of unemployment following the advent of affixation, reproduction and dissemination through new technological breakthroughs and unfair bargains disproportionate to the multifarious avenues of commercial exploitation. However it has been witnessed that performers' quest for such recognition has invited severe opposition from both authorial as well as the investing interests in the industry. This has impelled countries to be cautious in the grant of rights and the performers' have been granted secondary protection referred in the Intellectual Property legal terminology as " Neighboring" or "Related Rights"- a secondary status in relation to the copyright recognized entities.

The quest of the performer has been two fold – one, to beget protection and two, to enjoy it at par with those of the authors. On this road the performer has had to

run into opposition that questioned their authorial value as well as the crucial issue of practical implementation and administration of their rights without jeopardizing the rights of the existing rights holders. Using persuasive logic, innovative concepts and administering mechanisms in the statutory framework, many of the fears have been laid to rest or endeavored to be tackled. Despite the progress, reservations exist and cautious discriminations prevail in the treatment of the performers'– distinctive treatment between the audio and the audiovisual performer. The challenge is a continuing one in the context of the technological flux in the realm of communications and the daunting task of smooth commercial exploitation in a risk borne industry.

The objective of this research thesis is to ascertain the state of performers' rights in India with particular reference to the audio visual industry and to ascertain the viability and options for sowing the statutory frame for performers' rights as adopted by international instruments and other legal systems of the world. Such an exercise was felt to be useful considering the fact that though India can take pride in the fact that it has the most prolific entertainment producing industry in the world, a scan of the production environment from the commercial and legal perspective is least confidence inspiring. Further the low awareness of the value of intellectual property makes it even more vulnerable to exploitative practices both within the country as well as outside. However the need for implanting provisions and structures are inevitable considering the post TRIPS environment and World Trade Organization (WTO) barrier less trade flows in almost all conceivable sectors including entertainment and particularly the audiovisual sector. The adaptation to digital reality has been further hastened by the alacrity with which countries responded through WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). But a blind endorsement of these provisions would not be substantially meaningful considering the fact that they must be adapted to the reality at the grass roots level in India. Therefore the study and the thesis herein presented seeks to unravel the legal status of the performing artist in India in order to grant him protection or any envisaged protection in the future under the canopy of intellectual property framework. The attempt has been to assess the status of the performing artist in the audiovisual sector taking into account the prevailing protection under labor, welfare

legislations and contractual practices before arriving upon the proposition whether an alternative paradigm is required and if it is required whether conditions are appropriate to seed the same.

The challenge of studying the audiovisual industry is the low level of data documentation and transparency in transactions compounded by the low awareness of legal issues. It is all the more challenging to venture forth on a topic mainly on contractual and labor security, law and intellectual property rights that have not even remotely entered the contemplation of those in the audiovisual industry. In fact if there is a place where formal legal mechanisms are looked upon with immense suspicion then the audiovisual industry would be a prime example. The endeavor therefore was to unravel the state of the industry through the means of primary and secondary doctrinal materials and through a structured questionnaire to an assorted target (who by the strength of experience or official position can be considered to have authority of information and opinion) in order to etch the ground reality, hopes and desires of those dependent on the film industry to make a living, before making propositions for the adoption of concepts and statutes.

The first five chapters of the study trace the evolution of performers' rights with particular impetus on three diverse jurisdictions both at the judicial and statutory levels as well as from the collective bargaining platform. Chapter one is an assessment of performers' rights philosophy and its affinity with the theories that commonly substantiate copyright and generally intellectual property. It also delves into an enquiry about possibilities of common law protection available to the performers intellectual property in the absence of any express statutory protections in the back drop of history as well as based on principles of interpretation. The study also seeks to pin point the major obstacles that the performers have had to encounter in their quest for equal rights under the umbrella of intellectual property the world over. Chapter 2, 3 and 4 seeks to unlock the character and nature of rights enjoyed by performers in the United Kingdom –Anglo Saxon system, United States –an Anglo American legal system and the France – continental legal system. These countries are also rich in cultural productivity and have a tradition of performers' protection through both

non-statutory as well as statutory platforms. They have also responded to the challenge of digital technology thereby revealing what is required for a conducive environment for working these rights in balance with the demands of commercial exploitation.

Chapter five unravels the way in which the process of collective bargaining agreements have come to recognize notions akin to those nurtured by the copyright by making remuneration dependent on the exploitation of the performance with reliance on conditional assignments and contracts to the contrary. It also brings to the fore the meticulous manner in which labor conditions, remuneration and commercial practices have been woven together to standardize and streamline the functioning of the industry in an organized manner thereby enhancing the professional and social security of the performer.

Chapter 6 deals with the status of the performer through the international instruments - the Rome convention, the WPPT and the envisaged Protocol to the audiovisual performance. It seeks to measure the gains achieved at these international conclaves, the conflict of interests and the solutions proposed, the prospective impact on the status of the performer and a critical assessment of the distance yet to be covered. The possibilities of the digital media have been well taken into consideration by the international instruments and it points the way that statutes in the digital context need to be prepared in the future.

Chapter 7 concentrates on the main focus of the research thesis – performers' rights in India. A historical introspection is attempted to understand the status of performers protection or status in India from the ancient to the modern period and an assessment of its value in the intellectual property context. An assessment is made of the possibilities of the performers protection in the common law context and whether common law rights for the performer would persist in India in the absence of the statutory rights. An attempt has been made to evaluate the preparedness of the Indian law in the backdrop of the international instruments for performers rights particularly in the digital context. The attempt has been to clinically analyze and critically evaluate judicial perspectives with respect to performers rights. A critical appraisal of Section 38 seeks to bring to the fore the inadequacies of the statute and contradictions in its intent. The special reference

or the major impetus of the study is on the audiovisual performers' rights. The fairness of the exclusion of the audiovisual performer from the ambit of limited protection extended under Section 38 is analyzed by delving into the status of the performer since the beginning of the audiovisual industry in India. The effort has been to assess the adequacy of protection- legal, labor and contractual provided to the performer in the industry and to find whether an intellectual property paradigm ever existed in India. The attempt is made all the more meaningful in the context of the declaration of the film trade as an industry and the opening of investment in the audio visual sector to all the foreign investors as well. Chapter 8 is devoted to exploring these issues.

Chapter 9 exhaustively deals with an appraisal of the collective organizational structure of the performers' in the audiovisual industry in India and its impact on resolving the issues faced by the performer in the audio-visual industry. It attempts to bring to the fore the contractual and the customary trade practices with respect to employment or engagement in the film industry and notions of rights and obligations of the performing artist. The focus is to dissect contractual practices and the state of organization in the film industry to assess the levels of standardization in the practices and to identify the prevalence of notions of copyright - both economic and moral rights - if any in the transactions in the audiovisual industry. The focus has been on both individual as well as collectively bargained agreements in the audiovisual industry comprising both film as well as the television industry.

The gains from the aforementioned study of topics is intended to contribute to form a fair estimate of the status of the performers' in India and audiovisual performers' in particular in order to create a conducive environment for the germination of the framework of copyright law to effectively protect the performing artist without jeopardizing the interests of the industry. Chapter 10 carries the impressions gathered from the study and makes suggestions to practically work the rights in the Indian environment effectively. It is important to note that the American English standard (U.S. English - spelling and grammar) has been used through out the text of the thesis.

CHAPTER 1

PHILOSOPHY OF PERFORMERS' RIGHTS AND THE CONFLICT OF INTERESTS

Objective of the Chapter: The chapter seeks to explore the justification for performers' rights in the context of the philosophies and theories that have justified intellectual property protection in the past. It seeks to unravel whether chances of common law protection for performers exist in the absence of a statutory protection. The chapter endeavors to understand the common issues of conflict that have been confronted by the performers, the producers and policy makers in realizing an effective right's regime for the performer.

Performers' Labor and the Philosophy of Intellectual Property

The fundamental condition that has to be satisfied while demanding intellectual property rights for the performers' creative labor is the need for substantiation of performances as being one emanating from creative or intellectual labor.[1] The performer is the person who disseminates the work of the author through creative performances. The Performer also excels in performances that are not derived from any prior authors work like the folk arts. The effective rendition of the same demands a high level of discipline, commitment, talent and skill and perhaps professional training as well. In other words the performers' skill requires a definite set of tools and is a recognized creative effort in itself. This makes performance of a work a very distinct aesthetic art form. This has been so in ancient India, [2] in ancient Greece and Rome[3], in medieval Europe and the rest of the world, down to the present when professional and other contemporary art forms have taken roots. The classical, folk and contemporary art forms all demand a tremendous commitment and discipline particularly when it is pursued as a discipline and profession. In other words the performer has always been an

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[1] Richard Arnold, *Performers' Rights*, Sweet and Maxwell, London (2nd edn.-1997), p.1.

[2] The tradition of performing arts goes back to Vedic times in India. The theory of performing arts called *Natyashastra* was compiled by Bharatha muni. It is also regarded as the Fifth Veda and is a text accessible to all the castes. Saryu Doshi (Ed.), *The Performing Arts*, Marg Publications ,Bombay (1st edn.-1982), p. 2.

[3] Richard Arnold, *Performers' Rights*, Sweet and Maxwell, London (2nd edn.-1997), p.2.

intellectual laborer with his own distinct creative contribution in enhancing the quality and value of the performance of the work of the author. Though the manner of creativity might have undergone a change over the centuries nevertheless the effort has been continuously recognized and patronage has been extended to encourage the performer. With the advent of fixation and scope of mechanical and cost effective dissemination of recorded performance the performers' economic and commercial value has also increased[4]. It also brought along craftsmen in performances specially attuned to the demands of the new media. The performers' spirit to create and impress has been persistently challenged and the performer has responded ably by applying creativity and tact. In the cultural sphere, the political system of all countries have acknowledged the distinct creativity and acknowledged the intellectual prowess of the performing artist[5]. The performer has been able to tilt the fortunes of works by sheer magic of their presence and performance.[6]

The performer unambiguously falls into the ambit of the general prescription of what constitutes intellectual property that is literally those things that emanate from the exercise of the human brain.[7] The element of originality, labor, skill and judgment that is indispensable to the grant of copyright is also evident most expressively in the performing art form. Further the onset of affixation has facilitated the performers eligibility further as the drawback of being ephemeral has been displaced and tangibility, an important requirement for copyright protection, stands fulfilled. The philosophies that aided and molded the development of intellectual property in the form of patent, copyright and trademark laws apply in equal measure on the performer.[8] The Lockean theory

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[4] Sam Ricketson, *New Wine into Old Bottles*, in Peter Drahos (ed.), *Intellectual Property*, Ashgate /Dartmouth (1999), p.398. Effects of new technological development, proponents ask for protection.

[5] Awards have been instituted, scrolls of honor and pecuniary rewards presented to encourage citizens into pursuing cultural art forms.

[6] The first stars on the audio visual like Sir Charlie Chaplin began to produce their own films assured of the market their name commanded. The star system and the religious following that it has is enough statistical testimony to the art and commercial value of the performer and the determining influence it has on the work as a whole.

[7] N.S. Gopalakrishnan, *Intellectual Property and Criminal Law*, National Law School of India University, Bangalore (1st edn.-1994), p.143. The Blackstone prescription to identify literary property that was quiet influential even in times contemporaneous with the statutory anointment of copyright would accommodate the performers' labor as the exertion of his rational powers to create an original work.

[8] Lionel Bentley, Brad Sherman, *Intellectual Property Law*, Oxford University Press, First Indian Edition (1st edn.- 2003), p.32. For an account of Natural rights, (*f.n. contd. on next page*)

with its impetus on the personality and the rights of property over labor ring literally true for the performer as it has for other forms of intellectual property[9]. Under the general theory of labor as propounded by Locke, the performers' subject matter finds accommodation within the labor theory of value.[10] According to it the laborer removes the subject matter from the common state and the laborer fixes his property in them.[11] In other words, the rationale is that the labor was to be his title to the creation.[12] Others do not have the right to meddle with another's labor and pain. If this philosophy influenced the juristic and the political philosophy of intellectual property then the intrinsic worth of the performers' labor should also come within the eligibility quotient.

The profundity of the philosophy cannot be lost as even literally the philosophy propounded by Locke affirms the property of men in his own person that nobody has any right to but himself. This affirms the fundamental human right of the person to his own personality that guides him and the respective uses of both the physical labor and the faculties of his personality that guides him. [13] Nobody has a right to the labor of his body and the work of his mind but the laborer himself.[14]

One of the justifications theoretically advanced for the creator is that it is the natural right to the product of the intellect.[15] The creativity has to be encouraged and the social and economic justice to the creator has to be realized. [16] The opponents of this theory would base their criticism on the basis of social utility. However, the social utility would be the value of these rights proportional to the

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argument, production and public dissemination of cultural products. The authors' reference to the ancient aphorism to every cow its calf with regard to literary authorship applies in equal measure to the performers' affixations as well.

[9] See J.A.L Sterling, *World Copyright Law*, Sweet and Maxwell, London (1998), pp.40-44. See for Locke's theory (p.40), the theories of monopoly right (p.43), personality right (p.43), as well as Sui Generis right for the performer (pp.43-44).

[10] Peter Laslett, *John Locke, Two Treatises of Government*, Cambridge University Press, New York (2nd. - 1970), pp. 305-309.

[11] Jacqueline M.B. Seignetta, *Challenges to the Creator Doctrine*, 1994, Kluwer Law and Taxation Publishers, Boston (1st edn.-1994), p.20. On John Locke's Labor theory and creator doctrine of copyright. 'Thus the grass my horse has bit, the turfs my servant has cut, and the ore that I have digged in any place where I have a right to do them in common with others, become my property, without the assignation or consent of anybody' (quoting from Locke, *Second Treatise*, Chapter V.)

[12] *Ibid.* Labor marks the far greatest value of things.

[13] *Id.*, p.23.

[14] *Tonson* v.*Collins* (1760) 96 E.R.185. The Courts have applied the principles evolved in the 16th century to cases that have come up before it involving questions of unfair misappropriation of property including intangible property.

[15] J.A.L Sterling, *op.cit.*,p.55. Natural justice arguments are comprised of condemnation of theft and reward for labor.

[16] Peter Drahos, *A Philosophy of Intellectual Property*, Dartmouth, Aldershot, U.K. (1st edn.-1996), p.11.

effort expended by the laborer and effort could include how hard someone exerts to achieve a result and the degree to which the moral consideration played in choosing the result intended.[17] The career of the performer and the professional hazards involved would accommodate the performers' claim for property protection from this perspective as well.

Besides the natural justice arguments several other theories that were advanced to justify intellectual property right seem applicable for the performers' rights as well[18]. Cultural promotion is as much a rationale and cause for intellectual property protection advancement.[19] The importance of performances in being a source of cultural accomplishments cannot be denied in any nation state.[20] The creative incentive argument put forth on behalf of the rights for literary and artistic entities applies ditto with equal gusto to the performer as well.[21] Kant's Personality Rights Theory that influenced the moral rights crusade in France in the 18th century is as much relevant for the performers who are the new communicators of the modern era.[22] The act of creation bearing the imprint of his personality justify the grant of the inalienable right to his name and right to respectable treatment of his work that is the result of his ingenious labor. The theory impacted a change in presumptions in contractual dealings that created a new system, securing the creators interest in the market place. Even if it were assumed that the categorization of the performers' labor as property couldn't take place due to logical constraints nevertheless the value of the performers' labor could still be safeguarded from theft on the basis of the misappropriation principle under the head of equity. Thus seen from the perspective of the effort and creativity displayed by the performer and the philosophical theories that have substantiated intellectual property in the past, performer does not appear any

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[17] John Rawls, *A Theory of Justice*, Universal Law Publishing Co. Pvt. Ltd, New Delhi (2000), p.41.

[18] J.A.L Sterling, *op.cit.*,p.55.
Besides the natural justice arguments, there are the creative incentive arguments, general public interest arguments, social contract and the moral arguments. This can be complemented by encouragement of learning, promotion of economy and cultural promotion.

[19] J.A.L. Sterling, *op.cit.*,p.59.

[20] S.M.Stewart, *International Copyright and Neighboring Rights*, Butterworths, London (2nd edn. - 1989), pp.3-4. For an elucidation of the Theories of natural justice principles, the economic arguments, the cultural arguments and the social argument (p.4).

[21] *Id.*, p.60.

[22] J.A.L Sterling, *op.cit.*,p.43

less eligible to protection than the entities so far protected by copyright or principles of intellectual property.

Performers' Rights and the Common Law

The search for substantiation of the performers' claim to property rights leads us to unearth common-law sources emanating from natural law principles.[23] The need for such substantiation arises from the fact that there is no equanimity among the different statutory legal regimes even today with regard to the status of the performer. While some may grant preventive rights not in the nature of property rights others discriminate the audio performer from the audiovisual performer[24]. Thus the need for a holistic justification arises to beget wholesome property rights for the performer on the basis of common law principles. The question of Common law property rights to intellectual creativity came to be debated in two leading cases in the 17th century.[25]

Millar v. *Taylor* [26]

The plaintiff was the registered proprietor of the poem ' Four Seasons'. Taylor without the permission of Millar made copies of the poem so that he could sell them once the period of protection afforded by the Statute of Anne had expired. Millar moved the Court in order to substantiate that his common law copyright

[23] Jeremy Philips, Robyn Durie and Ian Karet, *Whale on Copyright*, Sweet and Maxwell, London (4th edn.-1993), p.3. 'Common law may be defined as a body of decided cases, which serve as a precedent, together with customary practices, which the Courts recognize as a valid basis for the administration of justice when the case is not one which is subject to statutory enactment. After the introduction of printing, there arose a concept of something like a property right in literary works, which gradually took root in common law. The provenance of this common law is unclear and is the subject of considerable debate'.

[24] For instance the contrasting treatment meted to the performer under the Copyright Act in India and in the United Kingdom today.

[25] It should be pointed out that prior to the promulgation of the Statute of Anne also the Courts in England had been seized of the question and have decided in favor of bestowing a common law literary property in literary creations[25]. However it was the Courts of Equity that granted the reliefs. The perpetual property right enjoyed by the authors in their literary work existed much before the statute of Anne. Even after the Act was passed there was no dispute for the next 50 years or so with respect to the existence of common law property right in literary works. This is evidenced by the decisions of the Courts of Chancery (between 1735 and 1752) where in no fewer than 5 injunctions were passed protecting printed works from being pirated that were not protected by the statute. All these decisions were from the Court of equity. See, Eaton S Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States*, So Hackensack, Rothman Reprints, Inc., New Jersey (1972), p.27.

[26] *Millar* v. *Taylor* (1769) 4 Burr.2303: 98 E.R.201 (K.B.).

was unaffected by the statute. He was successful and a favorable verdict was given in his favor. The verdict was based on the theories of property that substantiated the existence of a common law copyright in the intellectual labor.[27]

The Judges led by Chief Justice Mansfield based their majority judgment recognizing a common law copyright by tracing it to theories of property rights. Chief Justice Mansfield found that the source of authors' rights was the same either before or after publication and connected it to the notion of justice. It was based on the rationale that man should reap the benefit of his efforts of his own ingenuity and labor and that another should not use the name without his consent. Justice Willes linked the rationale of common law copyright to incentive and as an encouragement for the efforts of learned men. Justice Aston grounded his rationale on the basis that the author owns the produce of his mental labors. According to him the invasion of the property right was against natural reason. It is important to note that despite the difference with the *Lockean* rationale in this regard the judge confers property right to the author. In other words to sum up it was the arguments based on justice, the incentive and the natural rights that substantiated the common law property right to literary property.

The judgment stood out for the manner in which the Natural Law Property theory was relied and utilized by the judges. All the judges drew heavily from the rationale and philosophy of Grotious, Pufendorf and Locke[28]. It can in other words be rationalized that intellectual labor is endowed with quality of property owing to the incentive it imparts, the justice it begets for the creator and agreement with natural law that it realizes in this regard. The judges discussed the nature and origin of literary property elaborately[29]. It is significant to note that these very same questions are important from the point of view of the performers' search for common-law precedent in order to base their rights without recourse to statutory rights.

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[27] The only dissenting judgment by Justice Yates was also dependent on the very same theories of property to negate the existence of any common law right.

[28] Peter Drahos, *op.cit.*, p.25.

[29] The questions considered were of great consequences that included whether performers' have common law property rights in their performances?, whether intellectual productions have attributes of property?, whether the exclusive rights of authors to multiply copies of his books existed at common law and had been recognized prior to the statute of Anne?, whether this rights was lost by publication? and whether it had been taken away or abridged by the Statute of Anne.

The judges maintained that literary property did exist at common law and that its ownership was neither lost by publication nor abridged by the Statue of Anne[30]. They were supported by the general principle underlying all property that the laborer is entitled to enjoy the fruits of his labor whether manual or mental. The common-law existence of literary property was attested by its existence for two centuries. It was held that publication would not prejudice this right. As this was the only means to render his property useful. It was further held that the statute of Anne was only a cumulative remedy and did not disturb the literary property and that there was nothing in the Act to show that this was the sole object or effect of the Act.[31]

Donaldson v. *Becket*[32]

This judgment reaffirmed the majority decision in *Millar* v. *Taylor,* 98 E.R.201 (K.B.), except in one crucial aspect[33]. The House of Lords comprising of the twelve judges ruled that at common law the author of an unpublished literary compositions had the sole right to publish it for sale and can bring an action against any person who published it without his consent[34]. Importantly, the Court held that by the common law the authors' exclusive rights were not lost or prejudiced by publication. The copyright in a published work existed by common law[35]. Significantly, it was held that common law literary property was perpetual.[36] It was most crucially held that after publication, the Statute of Anne to which the author could look forward for protection took the common-law right away.[37] This was the point in which the ruling in *Millar* v. *Taylor* was acutely reversed. Five judges believed that the Statute of Anne could not destroy, abridge or in any way prejudice the common law property in a published work and did not deprive the common law right[38].

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[30] Out of the four judges, three of the judges took this position.
[31] Eaton S. Drone, *op.cit.*,p.28.
[32] 4 Burr.2408: 98 E.R.257.
[33] *Id.*, p.37. This was an appeal brought to the House of Lords from the Court of Chancery that granted an injunction based on the judgment in *Millar* v. *Taylor,* 98 E.R.201 (K.B.).
[34] Ten judges were for this finding while one dissented and lord Mansfield was silent on all the points in convention.
[35] This was decided at eight to three.
[36] Decision seven to four.
[37] Decision six to five.
[38] *Id.*, p. 38.

Two thirds of the judges who advised the Lords or three fourths including lord Mansfield held on to the doctrine that in the absence of any statute literary property exists in common law and is not lost or prejudiced by publication. There was nothing in the judgment in *Donaldson* v. *Becket* to unsettle this doctrine or to overrule the position in *Millar* v. *Taylor* so far as it affirmed it[39]. On the other hand the finding in *Donaldson* v. *Becket* that the Statute of Anne took away the right is an implied recognition of the existence of the right. It is noteworthy that after the case law of *Donaldson* v. *Becket*, support for the propositions not overruled by the judgment began to emerge from the British Courts[40].

The association with common-law and intellectual property protection was not maintained in the same manner everywhere. While the British jurisprudence followed up on the rationale of *Donaldson* v. *Becket*, with there being instances of subtle exceptions like protection being extended for those works not registered during the statutory period[41], the attribution of common law property right were few. The denial of a perpetual copyright further sealed the initiative or notions nursed in this regard. Most significant pronouncement was the provision in the 1911 enactment that expressly denied common-law rights in literary, artistic, dramatic and musical works. This did not merely deny the common law rights on copyright but also similar rights[42]. It is striking that the provision does not preempt the application of common law copyright to other subject matter other than those listed expressly. Thus intellectual labor fulfilling the condition of writing such as in respect of sound recordings or performances recorded there in should have been exempted. The labor of the performer in the recorded medium ought

[39]Eaton.S.Drone, *op.cit.*, p.42.

[40] For instance, in the case law of *Jeffrey* v. *Boosey* (1851) 4 H.L.C.961. The Court of Exchequer as well as the House of Lords gave expression to the ruling. The Courts were still aligned to the masterly analysis by Lord Mansfield who had ruled in favor of common law copyright for intellectual productions. However, there have also been decisions contrary to the ruling since *Millar* v. *Taylor*, 98 E.R.201 (K.B.) and *Donaldson* v. *Becket,* 98 E.R. 257, in which the injunctions granted in favor of the petitioner, has been dissolved. In circumstances where in an injunction had been initially granted against the publication of a book in which copyright had expired. Cited in Eaton.S.Drone, *op.cit.*,p.42.

[41] See *Beck Ford* v. *Hood,* 101 E.R 1164.This is the only case cited as an instance of continuing application of common law copyright to literary property. However the circumstances, it is evident that there were reasons for this exception. Cited in N.S.Gopalakrishnan, *op.cit.*,p.152.

[42] Section 31 of the Copyright Act, 1911 read:' abrogation of common law rights: - no person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance width the provision of this act or of any other statutory enactment for the time being in force, but nothing in this Section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.'

to have found space for validation as intellectual property and protected under the aegis of common law property rights unaffected by the strictures and prejudices of the statutory provision. However the section had a dissuading effect on the English Courts. It did not merely confine itself to the subject matter specifically mentioned in the legislation but the intent cast a shadow in its approach to attribute property rights to other intellectual subject matter claiming a property character and civil remedies as well. Despite being a criminal deterrent legislation, the courts found the presence of Dramatic and Musical Performances Act, 1925 a dissuading factor to attribute property rights to Performers' performance directly. Though in the course of evolution these property rights were indirectly recognized on other premises and principles.

This position in England is important for the performer in the Indian context considering the fact that both countries have a common historical pedigree and a continuity of the copyright system. The Copyright Act, 1914 promulgated in India is a replica of the 1911 enactment. It also carried the preemption clause. However there was no statutory expression of copyright for the performers labor. Therefore the Common Law property in intellectual creations that was recognized in *Donaldson* v. *Becket*, 98 E.R. 257, cannot be considered to have been impacted by any statutory expression in India. Under the Copyright Act, 1957 also the prohibition is against any copyright in any work other than through the means of the Act, but neither performance nor the performer is included in the term "work". Therefore a common law property right could very well be endowed on the performer in India[43].

In the United States of America, the case of *Wheaton* v. *Peters*[44] posed interesting questions in the new land about the existence of common law literary property and its existence. The case decided in the year 1834 is a standing precedent. It deviates from the position laid down in *Donaldson* v. *Becket*, 98 E.R.257, on several of the important propositions. The two questions before the Supreme Court were whether the copyright in a published work existed in common law and if so whether it had been taken away by the statute of 1790. The Court held that the law had been settled in England that since the passage of the Statute of Anne, an author had no right in a published work except to the

[43] Though there are no case laws, which have attempted recourse on this premise.
[44] 33 U.S. 591.

extent secured by statute.[45] Significantly, it was also proclaimed that there was no common law of the United States and that the State of Pennsylvania in which the cause of action had arisen too had not adopted one. The copyright most importantly did not affirm an existing right but created one.[46] The interpretations, analysis and criticisms of the judgment have pointed out that the judgment has only based itself on two grounds that the common law of England did not prevail in the United States and that in England it had been decided that the common-law property in published works had been taken away by statute. The first basis is no longer holding and has been swept away. The doctrine is well established that a complete property in unpublished works is secured by the common law. The Supreme Court in the case of *Wheaten* v. *Peters*, 33 U.S. 591, admitted this position. This decision has been followed by the same forum, the Circuit Courts and several State Courts in the United States. It has been logically analyzed that if there can be a common law in unpublished productions, then there is no principle that exists independently of the statute by which it can be held not to prevail in the case of published works[47]. In fact there have been differences between what constitutes publication among the State Courts and in the Federal Courts.[48] From the aforementioned analysis it is inferable that historically, logically and by means of analogy, performer can be afforded protection by means of common law rights even in the absence of specific statutory streamlining. This possibility was inherent in the Anglo-Saxon as well as in the Anglo-American jurisprudence applicable to intellectual labor.

Performers' Rights and the Conflict of Interests

The performers' quest for a copyright identity had met with opposition from diverse quarters. The detractors have ranged from those representing conflicting economic interests to those who found the claim unacceptable due to philosophic

[45] Eaton.S.Drone, *op.cit.*,p.43.
[46] *Id.*, p.44. Three of the judges were in favor, two against and one in absence.
[47] *Id.*, p.47.
[48] See chapter three for an analysis of the case law developments in the United States with respect to the performer where in publication has been interpreted to safeguard the property rights of the performer.

and doctrinal reasons[49]. The major adversaries have been the traditional entities like literary and artistic subject matter that have enjoyed copyright protection as well as the modern eligible entities like the producers of cinema, sound recorders and the broadcasters and other communicators to the public whose existence is fused with that of the performers. As new media in a digital world continues with its influx, the queue of actors in this tussle continues to lengthen. The Internet and the phenomenon of convergence pose additional challenges to the performer as well as the rest of the entities in the copyright realm. The grounds of opposition at times have been different and at other times have been based on similar premises though it arose from different interests. One can discern a commonness and similarity between the various arguments put forth and against the grant of performance rights where ever in the world the debate has surfaced. The similarities are not only with regard to the issues involved but also with regard to the personalities and institutions involved and the stances which they adopt .The intractable conflict of interests have seen but for a few exceptional countries prolonged inertia and circumspection on the part of the legal decision makers, awaiting clarity and definition of the economic and legal consequences if the performance right is granted. It has been a century of thought and tentativeness based on real and hallucinated misgivings and fears. The arguments can be grouped into economic, equity and constitutional premises.

Performers' Rights and Threatened Interests of Authors'

An attempt has been consistently made to maintain a fundamental line of demarcation between the traditional entities recognized under copyright and the new media off shoots like broadcasting, phonograms and the performer[50]. On the basis of characteristics of the aspiring subject matter, an attempt has been made to draw some distinctions as well as certain presumptions based on attitudes underlying the history of intellectual property. The opponents to the cause of performers' viewpoints argue that any neighboring rights can be enjoyed only if

[49] Both copyright and continental countries have reservations based on a conservatism, which they found, threatened if performers were accommodated automatically.

[50] On opposing authors interests see, L. Lee Phillips, *Related Rights and American Copyright Law: Compatible or Incompatible?*, in 10 ASCAP Copyright Law Symposium ,Columbia University Press ,New York (1st edn.-1959) ,p.231.

the authors so agree to its acceptance. It is further qualified that the rights should only cover those of a limited field in the performance, recording or broadcast.[51]
It was adduced on behalf of the authors that while the author would be keenly ready for the further distribution of the performance, the performer would rather be reengaged for his live performance rather than be exploited by third parties. The performer may demand higher remuneration that might negatively impact on the remuneration to the author[52]. The grant of rights of this nature has been skeptically viewed, as they are difficult to be practically implemented and realized effectively. Other than the reservations expressed by the authors, the protection of performers' would be having its repercussions on the recorders, filmmakers and broadcasters and this is considered a vexing tangle to reconcile all the diverse interests involved. The votaries of performers' rights point out that if adaptations and translations can be accommodated as distinct property amenable to protection then sound and visual transpositions on records and other devices can also be accommodated[53]. In other words the contours of the copyright regime have to be made flexible and theoretical distinctions narrowed where it stands opposed to technical and economic realities. There is little evidence to suggest that performers either individually or through collective agencies have blocked exploitation of the works. The performers are as keen for the widest dissemination of the works carrying their performances.[54]

Loss of control

One of the heightened fears has been about the loss of control over the audio or the audiovisual product in the hands of the producers or the broadcasters. However this fear has been countered by the substantial argument that it is always the form in which the right takes that will determine the effect of control or no control in this respect[55].

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[51] George.H.C.Bodenhausen, "Protection of Neighboring Rights", 19 Law & Contemp. Probs.156 (1954)., p.159.
[52] *Id.*, p.160.
[53] *Id.*, p.159.
[54] Richards Arnold, *op.cit.*, p.7.
[55] Brad Sherman and Lionel Bentley, *Performers' Rights: Options for Reform* (October 1995), Report to assist the Inter Departmental Committee constituted by the Government of Australia to decide on the question of extending performers rights, p.6. Available at <ftp://ftp.dcita.gov.au/pub/docs/sherman.doc>, as on 1st January 2004.

Consumer to Bear the Brunt

Another objection has been from the consumers' point of view that these impositions would be transferred to the ultimate consumer making the enjoyment of these to be excessively costly[56]. The communicators of performance would be flooded with claims from the author, the broadcaster besides the performers'. This was considered as an unhealthy prospect. The performers' counter this by the argument of self-competition.

Representative Hegemony

The opposing interests have pointed it out that if the performers' cede their rights to representative organizations the power they wield collectively could be immense and monopolistic. Therefore the better option would be the right to remuneration without rights that would block exploitation[57]. This has been countered by the fact that collective administration societies have always been supervised against monopolistic policies in the past and therefore the same state supervision can be effected through institutional mechanisms.

Questions over Economic Viability of the Industry

The performers' crusade for rights have weathered bitter opposition on several grounds from diverse quarters in the last century and still continue in its quest for the ultimate realization of the rights .On the economic plane, the authors have opposed the grant on the ground that it would diminish the slice of their income cake and also make commercial dealings in the final product of performance prohibitively costly[58]. They anticipate a set back to the secured interests of the author and see the possibility of the performers' status to overwhelm the intellectual value placed on them in course of time with performances requiring the mandate of the performer. Their hold on performance as a commercially potent product could be lost with the performer reigning in importance in the long run from the exploitation. Despite authoritative studies conducted to point out the negligible impact on the economics of the various industrial interests, strong

[56] *Id.*, p.160.
[57] *Id., p.163.*
[58] Richard Arnold, *Performers' Rights*, Sweet and Maxwell, London (2nd edn.-1997), p.5.

misgivings have been voiced on the imposition of a performance fees and the consequent royalty rates could have deleterious impact on the health of any particular industry particular industry and also alter the relationship between the industries.[59] However the performers' have countered that no such difficulties have surfaced in countries where performers' rights have been appropriated to their legislation and rather the performers' would only be too glad to facilitate the use of their performances rather than be a stumbling block. There has not been noticed any fall in the remuneration of the author's remuneration because the deal includes paying the performer.[60] It has been pointed out in studies by the copyright office in the United States (and several other countries where such studies have preceded adoption) revealed that it would not pose any detriment to the broadcasters industry, if the performance right were granted to the sound recorders and the performers.'[61]

Opposition Based on Burden on Broadcasters and the Consumer

The issue of performers' rights has not been without resentment and criticism from the broadcasters that the study and its inferences contain too many assumptions and policy visualizations rather than being plain explanatory economics.[62] Despite pointing it out that the several broadcasters who are on the brink of survival would find it hard to cope with the imposition it was inferred that the imposition would not drive them out. Similarly it was hypothetically inferred that the extra levy could be passed onto the advertiser and the consumer. To this

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[59] The reports on the economic impact vary from one country to another. The Canadian and the Australian report show that a high cost would have to be borne by the industries and for supporting the same through collective infrastructure. They also forecast that the models are not conducive to generating employment at a brisk pace.
See, *Economic Effects of Extended Performers' Rights*, paper prepared by The Bureau of Transport and Communications Economics (BTCE) for the Department of Communications and the Arts, Government of Australia (January 1996), pp.6-7.
Available at <ftp://ftp.dcita.gov.au/pub/docs/btce.doc> as on 1st January 2004.

[60] This concern has been voiced even by government-sponsored studies such as in Great Britain, like the Gregory Committee report in Great Britain in the 1950's. Richard Arnold, *op.cit.*, p.5.

[61] It is noteworthy that in the U.S. the hurdle to be crossed was two-fold considering that no sound record copyright had been granted any rights until 1971. It has to be noted that the debate has not included within its ambit the question of live performer and his rights as against recordings and the broadcasts and public distribution or communication to the public.

[62] Gary L. Urwin, " Paying the Piper: Performance Rights in Musical Recordings", 5 Comm. & L. 48, W '83.

the report noted that there was neither any precedence nor any cogent proof. Advertising initiatives always depended on audience size.[63]

The broadcasters advanced the argument that the performers' benefited from the use of the free airplay in the guise of popularity and fan following. The broadcasters felt that without the imposition of a price on the performers' services, the mutual benefit was equal. But the levy would create an imbalance in the relationship between the performer and the broadcaster who are unable to charge any thing on the facility provided to the performer particularly the first timers.[64] But it was recognized that it was the popularity of the artist that generated interest in the recordings rather than the other way round. Thus the free airplay objection was ignored in favor of the performer. While the free airplay benefit has been with reference to the broadcasts of the performer a similar argument has been put forward with regard to the free recording of their fixations, which is that, the performers' benefit from free copying.[65] The performers' pointed out that it was the same disadvantage that the authors faced when their works were copied that the performer faced. Unrestricted bootlegging has never increased their reputation and the performer would essentially like to control their performances and dissemination. Perhaps the use of the exposure in equation to the publicity was not as productive as was made out to be by the broadcaster[66].

Inadequate Compensation

Performers point out that most performances are inadequately compensated[67]. There are many more at the lower end of the pay scale even among the

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[63] *Ibid.* However the matter appeared to bear consolation from the fact that the levy was to be on one percent of the net rather than gross profits that would save loss-making broadcasters from the burden.

[64] *Ibid.*

[65] Richard Arnold, *Performers' Rights*, Sweet and Maxwell, London (2nd edn.-1997), p.7.

[66] In the states it was a contest between the performer and the recorder with the broadcaster. It is interesting there does not seem to have been much opposition from the recording industry to the quest of the performer as regards performance rights. However there does not appear to have been much consternation with regard to grant of the rights to their live performances in its transfer to the recordings. Either it was never debated with all the attention focusing on the exploitation by the broadcaster or the performers' were happy with the contractual agreements entered into with the recording producer.

[67] Gary L. Urwin, " Paying the Piper: Performance Rights in Musical Recordings", 5 Comm. & L. 24, W '83.

employed lot and then there are those waiting for their first breaks on whom none are willing to place their bets. However critics argue whether a performance right would beget equitable distribution of wealth. There was also a weak argument[68] that as there are performers' who are composers as well it would mot be befitting for them to be provided with two rights.

Aid to Performers of Unpopular Numbers

Another reason suggested for the rights in performances is that certain strains of performances like classical music etc would not be able to find monetary encouragement other than through the means of broadcasting and other communications as their earnings through direct sales were poor[69]. This was true of other ethno musical products as well. However there have been misgivings as to the boost that this would give to the production of these assorted music and the rest. As classical stations would be groping for survival it depends on the formulae being employed in order to calculate the proceeds to the performer but if it is on net basis there is not bound to be much. There is bound to be less fanfare and there fore less advertising revenue. The utility of this benefit has been questioned by the critics (not the broadcasters) that the proceeds which would be half of the total royalty for the recorder would not suffice to be plowed back into the production and the other half would be spread out among tens of performers' to be of any benefit to a single one.[70] It has been proposed by those opposed to the performers' statutory rights that the system of collective bargaining would be better than the legal regime imposing liabilities.[71] But this has been countered on the basis that these need not always procure minimum guarantees and further this would require being part of a union which would be a compulsory mode of administration of rights. Further this does not provide any rights against third parties and enjoin unauthorized exploitation.

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[68] *Ibid.* But these are in a majority according to the study.

[69] *Id.*,p.27.

[70] *Ibid.*

[71] Richard Arnold, *Performers' Rights*, Sweet And Maxwell, London (2nd edn.-1997), p.6.

Equity

The next basis of the right from the proponents of the performers' cause has been on the basis of equity[72]. It is a costless income that is generated by the use of performances in broadcasting therefore advertising revenues has to be shared. The broadcasters argue that they are paid at the time of recording and they do have the freedom of choice to opt out when they are underpaid .The broadcasters are not free from bearing costs as there're input costs such as airplay time etc that they have to bear. Thus according to them the performers' rights premise on costless income is wrong. The producers pointed out that the performances are transitory and elusive in substance and even if fixed is not the result of their labor but that of the producer. But it has been equally convincingly argued that the producer cannot do without the performer if he has to record a performance.[73] The payment made to other program inputs cannot be compared with the need to pay royalty to performers' because the broadcaster does not stand in the same chain as the immediate user of the service.[74] The immediate user has already paid them. But the rationale fails to answer that the artists either are underpaid or have not consented to the manner of diverse exploitation as was initially contracted for. Performance rights are seen as a way for musicians to obtain monetary relief from the rigors of their live entertainment possibilities competing with their own recorded out put. But this has been questioned because two products are being seen as substitutes when they are in reality not so. There were other reasons for the studio musicians to have ceased their performances like the change in the public tastes. Most of the performers' had long ceased to be obsessed with live performances and have looked to the studios, as a source of income therefore according to the detractors; the self-competition angle does not merit importance.

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[72] Gary L. Urwin, *op.cit.*,p.28.
[73] Gregory Report referred in Richard Arnold, *Performers' Rights*, Sweet And Maxwell, London (2nd edn. -1997), p.6.
[74] Gary L. Urwin, *op.cit.*,p.30.

Rights Imperil Freedom of Speech

The constitutional argument was based on the fact that the fetters on exploitation in the form of performance rights were an affront to the first amendment right in the form of free speech[75]. The broadcasters sought to depend on the same to protect themselves from the application of common-law principles as well as that of the state legislations in this regard. This was however clarified by the Supreme Court in the *Zacchini* v. *Scripps-Howard Broadcasting Co.*[76] where in the rights of publicity, a common-law like copyright was upheld as against the first amendment right of free speech. Thus even if the right became legislatively imprinted there would not be any constitutional block for the same.

Stimulant to Artistic Creativity

In the United States, the constitutional clause of intellectual property protection instills the mood and encouragement for imparting protection to the performer. It has been pointed out that a performance right rewarding only those few performers' with the proven skill to windup in the recording studio would be at best an efficient way to satisfy what has been called the ultimate aim of copyright law to stimulate artistic creativity for the general public good. Therefore it needed to be extended to those who were not recording artists as well.

Argument Based on the Interpretative Width of Words

The hangover of legislations with respect to literary and artistic property creates a mental block when it comes to accepting new forms of intellectual property for legal protection. While in some countries it is the definition and meaning to be appended to the word author or work that is brooded upon, in others it is the more direct and apparent guidelines like the constitution that guide interpretations. The word "writings' in the American constitution have sufficiently provided the detractors of performance rights with the weapon to cry that a

[75] *Id.*,p.32.
[76] 433 U.S. 562.

performance on a record cannot be considered writing[77]. But their Courts have expansively interpreted the same and accorded 'records' the status of writings, as it is a method of fixing creative works in a tangible form. Such dilemmas have been encountered in other jurisdictions as well. Interpretations of the words 'dramatic performances' as to who are authors and what is originality have been encountered elsewhere as well. But the legislative intentions have been sufficiently straightforward and precise providing no leeway for the interpreter. But the word writings in the American constitutional lexicon was narrowly construed and lent an additional arm to the confusion, as even the eligibility of a tangible fixation was doubtful.

Derived Execution

The performer has always based his claim to protection at par with other subject matter granted protection under the copyright realm on the basis of the tangible creative contribution made by his intellectual efforts. However, the tendency has been to treat performances as always being derivative, subsidiary and therefore secondary to the authors' works.[78] The performers' coterie point out that as long as the economic value is substantial there should not be any discrimination. The fact that it is derived does not mean that it is economically and morally less deserving of protection. Further performances that are not based on works are also creative and original labor subsists in them with recognized tangible economic value.[79]

Unqualified General Protection

The performers' blanket claim to protection without discrimination has also evoked considerable criticism. This has also raised objections on the basis that it is impractical to grant and administer the same to a multitude of cast particularly when more than a few performers' are involved -group performances.[80] Though this has been countered on the basis of the efficacy of collective licensing and the

[77] Gary L.Urwin,*op.cit.*,p.36.
[78] *Id.*, p.37.
[79] Richard Arnold, *op.cit.*,p.5.
[80] *Id.*,p.6.

relatively negligible obstruction in exploitation from any performer with or without compulsory licensing in different countries.

Question Over Creativity

To be eligible for authorship it is essential that a minimum quantum of originality needs to be fulfilled. The quantum has varied from country to country but nevertheless it is an essential constituent of the eligibility test even for literary and artistic property. The question posed is how the literary author or the artist has rendered the performance, whether it is a straight replication of what the composer has originally created. Amongst performers (be it in audio or the audio visual), even if some do qualify owing to the practice and creativity of their art, there are others who are mere craftsmen.[81] Then would it justify if the performance right were given to the majority of those who are merely replicating the directions in the chart? The very rationale of performance right to help the artists would be lost if such an interpretation is allowed. It has been pointed out that the recording segment being in themselves a minority from the vast multitude of live performers' a further sifting from amongst the performers would not beget the purpose behind the need for a performance right. It is not because the performers' are less creative that they have to follow the directions but because they are provided situations in which they cannot do otherwise. Nevertheless this point of disagreement between creativity and non-creativity does make it look like it needs a re-look for the convenient administration of the rights. But as yet from experience there do not appear to be any difficulty in granting this without distinctions. Can this distinction be *adhoc* according to the differing circumstances and divisions on the basis of performing vocations such as Actors and musicians and among them vocal and the instrumental or a grading among themselves? Though this is a problem to be resolved, this has not been seen to be a reason substantial enough to wish away the need for performers' rights.[82]

[8181] Gary L. Urwin. *op.cit.*,p.44.

[82] While the effort of creativity might not seem equally distributed nevertheless that is something to be left to consensus. *Id.*, p.49.

Best Left to Market Forces- Freedom of Contract

The proposition to leave it to contracts and collective bargaining contracts alone has been met with the counter that it provides no reprieve from violations by third parties. The lack of a statutory protection only provides a fillip to the interests like bootleggers, as there would not be any legal instrument that they would be violating.[83]

Anticompetitive Trends

Critics pointed out that the imposition of performers' rights raises the specter of anti-competitive trends in the commercial dealings of performances. This has been overcome or negotiated through the mechanism of collective licensing that has been resorted in several countries.[84] There have been few indications if not nil evidence to suggest that individual performers' tend to block exploitation.

Era of Convergence

The advent of the information superhighway and the consequent era of convergence that has been ushered in have endangered the framework of security in which entities are protected under copyright. The same threat looms large over the performances as well[85]. They require rights more in the digital environment than in the traditional market environment. Performances would form an important underlying work that may be subject to a variety of forms of exploitation. This brings to the fore possibilities of circumvention much more than what deleteriously impacts in an analogue environment. Therefore any measures taken to protect other works equally apply with respect to the performers creation as well.[86]

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[83] Richard Arnold, *op.cit.*, p.6.
[84] *Id.*, p.7
[85] See, "WIPO International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology", Organized by WIPO in Cooperation with Ministry of Education and Culture of Spain & with the Assistance of the General Authors and Publisher Society Of Spain (SGAE), Seville, Spain, May 14 to 16, 1997,WIPO (1998).
[86] Brad Sherman and Lionel Bentley, *Performers' Rights: Options for Reform* (October 1995), Report to assist the Inter Departmental Committee constituted by the Government of Australia to

The characteristics displayed by the performer fully confirms to the theoretical justification that was used for the substantiation of intellectual property. This positively points to the eligibility of the performers creative labor in the intellectual property firmament. An assessment of the chances of performers' protection within the common law regime points out to strong possibilities of protection. The aforementioned elucidation of the conflict of perspectives between the authors, producers, broadcasters, users and the performers regarding the grant of rights to the performers is indicative of the issues to be tackled by the legal system in any country that desires to find an agreeable solution to the issue of performers' rights. The philosophy, economic and legal logic has nevertheless found the diverse jurisdictions applying themselves to realize the rights to the optimum extent possible and the conflict of interests has never been found to be insurmountable in character.

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decide on the question of extending performers rights, p.16. Available at <ftp://ftp.dcita.gov.au/pub/docs/sherman.doc> as 1st January 2004.

CHAPTER TWO
JUDICIAL AND LEGISLATIVE DEVELOPMENT OF PERFORMERS' RIGHTS IN THE UNITED KINGDOM

Objective of the Chapter: This chapter endeavors to study the evolution of performers' rights in United Kingdom and understand the judicial, legal and administrative means adopted to secure a balance between rights and commercial expediency in order to secure the rights of the performers. The study is significant from the Indian perspective considering the common legal history particularly with regard to copyright law.

Statutory Attempt to Protect the Performer

Moves to realize statutory protection for performers in United Kingdom were made comparatively early. In Great Britain the first legislative moves In this regard was made in the year 1925 through a Private Members Bill[1]. Though it received state support during the legislative progress, it is noteworthy that it was the interests representing the industry that decided to sponsor a bill on behalf of the rights of the performers' in England.[2] Thus it was to be expected from the outset that the endeavor to secure a statutory protection would only go to the limit where the interests of the sound recorders or the broadcasters would not be hurt. This is evident from the criminal remedy that was proposed by the proponents of the bill rather than a civil remedy that would ostensibly have provided the performer with some right akin to that of a proprietary interest. That would have got them far too close to a copyright status for the interests in the industry to feel comfortable. Further, it could be said that it could have been one way for the sound recorders to rein in the broadcasters who were causing great consternation to them and the performers' by exploiting affixed performances and live performances without authorization and without limit. The bill was moved with

[1] Initiated by Sir Martin Conway in the House of Commons. It is significant that it was only a private members bill rather than one that was moved under the aegis of the state. But the Bill did receive the support of the government. Richard Arnold, *Performers' Rights*, Sweet and Maxwell,London (2nd edn.-1997), p.14.

[2] *Ibid.* The primary sponsor of the Bill was the Gramophone Company Limited now EMI records.

the ostensible intention of improving the broadcast programs in order to encourage the performers' to come forward and exploit their talents through the new media[3]. This can be considered as a way that the broadcasters found to boost the confidence of the performers' as they were desisting from participating in programming owing to the easy susceptibility to piracy off the air. It also negatively impacted the relationship between the performer as well as the gramophone companies as the latter lent or licensed the product to the broadcasters. Thus, for the aforementioned reasons the performers' confidence had to be boosted through some credible tangible legislative means. It can be inferred that the broadcaster as well as the gramophone or the sound recording companies stood to gain and there was an interest in the advancement of some kind of protection for the performer[4].

Civil Proprietary Rights Considered

Significantly, Parliamentary interests were not oblivious to the requirements of a proprietary right or a civil right in order to make the same an effective remedy. Though it was mooted in the parliament it did not find acceptance in the House of Commons and was overruled. The proponents did attempt to bring the same within the ambit of the Copyright Act rather than attempt a separate legislation; this was vehemently opposed on technical and administrative grounds[5]. It was also advanced that an effective remedy lay in injunction and damages. Thus it can be noticed that as early as in 1925 the need was voiced in the parliamentary debates to bring the issue of performers' protection into the copyright spectrum and to grant statutory civil rights.[6]

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[3] *Ibid.*

[4] *Ibid.* The reason advanced for initiating the Bill does not make any mention of the performers' interest explicitly but only that of the industry as a whole. The concerned bill apparently had the approval of the broadcasting industry; the gramophone companies as well as that the artists despite being provided a mere criminal remedy- Statement by Earl of Shaftsbury in the House of Lords.

[5] *Ibid.* Henry Slesser propelled this debate. Whom Slesser represented appears to be an interesting question whether he was the spokesman for the performers' does not seem apparent but his utterances seem to be genuinely in their interests. Though out voted it appears he raised an important point, which would otherwise have been by passed.

[6] *Id.*, p.14-15. Statement of Sir Viscount Haldane in the House. The Bill was passed on July 31, 1925 without amendments.

The First Legislative Initiative- The Dramatic and Musical Performances Act, 1925

The first initiative to grant the performer any protection under the law was made by the English legislature in the year 1925[7]. There were no reported case laws that addressed and decided the question of performers' protection prior to this enactment[8].

Salient Features of the Act

The Act as it finally fructified was a preventive criminal measure to stall unauthorized reproduction of dramatic and musical performances[9]. It was an offence under the Act to knowingly make records directly or indirectly from or by means of the performance of any dramatic or musical work without the consent in writing of the performer[10]. The protection was targeted or was confined to the audio products that is making of records. The reproduction could be rendered either directly or indirectly and this could mean through means other than from the original recording and could also be from the recording of the artists [11]. It covers any dramatic or musical work that holds the audio part of the performance. The use of the words dramatic or musical works could mean works based on a prior literary or artistic work though such a controversy does not seem to have arisen. Significantly it is stipulated that the consent is required to be in writing –in other words, oral consent would not be sufficient[12].

The abettors or contributory infringers along with the offender are equally liable – this includes those who sell, let on hire or distributes for the purposes of trade or

[7] The Dramatic and Musical Performances Act, 1925.

[8] The judiciary as well as the litigant could have been restrained owing to the preemptive tenor of the 1911 enactment that made the extension of copyright protection to new entities virtually impossible judicially unless the parliament legislated on the same

[9] *Ibid.* The preamble expresses only this idea. Appendix 2A.

[10] Section 1(a) of the Act. Richard Arnold, *op.cit.*,p.274.

[11] It is unclear whether imitations would come under the purview.

[12] Richard Arnold, *op.cit.*,p.274.

by way of trade exposes or offers for sale or hire any record[13]. The contributors' liability arises only if the offence was for the purpose of trade. Interestingly the public performance of the record has also been accounted for, though what is used for public performance must be the pirated one or the stolen one[14]. By way of punishment, the offender is liable to a summary conviction and to a fine not exceeding 40 shillings for each record for which the offence is proved[15]. But a maximum limit of fifty pounds has been placed on any transaction. However if the purpose was with a non-trade objective even the principle offence of unauthorized production of the records has been exempted[16]. The mere possession of essential equipment to commit the crime (but not actual execution) of the Act would invite a fine not exceeding 50 pounds[17]. The Courts are empowered to order destruction of the records or plates used for making the copies[18]. The Act was strictly confined to audio records or similar contrivances for reproducing sound – leaving open the question whether the audio segment of an audiovisual would be included. The performance of any dramatic or musical work includes any performance, mechanical or otherwise of any such work that the performance is rendered or intended to be rendered audible by mechanical or electrical means[19]. Importantly, the Act defined the term "performer" as meaning the persons whose performance is mechanically reproduced[20].

Criticism

Though there is no mention that performance needed to be derived from any "work", in order to be a prerequisite to qualify as a performance under the enactment nevertheless the title of the enactment appears to be self-explanatory in this regard -Dramatic and Musical Performances Act. This can be considered ambiguous and susceptible to varied interpretations. The maiden legislation for the performer was explicitly a criminal deterrent measure but without any corporal penalty. The imposition of a paltry fine (upon a summary conviction) was the only

[13] Section 1(b).
[14] Section 1(c).
[15] Richard Arnold, *op.cit.*,p.274.
[16] *Ibid.*
[17] *Ibid.* Section 2.
[18] Section 3. Richard Arnold,*op.cit.*,p.274.
[19] *Id.*, p.275.
[20] *Ibid.* Section 4.

consequence to fall upon and deter the offender. This symbolic statute, though a harbinger of greater reforms would not be enough to counter the organized pirates and bootleggers. Though the audiovisual market might not have been as well developed as the audio segment nevertheless the Act had left out a key sunrise sector that profited from performances and was exploited by the pirates and the bootleggers. The Act did not provide a civil remedy by way of injunction and damages to the owner of the recordings or to the performer and therefore was a soft legislation, as without these the rights of the performers' would be rendered nugatory. There was no explicit mention as to who possessed the *locus- standi* to move the Court. There is no guidance in the Act with regard to the qualitative criteria to be fulfilled in order to be a performer as the definition of the word "performance" was a weak functional definition. The legislation seeks to protect the subject matter that is the performance without reference to its character either as property or a quasi-property. It is significant to note that neither is there an express negation of the fact that it is either property nor is there a mention whether it is anything in the nature of property. This confounds the interpreter as even though not ordained as being protected by copyright standards, it still could have had the property right qualities recognized. This ambiguity in the Act led to ensuing case laws.

Judicial Perspectives on Performers' Rights

The first case law within the ambit of Dramatic and Musical Performances Act, 1925, arose in the year 1930, five years after it was enacted. In the mean time there were no reported case laws as referred to in the commentaries with regard to any criminal proceedings to check infringements of the enactment. Interestingly the first case law, *Musical Performers' Protection Association Ltd.* v. *British International Pictures Ltd.*[21] sought to pray for a civil remedy rather than a criminal indictment against the alleged offenders. The plea was for an injunction to restrain the commission of a criminal offence that was essentially a civil tool in

[21] (1930) 46 T.L.R. 485, cited in Richard Arnold, *op.cit.*,p.15. The cause of action arose during the course of the making of the Alfred Hitchcock film Blackmail. The defendant was the production company that hired musicians to provide incidental music to the film. Although the defendant paid the musicians, the latter were not asked nor did they consent in writing to the incorporation of their work in the making of the film. However five of the musicians later assigned their rights under their 1925 Act to the present plaintiffs who brought the proceedings

a civil remedy. The question to be resolved by the Court was whether the 1925 Act granted a civil right and a civil remedy for any right of property.

The Judge did not feel inclined towards these arguments and declined to grant the prayer of the plaintiffs upon the following grounds. Both substantial and practical issues influenced the decision of the Court. The Judge was impelled by the fact that there was no hint of any reference to the Copyright Act in the new Act. Further the Act only provided for fines and no penalties were prescribed. Therefore there was no indication of anything propertied percolating to the performer. According to the Judge both non-copyright and copyright protected works come within the purview of protection of the act. Further, any member of the public could initiate prosecution. The court inferred that the Act was deliberately worded to preclude a property right being read in. the Judge was also further awed by the prospect of 100 separate rights of property being administered for a performance composed of a hundred performers'[22].

A Critical Viewpoint

From the judgment it appears that the right to property in intellectual labor appears to be one that can only be legislatively conferred. Only if civil remedies are explicitly conferred can a property right said to have been conferred. Though this appears to be a handicap specially confined to the realm of intellectual property and English legal statutory and judicial discourse. There is not even a murmur of performers' rights akin to that of common-law literary property even if in the present circumstances, the performers' had rendered the services though the question was as to the extent of authorization.

The judgment also exposed the other frailties that the performer was confronted with in the frame of the 1925 Act. Even with the criminal remedies afforded to him, he did not have enough teeth to counter infringements in order to compensate him and provide equal justice. The fines that were imposed on the violator went to the crown .The fact that the prosecution could be launched by anyone further diluted his responsibilities. Rights were to be determined by the kind of remedies that were conferred. A concern that the Judge echoed was the

[22] Richard Arnold, *op.cit.*,p.16.

practical difficulty involved when a number of performers were involved in a performance.[23] Thus hypothetical practical and technical difficulties appear to have overwhelmed the judicial mind in the interpretation of the 1925 Act. Even though the principle of civil injunction and damages for breach of statutory duties was commonly resorted to and granted by the Courts in England, the Courts were not inclined to apply it to the performers' under the canopy of the present Act [24].

The Gregory Committee Report

The Government of United Kingdom constituted the Gregory Committee in 1952 to go into questions and issues in copyright law revision that included the revision of performers' rights. The Committee put to rest all speculation that the Act of 1925 granted implied rights of a civil nature that was explored in the *Blackmail* case[25] in the year 1930. The artists' representation to be considered as entities eligible to copyright protection was out rightly rejected by the Committee. The Gregory Committee Report clarified that the 1925 Act did not propose to give civil rights to the performer. The Gregory Committee Report out rightly rejected the recommendations of the Musicians union, Equity and the Variety Artist's Federation to give performers' a right in the nature of a copyright. Among the several reasons cited in support of the decision the one that strongly influenced their position was that it was not done before.[26] Thus the lack of an authoritative precedent in law and practice was advanced as a substantial reason to refuse to the performer a claim to a civil redress.

The 1958 Act

Influenced by the recommendations contained in the Gregory Committee Report, the Dramatic and Musical Performances Act, 1958 was passed in United

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[23] *Id.*,p.16.

[24] *Groves* v. *Lord Wimborne* [1898] 2 Q.B.402. No further case seem to have come up under the 1925 Act and this seems to point not to the efficacy of protection for the performer rather the there seems to have been least inspirational impact on him to spur him into the litigation.

[25] Justice *McCardie* appears to have been vindicated in his judgment 20 years later.

[26] The Gregory Committee Report, 1952. Richard Arnold, *op.cit.,p.16.*

Kingdom.[27] The enactment had the following differences with its predecessor. It was a certain improvement over the pioneering legislation of 1925. Alterations were made with respect to the penal provisions that included not only enhancement of the existing fine but it was supplemented with corporal punishment (of imprisonment), in addition to the fine that was the only punitive measure in the prior enactment. The amount of fine was also raised from the previous ceiling of 50 pounds to 400 pounds.[28] There was an alternative to those who could not pay the fine, which was to undergo imprisonment on conviction or indictment for a term not exceeding two years or to a fine or to undergo both[29]. The need for authorization of the performer for private and domestic purposes was exempted but the use for non-trade purposes was not exempted. This is a significant difference from the prior provisions in 1925 enactment. The most noteworthy of the additional coverage was with regard to the extension of the Act to cover performances in cinematograph films. The making of cinematograph films knowingly without the consent of the performers' was also made an offence. The consent of the performer was required to be in writing.[30] It had to be from the performance of a dramatic or musical work. The recording could be made directly or indirectly. While the consent in writing was made compulsory with respect to performances in cinematograph, imprisonment as a punishment was not prescribed as a punitive measure for the infringement of the performers' right in the cinematograph.[31] It was also made an offence to sell or let for hire, distribute for purposes of trade or expose for sale or hire the cinematograph film so made.[32] The use of the film for exhibition purposes to the public was also a violation of the provisions. The only use that was exempted was that of use for private or domestic purpose.[33] It is noteworthy that knowledge was made an ingredient for liability.[34]

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[27] Dramatic and Musical Performers Protection Act 1958 (an Act to consolidate the Dramatic and Musical Performers Act 1925 and the provisions of the Copyright Act 1956 amending it (23rd July 1958).
[28] Section 1. *Id.*, p.276.
[29] *Ibid.*
[30] Section 2(a).
[31] Section 2. Richard Arnold, *op.cit.*,p.276.
[32] Section 2(b)
[33] Section 2(c)(Proviso).
[34] This narrows down the scope for convictions.

Another striking addition was the imposition of penalties for broadcasting without eliciting the consent of performers. Broadcast of a performance could be done only with the written consent of the performer[35]. This was to be observed even if it is only a partial performance that was covered. Interestingly imprisonment was not extended to infringement through this form of communication and the fine does not exceed 400 pounds. There is no distinction in treatment with regard to those who are in possession of plates. For the first time special defenses were introduced.[36] There was an elaborate provision for fair use concerns. If the record, cinematograph, broadcast or transmission to which the proceedings relayed was made or intended for the purpose of reporting current events then it was not be considered as infringements[37]. If the recording was only a background or incidental to the principal matters composed or represented in the film etc, it will not attract the provisions[38]. That is incidental usage did not warrant any consent from the performer.

Another significant addition to exemptions was that the exploiter who bona-fide (in good faith) believed that the consent had been procured from the performer would be exempted from liability as if it had been proved that the performer had themselves consented in writing to the making of the infringing matter.[39] Private and domestic uses were also exempted. In a sense the 1958 enactment was an advance over the prior Act having taken into account the technological changes as well as the performers' concerns therein. The performer's definition has not been attempted and any one whose performance can be mechanically reproduced is considered a performer. Therefore a descriptive or explanatory or functional definition has been attempted.

The Performers' Protection Act, 1963(amended)

The 1963 Act amending the law relating to the protection of performers' was enacted in order to give effect to the Rome Convention[40]. The difference from the

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[35] Section 5. *Id.*, p.277.
[36] *Ibid.*
[37] *Ibid.* Section 6(a).
[38] *Ibid.* Section.6 (b). It is important to note that the latter exemption is not even in the list of fair use for literary and artistic subject matter today.
[39] Section 7(a)(b). Richard Arnold, *op.cit.,p.*278.
[40] *Id.*, p.280. this is expressly provided in the preamble to the 1963 enactment.

prior enactments besides the wording of the title has been that there has been a more specified enumeration of performances with reference to works in relation to performers'[41]. The existing ambit of the term performers' and performances had got narrower. The extent of the enactment was expanded to include performances that took place outside the United Kingdom and the infringement-taking place inside the United Kingdom[42]. Though Infringements outside were not to be entertained[43]. A new provision was incorporated for taking care of offences by corporate bodies identifying those who were responsible in case of any misdemeanor by the companies[44]. Live transmissions without the consent in writing of the performer otherwise than through the use of a record or cinematograph film or the reception and the immediate retransmission of a broadcast either to a subscriber or through wires or other paths, provided by a material substance so as to be seen or heard in public was made an offence under the Act. [45] Cable programs and the possibilities they afforded were taken into account. Any infringement would invite a fine not exceeding 400 pounds and a minimum of 50 pounds.[46]

This Act was the result of international pressure particularly following the Rome Convention in the year 1961.[47] Interestingly without making any change in the criminal remedy afforded, the ambit of the Act was expanded. It might be reminded that the Rome convention was never particular about the means employed to beget protection for the performer. Thus the British idea of offering a criminal remedy was never in disagreement with what was adopted at Rome. In fact the United Kingdom proudly claimed that it had influenced Rome. However changes were brought about to the *Dramatic and Musical Performances Act* by amending the title to *Performers' Protection Act, 1963* to suit the Rome agreement. Changes were made to the definition of the term 'performer'. A

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[41] *Ibid.* Section 1.
[42] *Ibid.* Section 2.
[43] *Ibid.* The 1956 Act that was passed extended the Act to films but kept the criminal remedies intact. It has to be noted that the performer in the audio visual –film also found a criminal remedy under the 1956 Act. This seems to echo the general European trend of not isolating the audiovisual stream from the statutory initiatives.

[44] Section 4-A.
[45] *Id.*, p.281. Section 3.
[46] Section 4.
[47] United Kingdom was opposed to the grant of a full-fledged authorization right at the Rome convention, 1961. Richard Arnold, *op.cit.*,p.18.

provision was incorporated to make it clear that the place of performance was immaterial. Notice was taken of the possibilities of cross border exploitation particularly the use of cables. Further it included the extension of the Act to records made abroad without consent required by the local law and to extend the Act to the relay of performances by wire. The present statutory regime under the Performers' Protection Act was considered to be working satisfactorily as there were very few prosecutions under the 1963 Act. An increase of fines was effected in the 1972 amendments to the Performers' Protection.[48]

An Assessment of the Act and the Amendments

An analysis of the provisions and the amendments show that infringements began to be taken more seriously by the lawmakers. The increase in the fines shows the realization for the need for more deterrence to be built into the law. The introduction of corporal punishment is also a pointer in this direction. The recognition of records of performances effected outside the state and the protection accorded to these upon fulfillment of certain criteria within the country shows the credence given to the cross border exploitation under the onslaught of novel technology like broadcasting. Possibilities of evasion by resort to corporate ownership were to be curbed by the attribution of culpability to specific officers under a principle of presumption. One of the most significant features of the performers' enactments in Great Britain has been the fact that both the media (audio and the audiovisual) were taken into consideration for protecting the performers' labor. There was no discrimination meted out to the audiovisual performer. This is noteworthy considering the fact that the Rome convention that had influenced the legislations in several countries (including United Kingdom) had discriminated against performers' in audiovisuals by excluding them from the purview of the Act. However United Kingdom seemed not to oblige the spirit of the Rome convention in this respect.

Drawbacks

The imposition of fines did not directly benefit the performers' since the fines went to the state coffers. Though the State claimed that the Act functioned

[48] See the schedule appended to the Act, *Id.*, p.284.

immaculately, nevertheless there were several cases that came before the Courts expecting to beget a civil injunction remedy rather than stay limited to the apparent criminal remedies. The right of the performer cannot be invoked once the consent was granted and further duplication of the affixation and sale by third parties of the records for which consent was given. There was neither attribution nor remedy for the violation of any moral right of the performer in his performance.

Apple Corp. v. *Lingasong Ltd.*

In *Apple Corp. Ltd* v. *Lingasong* Ltd.[49], the plaintiffs were the famous five of pop- the legendary Beatles. The subject matter of contention was the performance rendered by them in a star club in Germany, Hamburg. Upon an oral consent by one of the Beatles in the presence of others, one Mr. E.W Taylor made a tape recording of the same. No consent in writing had been granted by the singers. The affixer offered to sell the same to the manager of the troupe for a price. But the price offered by the affixer-recorder was not found agreeable by the manager and was refused. After a gap of 10 years an offer was made yet again to the Beatles with a price tag of 10000 $ and a royalty but this was again refused. In the year 1975 there was a proposal from Lingasong Music Company to convert the same into gramophone records. In response to this deal and the impending release of the gramophone records, the Apple Corp., the Beatles company, moved the Court for an injunction against Lingasong seeking to restrain the defendants from making, selling or distributing by way of trade records or tapes reproducing the Hamburg performance by the Beatles together with a prayer of injunction against passing off as also against unlawfully interfering with the plaintiffs trade or business or[50] legal relations.[51] The claim was based on the Dramatic and Musical Performances Protection Act, 1958 and The Performers' Protection Act, 1963.[52]

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[49] [1977] F.S.R. 345.
[50] *Id.*, p.347.
[51] *Ibid.* Surprisingly and rather intriguingly the plaintiffs did not contend on the basis of ownership of copyright.
[52] However in the meantime, the Courts seem to have been accessed with much frequency for the criminal redress but often the Courts as can be perused in arguments for a civil redress, the Courts did grant injunctions in the nature of Anton pillar even in a criminal proceeding. Though

Justice Robert Megarry opined that the Act of 1925 and 1958 could not be regarded in isolation without reference to the Copyright Acts. The Court reasoned that the parliament enacted these limited remedies and abstained from conferring any copyright in a performance. Therefore the action of the petitioner was to bring a right of action in tort for the breach of statutory duty that would confer something in the nature of copyright on something that parliament has refrained from making the subject of copyright.[53] The Judge was convinced by the observations of Justice Mcardie in the *Blackmail* Case. In relation to the Rome convention, 1961, the Judge pointed out that though changes were brought into the ambit of the enactment but it left the structure and operation just as it were. The criminal remedy was an act of deliberate selection and not an omission. The Court also noted that the though only some sort of oral consent was given to the making of the original tapes but even that is not enough to grant any equitable relief. Equity, it observed, had a long tradition of decorously disregarding the statutory requirement of writing. Even though the difference between consent for primary fixation and the right to make copies was pointed out, the Court did not deem it necessary to interfere. The Court also took into account the long silence from the plaintiffs on this issue as negating and estopping (preempting) the right of the plaintiffs to a civil Action.

The Whiteford Committee Report

The *Whiteford Committee* went into the question of performers' rights in the year 1978[54]. The Rome convention, 1961 and its provisions to which Britain was a signatory impelled a need for the study of performers' status by the Committee. On the question of the definition of the term "performer", the Committee was convinced that protection needed to be extended to cover variety artists.[55] Though they refrained from attempting a definition of the term "variety artists", the

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these cases may not have been popularly reported nevertheless it holds evidence of norms and deviation that the Courts have taken when they would have intended or been the result of an oversight.

[53]. The petitioners relied on the principle of violation of the statutory duty relied in the case of *Cutler* v. *Wandsworth Stadium Ltd* [1949] A.C. 398 and *J. Bolinger* v. *Costa Brava Wine Co Ltd.* [1960] Ch. 262.

[54] *Copyright and Designs law, Report of the Committee to Consider the Law on Copyright and Designs*, Mr. Justice Whiteford, Chairman, Her Majesties Stationers Office, London, p.105.

[55] *Id.*, p.109.

Committee observed that it must include acrobats and jugglers within the definition of the term "performer". While the move was a break from the conservative attitude of linking the performers' protection to the performance of a literary, dramatic or an artistic work, the paradox was that it appeared to lay down an arbitrary new line of segregation. Though the Committee considered sportsmen as being ineligible for protection, it did not explain under what rationale the distinction between sportsmen and variety artists was to be maintained. This is a striking anomaly since both acrobats as well as jugglers are performers' of "non-works" that earlier on were excluded together with sports or other "non-scripted" events. Thus once the distinction between works and non-works no longer prevailed, any attempt to pick and choose performers' from the non-work based category smacked of arbitrariness and the preference was inexplicable. But the Committee did not dwell or elaborate on this other than express its preferences.[56]

With respect to 'defense' to infringement, the Committee also advanced the opinion that the requirement to prove knowledge or that the defendant had the knowledge need not be discharged by the petitioner or the complainant but the defense of innocence was to be exercised by the defendant if he *bonafidely* believed that he had reasonable grounds to believe that the consent of the performer had been obtained.[57] The Committee suggested that the penalties imposed should be constantly reviewed.[58] It felt that this could be done by taking note of the changing technology and communications environment. Even though the Committee did not make any suggestions regarding the desirability as to whether an upward revision was required or not, it is noteworthy that the dynamic environment in which the performer operates had been taken into account and the need for variations suggested.

A most significant recommendation made by the Committee was with regard to civil redress that had been a long-standing demand of the performers'. Though the Committee felt that it was difficult to confer any new property right as according to it that was outside its agenda, it nevertheless endeavored to confer new remedies. It was for the first time that a governmental body in the United

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[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*

Kingdom was keen on providing the redress through injunction and damages to the performer[59]. Though this was not tantamount to granting full property status to the performers' work, it was in fact just falling short of it. The Committee was against granting a copyright status to the performer as it felt that the grant of rights to his performance could lead to practical difficulties[60]. The right to civil redress appears to have been recommended without addressing the rest of the issues that were voiced earlier on with regard to the conferment of a civil redress. The Committee recommended that Section 2 of the 1963 Act should be amended to avoid a construction of reciprocity.

Most significantly, the Committee discarded the need for consent to be made in writing. This would make contracts vulnerable to a lot of interpretation particularly oral contracts and its implications. There is no justification advanced by the Committee in negating the need for consent of the performer to be made in writing[61]. The Committee preferred a consolidated Act covering all the present Performers' Protection Acts. It is noteworthy that they did not find the need to bring it under the canopy of the Copyright Act, though it was suggested that it should be incorporated under copyright and related rights. Nevertheless, the need for a consolidated Act was accepted which indicates the importance that was ascribed to performers' rights protection[62]. The Committee was vehement in the disapproval of the idea of a single Act consolidating both the copyright and performers' protection. The reason cited was the prevailing complexity of the Copyright Act.[63]

The Turning Point for Performers' Rights - the *Ex parte* Decision

After the unsuccessful attempt in persuading a civil right for the performer in *Apple Corps* v. *Lingasong,* the artists approached the Courts in the following year in *Exparte Island Records* case.[64] The plaintiffs were comprised of a combination

[59] *Id.*,p.110.
[60] *Id.*, pp.104 to 105. Whiteford Committee Report.
[61] *Id.*, p.110.
[62] *Ibid.*
[63] *Id.*, p.108. The Committee relied heavily on the recommendations of the phonographic industry and the musicians union.

[64] [1978] Ch.122.

of successful artists[65] along with the recording companies. Each artist had an exclusive contract with the recording company for the exploitation of his musical performances. It was alleged that their business was being deleteriously affected and damaged owing to the illegal conduct of the defendants dealing with tape recordings of live musical performances and making copies of the same and selling these in the form of gramophone records, tapes and cartridges[66]. Their conduct was causing loss by reducing the sale of legitimate records. This was contrary to the statute as exemplified in Dramatic and Musical Performers' Protection Act, 1958[67]. The plaintiffs prayed for an Anton pillar order, as they feared that all evidence would disappear if they served a writ on the defendants.

The plaintiffs appeal was on the ground that they had a claim for breach of a statutory duty created by the Dramatic And Musical Performers' Protection Act, 1958, and alternatively that they had a right in equity to protect their private rights from injury by tortious or criminal acts.[68] The question before the Court was whether bootlegging which was a crime could confer a civil right of Action on the performers' and recording companies. They pointed out that as the statute had been passed for the protection of a particular person or class of persons (the performers) as they could give or refuse their written consent. The Courts also had to consider the protection of private rights as a reason for a civil cause of action[69]. Based on the decision of *Gouriet* v. *Union of Post Office Workers*[70] that though generally a violation of a criminal statute could not afford a civil redress nevertheless there was an exception when the offence was not only against the public at large but also causes special damage to the private individual. If a petitioner can show that his private right is being interfered by a criminal act thus causing or threatening to cause him special damage over and above that caused to the generality of the public then he does have a cause of action.

The Court rejected the first premise on the ground that the Act did not impose a public duty towards a class (performers) in comparison to other Act's of the genre that begot and invoked such a cause of action. The appeal was allowed by a majority of three to two on the second ground where in the Judges including Lord

[65] *Ibid.* About thirty in numbers.
[66] *Ibid.* Bootlegging.
[67] *Id.*,p.124.
[68] *Id.*, p.126.
[69] *Ibid.*
[70] [1978] A.C.435.

Denning reasoned that the rights of the performer's and the record companies under contracts between them were civil rights in the nature of rights of property which gave rise to a civil cause of action.[71] This judgment had far-reaching ramifications in that it granted untrammeled property rights though not perhaps in the same parlance and character as what is meant by it in copyright terms[72].

The Intervening Lonhro Precedent

In the *Lonhro Ltd. and Another* v. *Shell Petroleum Co. Ltd* [73] the wide principle of civil liability accepted in *Exparte* Island Record Case that arose upon injury to property or rights in the nature of property was denied its sanctity by the House of Lords. The observation of the learned Judge further narrowed the scope of remedy for those affected by bootlegging though the performers' were exempted. It is noteworthy that the facts don't reveal a similarity with that of intellectual property and contracts associated with it[74]. Lord Diplock cast certain observations about the decision in *Exparte*. The learned Judge observed, *"The application for Anton pillar orders was made by performers' whose performances had been bootlegged by the defendant without their consent and also by record companies with whom the performers' had entered into exclusive contracts. So far as the application by performers' was concerned it could have been granted for entirely orthodox reasons. (As it had been passed for the protection of performers'). Whether the record companies would have been entitled to obtain the order in a civil action to which the performers' whose performances had been bootlegged were not parties is a matter that for the present purposes it is not necessary to*

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[71] *Id.*, p.135.

[72] The perspective of property rights put forward by Lord Denning raised a lot of skeptic comments from the legal analysts. See David Kitchin, "Putting the Boot into Bootlegging Ex Parte Island Record Ltd" [1978] EIPR 33

[73] *Lonhro Ltd. and Another* v. *Shell Petroleum Co. Ltd* (No.2)[1982] A.C.173, H.L.

[74] *Id.*, p.175. *Lonhro* were the owners of a crude oil pipeline from the port of Iberia in Mozambique to a refinery at Feruka near Umtale in Eastern Zimbabwe, called at all material times as Rhodesia. The refinery was operated and owned by seven participating oil companies and the use of the pipeline owned by the plaintiffs was governed by an agreement. While the agreement to source fuel through the pipeline was subsisting there was a declaration of independence from the government of the region. This led to sanctions being imposed by Great Britain by means of two directives. Defying the sanctions the refinery company brought oil through routes without resorting to the pipeline owned by the petitioners. This led to heavy loss for the plaintiffs and they wanted to restrain the refinery from resorting to any other means of sourcing the oil than by way of pipeline as that was causing interference with the contractual agreement between them and thereby sustaining damages.

decide". Further Justice Lord Diplock was unable to agree to the propositions of Justice Lord Denning and Waller [75] in *Exparte* with regard to their rights in the nature of property propositions.

RCA v. *Pollard* [76]

In this case the Judges relied on the *Lonhro* judgment to drive home the point that the petitioners were not entitled to a civil action for injunction and damages as claimed by them. The Lonhro decision had overruled the wide principle of civil liability enunciated by Denning and Waller Justice that the injury to property or rights in the nature of property was sufficient to invoke the civil right of Action. The Judges endorsed both the views of Lord Diplock that overruled the decision of Shaw and Waller as well as that of Denning and Waller in *Exparte*[77]. The effect was that while the argument whether the statute was for the performer as a particular class was disapproved in *Exparte* was reinstated as the proper yardstick to which the performers' qualified, on the other hand, the wide theory of injury to property to which any party, be it the performer or the recorder or any affected party sought recourse on the civil side to the Courts was set aside as being too wide a principle to be found agreeable in *Lonhro.*

The Court felt doubtful in allowing some such principle where the defendant's conduct involved no interference with contractual relationships but merely reduces the potential profits. Upon the facts, the Court found that the conduct of the defendants did not reduce the value of the plaintiffs' property. As the wider principle did not find favor with *Lonhro*, there was no question of any non-

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[75] *Id.*,p.187.

[76] [1983] Ch. 135. *RCA Corporation* had at all material times the benefit of exclusive recording contracts with Elvis Presley where by they were entitled to the right to exploit for profit records of all performances of Elvis Presley. The second plaintiff's- RCA Ltd was at all material times licensed by the first plaintiffs in respect of the sale, manufacture and distribution in the U.K. of the records of the performances of Elvis Presley. The plaintiffs claimed that they had the right to exploit the records of Elvis Presley to the exclusion to all others and that they had private proprietary interests, which they had to protect from the unlawful interference that caused damage to their interests. The plaintiffs further alleged that business of the defendants of dealing with bootleg records of Elvis Presley was a violation of their legal right. They also sought a declaration that the defendants were not entitled to engage in making and selling or letting for hire or distribution for the purpose of trade, exposing or offering for sale or hire or using for public performance any record of the performance of Elvis Presley without his consent in writing, it was also sought to restrain him by way of injunction, to order delivery up and special damages as further relief.

[77] *Id.*, p.158.

proximal damage to be taken note of and the need for a civil right to be invoked. All the Judges found the result undesirable and regrettable but decided that the parliament was a more apt office to bring in new remedies for new wrongs.[78] The judgment was heartening for the performer as the recognition of the performer as a class to be protected gave them the locus for civil action[79], while the deprecation of the injury to property theory by the court did not provide the recorder with any reprieve. While the performer gained inadvertently, the fate of the recorder was left undecided.[80] One outstanding characteristic of the judgment has been that there has been no out right negation of the character of property to the subject in dispute that is the recorded performances.

Rickless v. *United Artists Corp.*

The next landmark in the series of battles for that assured civil right of action was in *Rickless* v. *United Artists Corp.*[81] This concerned the production by Blake Edwards and United Artists of a sixth 'Pink Panther' film after the death of Peter Sellers, using clips and outtakes from previous films of the artiste in the series. . The test as formulated and accepted in *Lonhro* decision was followed by bringing the Act within the ambit of the principle of a civil claim for statutory breach. The court recognized that a coherent scheme of protection for the benefit of the performer had already been framed in the Act. The most interesting highlight of the decision was the recognition of proprietary pretensions in the provisions of the Rome convention imparting protection to the performer in order to substantiate the availability of civil rights and remedies for the performer. The Judge inferred that civil rights were an implicit endowment on the performer under the Rome convention[82]. Though the Rome convention had left the matter to the respective states, it had not expressly spoken against it. But to have read in an obligation in the absence of any specific directive in the Rome Convention was the denial of the liberal tone of Art. 7 and the volition of those countries that

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[78] Oliver J. *Id.*, p.154.
[79] Allan Evans, "Civil Remedies for Bootlegging" [1983] 5 EIPR 31.
[80] Allison Coleman,"Performers Protection After Pollard" [1983] 5 EIPR 71.
[81] [1986] F.S.R. 502. Also reported in (1988) Q.B.40. Personal representatives of Peter Seller's brought the action relying on a number of causes of action including breach of statutory duty under the Performers' Protection Acts.
[82] Interestingly this is nowhere provided in the Performers' Protection Act.

wanted to enjoy the freedom of option.[83] Unlike prior instances where in the Act was considered secondary and insignificant in comparison to notions and concepts in copyright, the Court thought differently in the *Rickless* decision. Till then the performers' Act was even considered inferior to other criminal enactments as the denial of the right of civil claim for statutory breach in previous case laws show. It was also clarified that the Act was a significant welfare legislation that the public had a duty to protect for the welfare of the performers'. It was also settled that the performers' had a right as against the corresponding duty on the public to observe adherence to the Act. In other words, it was a different interpretation on the same set of materials that was presented before and after the Rome convention. Though it must be taken note that the grant of civil claim against breach of statutory right cannot be considered by any stretch of imagination as equivalent to a grant of property rights in the performance.

Rickless Examined

As against the popular perception of the performer having been granted the property rights, the *Rickless* judgment has only granted him a civil right to injunction and damages[84]. But the advantages are relative in the sense that the *Rickless* judgment did reach this conclusion by reasoning that the enactment was for the protection of the performer, which brought out the welfare point of the enactment -not that it was very much in doubt. The major premise and consequence of the judgment was that the grant of private rights of action inevitably led to the endowment of property rights. Any right of Action for injunction and damages led to the creation of property rights. It cannot have an isolated existence apart from the concept of the property. Though the application of the term property would create a logical administrative problem that seems to have been resolved by the use of the term quasi property. The judgment further infers that if the Act has been for the protection of the performer then it would have to endow private rights of action to the performer. Whether this would

[83] Though the same has been subject to much criticism the re cognition and the status accorded to the Act as a means securing to the performers' dignified and undiscriminating protection was assured

[84] The judgment has come under academic debate and analysis, see Adrienne Page," Rickless v. United Artists - a Queens Bench Perspective on Copyright and Performers right" [1986] 8 EIPR 6.

provide all the remedies as afforded to a property right if it is acknowledged is doubtful. Though this provides the remedies of injunction and damages it need not fully grant other relief's that commonly go with property rights. However there is a paradox in this regard as the reason why the performer has found himself entitled to the relief for the statutory breach is due to its public right character of the law to protect the entity. It is not a private right that spurs or invokes a property right but it is a public right that has spurred the creation of a private right of action.

Critically it can be opined that the judgment totally misconstrued the Rome Convention at the interpretational level as grant of civil rights was substantiated on the basis of the Convention. It is notable that the Convention was large hearted to provide countries with much leeway by adopting the possibility of prevention clause. Further the *Rickless* case revolved around the fact of performers' rights in films. The attention of the Judge does not seem to have been brought to Article 19 of the Rome Convention that categorically ousts the application of the Art.7 from the performers' who have consented to perform in films or audiovisuals. Despite this and without reference to this apparent exception, the judgment seems to have based itself on the Rome convention as the influencing reason particularly in the factual context of the rights in films. The dilemma of the British Courts is evident from the fact that despite the acknowledgement of the breach of statutory rights leading to civil rights of private kind that it termed quasi property, they could not allow or countenance an injury to property argument. The ambit of the breach of statutory right is wider than the injury to property argument if appellation of "property" to performers' efforts is what the Judges wanted to guard against.

Thus without countenancing the question of property status in a straight forward manner nor classifying the performers' right as being of such status or with no reference to its incapacities *vis- a- vis* the copyright provisions, on the mere ground of principles alone, the judgment sought to base the performers' civil rights on principles that emanate out of the violation of any general statute. Finally, on a comparison with other legal regimes, it can be seen that the English Courts' finally succeeded in granting the right of civil rights to performers' without touching upon the areas of common-law intellectual property, unfair competition, right of privacy, the right of publicity and most basically property rights in

intangibles. This indirect approach leads to an inadvertent grant of a right of unqualified limitless duration to the performer that is more advantageous to them than the limits of copyright. This approach, nevertheless, effectively procured for the performer, a guarantee against unauthorized use of their performances.

Salient Features of Performers' Rights in U.K. under the Copyright Designs and Patents Act (CDPA), 1988

Some of the salient features of performers' legal status in Britain today is instructive of the way the rights can be realized and managed for securing the rights of the performer. Under the weight of international and regional pressures like the European Commission, United Kingdom passed the Copyright, Designs and Patents Act in 1988. It incorporated changes in tune with the demands of the technologically transformed world as well as in tune with the demands of the administrative challenges to manage the rights. Performers' protection ceased to be a separate enactment under the Performer Protection Acts and was protected under the canopy of the 1988 Act. The only distinction was with respect to the fact that performers' rights were placed in Part-II, while the traditional entities were placed in Part I. This was symbolic of the fact that there was a variation in the treatment meted to the traditional copyright enjoying entities, the performers' and others. In other words protection would not be fully synonymous with that enjoyed by the copyright entities like the literary, dramatic and artistic subject matter. Even though the rights are marginally distinctive, nevertheless, there are broad areas of convergence and equivalence between the rights. The variations would be instructive of the difficulties in management, exploitation and administration if it were made on equal terms with the traditional copyright subject matter.

Performers' rights subsist in a qualifying performance in the United Kingdom law without observance of any formalities and very importantly it exists independent of copyright that may subsist in any work.[85] The CDPA 1988 does not define the term "performer" but defines the term performance. However the definition of the term "performance" reins in the qualification of eligibility for the performer and sets limits to it. The term "Performance" means a dramatic performance, a

[85] Section 180(4)(a).

musical performance, a reading or recitation of a literary work or a performance of a variety act or any similar presentation.[86] The performance should be a live performance and one or more individuals can render it. It is noteworthy that while the first two categories are not linked to the performance of any work-the last two categories are so linked. Therefore it is a hybrid definition.[87] Significantly the term "variety act" has not been defined under the Act and therefore commentators have called for the meaning ascribed to it in a dictionary.[88] If the inclusion of "variety act" was inspired by the *Whiteford Committee* then it could mean magicians, clowns, jugglers, acrobats and the like. However the inclusion of the term "similar presentations" in the definition of performance leaves the way open for borderline cases. This would compel a judicial interpretation, as the principle of *ejusdem generis* would have to be applied, in order to identify those similar presentations that fall within the ambit of a variety act. It can be said that because of the hybrid nature of the term performances, the shadow of subjectivity still pervades the definition. For example not all sporting performances can qualify. But with the increasing entertainment quality, characteristic techniques and discipline in the aesthetics of the game and the immense commercial value much of the sports as well as those that are improvisations of the arts like ball room dancing can qualify.[89] The terms of the provision therefore gives enormous flexibility for giving room for improvised performances, interviews and aleatoric (interactive shows) works. While the Act has tried to be as certain as possible with regard to eligible performances, the usage of subjective phrases creates room for speculation.[90] The lack of a definition of a performer also gives way to speculation whether either artiste interpreters or artiste executants should be protected.[91]

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[86] Section 180(2)(a)(b)(c)(d) of the CDPA. 1988.
[87] Richard Arnold, *op.cit.*, p.42.
[88] *Ibid.*
[89] While the Gregory Committee skirted the issue on the ground that it had not been rendered before, both Whiteford Committee and the following green papers did not consider the plea for extension. *Id.*, p.46.
[90] It has even been broached whether the artistic works such as lighting modulation during plays would qualify to be a performance, the rights owner being the light man technician.
[91] Richard Arnold, *op.cit.*, p.50. There is support for this by reference to the French text of the Rome convention and certain other documents such as the preparatory document for and report of the WIPO/UNESCO Committee of governmental experts on dramatic, choreographic and musical works.

The 1988 Act does not emphasize on a further classification or filtration among the performers' who are heard in the audio or appear in the film. In other words there is no requirement that the performers' should be professional and that the amateurs or less creative among them would be excluded from protection.[92] Though the term performances are hybrid, there is no further classification between performers' based on any rational. Performers' rights cover each performer and in a collective performance it is not shared between the performers as each one of them is entitled to their rights.

The Act does not discriminate between mediums of communication or affixation and both audio as well as audiovisual medium performances of the performer, with some differences, are amenable to protection. The recording can be made either directly from the live performance or from a broadcast or cable program of the performance. The recording will also include the recording, made directly or indirectly from another recording of the performance.[93]

The Need for Consent

The rights are violated if the users exploit the performances either live or recorded without the consent of the performer[94]. It is noteworthy that no positive authorization right in the nature of that granted to the copyright protected entities under part 1 has been given to the performers. However since the amendment in 1996 following the harmonization directives of the European commission, there is a noticeable change in phraseology[95]. Further there has been an up gradation of rights to property rights with rights in live performances continuing to be considered as non-property rights. There is a need for consent to be elicited from the performer[96] and also the owner of recording rights. No formalities are specified for the manner in which consent has to be expressed. The rights include the need for consent for recording the live performance, broadcasts the live performance or makes a recording directly from the live performance that is broadcast. The rights from the recording are the right of reproduction, distribution, rental and lending and the right of making available.

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[92] *Ibid.*
[93] (a),(b),(c).
[94] Section 182(1)(a)(b)(C) of CDPA, 1988.
[95] For instance the term authorization can be noticed with regard to the distribution right.,
[96] Section 180(1)(a)(b).

The rights make the CDPA to be in line with the WPPT requirements and in particular the "making available" right brings it at par with the digital challenges. The definition of "making available" is at par with the definition provided for in the WPPT in that it makes the making available of the recording without the consent of the performer by electronic transmission in such a way that members of the public may access the recording from a place and at a time individually chosen by them.[97] It is also an infringement, bereft of distinctions, if the recording is shown or played in public or communicated to the public if that recording was made without the consent of the performer. This means that once the consent for recording is proper any use of this nature does not provoke action unless for equitable remuneration with respect to sound recordings.

Duration of Protection

The performers' rights subsist from the year next following the date of performance for a period of 50 years.[98] This applies to all performances without distinction of nationality and place of performance. Through the E.C term Directive an improvisation has been brought about in this regard in that if within the 50 years a recording is released then for another period of 50 years from the end of the calendar year in which the recording was released rights would subsist for a period of 50 years. If the case concerns the duration to be enjoyed by a non-E.C. national then the reciprocal treatment principle would be the yardstick applied. This is a major gain of additional 50 years for the performer and this could provide the performer a right of 101 years (divided between unpublished and published durations- still it begets added protection).[99]

Assignment of Rights

Initially performers' rights were not granted a property status but only civil rights of redress for breach of statutory duty and therefore it could not be assigned. They were similar to but fell short of full copyright status. But from 1996 performers' rights have been upgraded (partly) to the status of property rights. The rights are divided on the basis of that which may be assigned called

[97] Section 182CA(1).
[98] Section 191(a)(b).
[99] Richard Arnold,*op.cit.*, p.59.

performers' property rights and those that are not assignable but transmissible on death. Property rights include reproduction right, distribution right, and rental right of the recording and the right of making available. While the non-property rights include right of fixation and broadcast of a live performance[100], public performance and broadcasting by means of recording made without consent [101] and dealing in illicit recording. These are not assignable.[102] These rights are transmissible on death. It is important to note that the non-assignability of certain rights has been effected to safeguard the performer from the clutches of the unfair bargains so that rights in the performance and initial fixation are not frittered away at throwaway prices.

Formalities

Property rights of the performer can be assigned only by means of a written instrument, signed by and on behalf of the assignor.[103] The existence of a mere agreement to assign but no executed assignment will operate an equitable assignment in favor of the assignee in the similar mode as the concept is applied with respect to copyright. Assignment of property rights in relation to a future recording of contracts is also provided for.[104] Assignment of a future recording of a performance would be ineffective only in certain circumstances like a prior assignment of the subject matter, no consideration was given, a condition precedent remaining unfulfilled and where the purported assignment formed part of the contract which had been held to be unenforceable as being in restraint of trade.[105] Assignment of future rights cannot be rendered infructous by the absence of a signature. These provisions are noteworthy and useful as they secure the performer against unscrupulous exploitative practices in the trade by taking away all future works for paltry sums or even circumvents a prior assignment to a collecting society.

Presumed Transfer of Rights

One of the most conspicuous provisions has been the provision of presumed transfer of rental rights of performers' rights in films. The provision says that unless there is a contract to the contrary there is a presumed transfer of

[100] S.182.
[101] S.183.
[102] S.184.
[103] Section 191(a) (3).
[104] Section 191(c)(2).
[105] See Richard Arnold, *op.cit.*,p.68.

performers' rights in films arising from the inclusion of his recording of the performance in the film[106]. The performer is entitled to an equitable remuneration for the presumed transfer of rental rights[107]. It is important to note that such a presumption does not work in case of sound recordings. Even agreements involving intermediaries would give effect to this agreement. The non-property as well as the property rights is susceptible to licensing practices. Either in relation to a specific performances or specific description of performances. Licenses can be either express or implied and the benefits of the same would percolate to successors and other representatives of the interest.

Compulsory Licensing

Compulsory licensing provisions are another important high light of the performers' rights regime in United Kingdom. Besides the circumstance where in the Copyright Tribunal can enforce the power of consent when the whereabouts or the identity of the owner of the performers' right is unknown, there are instances like in cable program service under the Broadcast Act, 1990 where in the inclusion is covered by a statutory license upon the payment of reasonable royalty or other payment. The Copyright Tribunal can also give consent for compulsory licensing subject to the circumstances that the performer has withheld the grant of consent unreasonably. The latter condition has however been removed upon the intervention of the E.C Rental and Lending Rights Directive, which found it objectionable. It is important to note that the Tribunal has the power to grant consent only in specific circumstances and this does not cover the entire array of rights[108]. It is important to note that the Tribunal can undertake any action only after reasonable enquiry had been conducted. The term reasonable enquiry can include writing to and attempting to elicit information from the collective bargaining and administration authorities[109]. The Tribunal has to ascertain where the original recording has been made subject to proper consent

[106] Section 192(f)(1).
[107] 191(f)(4).
[108] One of the few circumstances where in Courts had to resolve a compulsory licensing issue was in the case of *Exparte Sianel Pedwar Cymru* [1993] EMLR 251. While the deceased performer was known, the Tribunal gave the consent on behalf of unknown representatives.
[109] A 28-day period of notice has to grant and it has to be published in an appropriate manner. Section 190(3).

from the performer and whether any further recording that is being attempted is in consonance with the purposes for which the original recording was made[110]. The Tribunal may either not give consent but might only do so upon proper terms of remuneration being given. The Tribunals consent is specific to the right asked for (that is the reproduction right) and would not provide an open sanction for the recording to be exploited through any other avenues[111]. It is important to note that if in the future the real owner is ever identified the tribunal can include the terms of payment in the order[112].

The circumstances are provided for where in the performers' rights shall be available as of right when it is being exercised contrary to public interest. This would require the sanction of the monopolies and mergers commission supplemented by the sanction of license by the secretary of state. The practices that invite the action from the commission are as follows when conditions are included in licenses granted by the owner of a performers' right that tend to restrict the use by which recording of the or the copy of the recording may be put by the licensee or which restrict the right of the owner to grant other licenses and the refusal of an owner to grant licenses on reasonable terms. The concerned Minister of Trade and Industry can cancel or modify the conditions and/ or to provide that the licenses in respect of performers' property rights shall be available as of right[113]. The Copyright Tribunal has the power to settle the terms of the license in default of the agreement if any that is not arrived at on the issue. Similarly the lending of films and audio recordings shall be considered to be proper with the payment of a reasonable royalty or other payment, for this a special order would have to be made by the secretary concerned. These performers' rights that have been revived by the terms of E.C. commission directive would be subject only to the payment of a reasonable royalty.

Non-Property Rights

Performers' non-property rights comprise of fixation[114] and live broadcasting of performance[115], public performance and live broadcasting by means of recording

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[110] Section 190 (5).
[111] Like through rental and lending and distribution of copies.
[112] Section 190(6).
[113] The Minister will have respect for terms of conventions in this respect to which the United Kingdom is a party
[114] Section 182.
[115] Section 192 A (1).

made without consent[116] and the right to deal with illicit recording. These rights are not assignable but are transmissible upon death. It has been specifically provided that the recording rights should be assigned or otherwise transmitted though the contractual rights upon which they depend are transmissible[117] and the assignees are not affected.

The Right to Equitable Remuneration

One of the most important developments within the United Kingdom copyright law has been the creation of the rental and lending rights for intellectual creations including performer rights.[118] This was the outcome of the European Commission harmonization drives that pioneered the incorporation of new and unifying changes across the European region. Where a commercially published sound recording of the whole or any substantial part of a performance in which performers' rights subsist is either played in public or included in broadcast or a cable program service, the performer is entitled to an equitable remuneration from the owner of the copyright in a sound recording[119]. Another circumstance in which this operates is when there is a presumed transfer of a performers' rental right in copies of a film or an actual transfer of his rental right in copies of a film or of a sound recording to the producer[120]. Even if the rental right transferred were assigned to a third party, the performer would be eligible to collect it from him.[121] The right to equitable remuneration is unwaivable. This has a twin effect of nullifying agreements that try to circumvent the rigor of the right by providing for either the waiver of the right or exclusion from questioning the amount agreed upon as equitable remuneration. There is no way in which the role of the Copyright Tribunal can be ousted from the regulatory function on equitable remuneration. It has been mandatorily provided that the right would be transmissible only to a collecting society for the purpose of enabling it to enforce

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[116] Section 184.
[117] Richard Arnold,*op.cit.*, p.71 Section 192b(1).
[118] The definitions of rental and lending rights have been clarified to check any overlap into the realm of communication to the public. 182(c) (4) and 182(c) (3) (a) (b) (c).
[119] Section 182(d)(1).
[120] Section 191(f) (4) and Section 191(g)(1). This can be rendered even through intermediaries.
[121] Section 191(g)(3).

the right on his behalf.[122] The equitable remuneration can be arrived at either through the means of mutual agreement or through the means of intervention and prescription by the Copyright Tribunal. The Tribunal shall make the order as to the method of calculation n as it may feel is reasonable in the circumstances. The Tribunal is expected to take into account the value of contribution made to the performance by the performer either in the audio or in the film. The criterion on which this is to be based on has not been spelt out but nevertheless this implies that a categorization between artistes would definitely be in mind while applying to make such a valuation. The reference to the Tribunal may be made during the course of the protection. This means that even if an amount had been arrived at either by agreement or by reference to the Tribunal, this would still be amenable to review on a further reference to the Tribunal. A major highlight of this right has been that there can be no move to exclude or restrict the Equitable Remuneration or to oust the right of any person or restrain any person to question the amount of equitable remuneration or to restrict the jurisdiction of the Copyright Tribunal.[123] With respect to the right to equitable enumeration, the performer can deal the same either individually or by means of the collective administration society. This once again sees to it that the benefit reaches the performer and does not seep into the control of others.

Difference Between Remuneration in Sound Recordings and Films

There is a subtle difference in the mode of payment of equitable remuneration between the remuneration to be paid for performances in films and those to be paid for performances on sound recordings. The mode of payment on the rental right in the film can be a single payment made at the time of transfer of the right.[124] There is no corresponding provision with respect to the sound recordings. It is important to note that the Act does not define what is meant by the term "Equitable Remuneration". The extent of exploitation does not profoundly appear to be the criteria essential to be taken into account to resolve the question of mode of payment whether it should be single or any other mode

[122] The rights are transmissible by testamentary disposition or by operation of law as personal or movable property.
[123] Section 182 D (7) (a)(b).
[124] Section 191(h)(4).

remuneration. In this aspect too there is a difference between sound recordings and the films. While it is specifically mentioned in the Act that a single equitable remuneration has to be given each time the recording is played such a stipulation is not mentioned with respect to the rental of films. However, there is reason to characterize this distinction as merit less as the term Equitable Remuneration as meant in the E.C. Rental and Lending Directive would testify.[125] It speaks about equitable remuneration for the rental; this means that the remuneration has to be directly proportional to the extent of rental. This is despite Section 16 of the recital that says that the equitable remuneration may be paid at any time on or after the conclusion of the contract. [126]

Yet another significant difference between the rights accorded to performers in sound recordings and films is that the performer in sound recordings has been given much longer rope with respect to rights than that accorded to the performer in the films. While a substantial right of rental has been provided to the performer in the sound recording, the performer in the film has been extended a qualified right of rental. There is no equitable remuneration for the performer in sound recording for the rental of the same. However the rental rights is presumably transferred for the performer in films when he agrees to incorporate his performance in the film to the producer. This is subject to equitable remuneration. It would require experience in practice as to which is more valuable or effective to performers. Again in contrast to the rights of the performer in the sound recording, the performer in the film is not granted any right in the performance or broadcast or incorporation in the cable program service. There is no equitable remuneration either for the concerned forms of exploitation.[127] The performer in the sound recordings on the other hand is vested with rights to equitable remuneration for these modes of exploitations. The only criteria to be fulfilled being that the records must be commercially published. The only drawback for this criteria is that the characteristics of commercial publication is narrower than that construed when the performance reaches the public. Commercial publication is considered to take place when the issue of copies is

[125] Article 4 (1).
[126] Interpretations are possible to suggest that it doesn't indicate the amount but the method and the timer of payment Richard Arnold, *op.cit.*,p.83.
[127] Section 182D.

effected. When the sound records whose copies have not been circulated are broadcast or played in public or used in cable program service then the performer would not be entitled to equitable remuneration as the terms of the word commercial publication would not be fulfilled.

Collective Licensing

Collective licensing bodies have become indispensable mechanisms to implement the administration of multifarious performers' rights. However the law has taken precautions to see that these powers of ownership and administration by the collective administering or licensing bodies are not in any way abused through monopoly. In view of this the 1988 Act of U.K. had constituted the Copyright Tribunal with expanded powers to adjudicate this question. Further provisions have been added since the introduction of performers' property rights by the regulations introduced in 1996. Both licensing schemes and licensing bodies are regulated under the Act.[128] Licensing schemes operated by these bodies can be referred to the Copyright Tribunal and application for licenses can be made to the Tribunal. The application must relate to licenses for copying a recording of the whole or any substantial part of a performance in which performers' right subsists or for renting or lending the copies to the public[129]. However there is no power in the Tribunal with respect to issue of copies to the public other than the aspects relating to lending and renting[130]. The reference can be from a representative body alone and not from a single individual if it is only the scheme that is proposed to be operated.[131]The organization has to be reasonably representative of the interests who need a reference. The Tribunal in this regard is endowed with wide powers for granting an order in full, in partial or in a modified form for any sanction for license of any limit of duration. While no power to prevent the prevalent scheme from being operational is present with the Tribunal, if it passes an order it can be dated retrospectively. The Copyright Tribunal has the jurisdiction to hear and determine the proceedings for

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[128] Schedule 2A.
[129] Schedule 2A. Para.2 (a)(b).
[130] However it has been ruled that the Copyright Tribunal can consider the scheme as a whole. The decision was given in the *British Phonographic Industry Ltd.* v. *Mechanical Copyright Protection Society Ltd., Composers' Joint Council Intervening* (No.2) [1993] EMLR 86.
[131] Schedule2 A. Para. 3(1).

determining the amount of equitable remuneration for exploitation of commercial sound recordings[132]. It has the power to decide upon reference the amount of equitable remuneration for transfer of rental right, Determination of royalty or other remuneration to be paid with respect to retransmission of broadcasts of performances or recordings, references made to it with respect to licensing schemes in operation and settling royalty for lending of recorded performances.

A Flexible Approach

Even after a reference, the Tribunal can be accessed again, though a minimum period needs to have elapsed from the time of the previous order[133]. Not only with respect to the unreason ability of the terms of the license but also where there has been a sheer failure to grant the license, the aggrieved can knock on the doors of the Tribunal[134]. Even grant of licenses beyond the scope of schemes are brought within the scope of the Tribunal for checking out their reasonability[135]. The tribunal in such cases of reference makes an order if it is satisfied that the charge is well founded. The order shall contain such terms that the Tribunal considers reasonable[136]. Both the operator of the scheme as well as the applicant has the right to apply to the tribunal to review the order.[137] The endowment of powers on the Tribunal to keep vigil and scrutinize the various licensing schemes and instruments act as a shield against abuse of a monopoly position and makes use and exploitation of performances much more accessible and economically cost effective.

Service Providers' Liability

Provision for clarifying the liability of the service provider has been incorporated by making him liable only if there was an actual knowledge to the service provider of their service being used by another for infringement. In deciding on the

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[132] Section 205 B (1)(A) TO (H).
[133]Schedule 2A. Para. 5 (1).
[134]Schedule 2A. Para. 6(1).
[135] Reasonability depends on the availability of other schemes, or granting of other licenses to other persons in similar circumstances, the terms of those licenses and schemes and to exercise its powers so as to secure that there is no unreasonable discrimination between licenses or prospective licenses under the scheme or license in question and licensees under those schemes and licenses. The Tribunal has to take into account the entirety of circumstances and is vested with tremendous discretion. Richard Arnold, *op.cit.*, p.89.
[136]Schedule 2A. Para. 6(2)(a), (b) and 6(3)(a)(b).
[137] But this can be only after the elapse of a particular period of time. Schedule 2A. 7(2)(a)(b).

question of knowledge the question whether any notice had been received would be looked into[138].

Infringements

The CDPA upgraded the protection to the performer from a mere right of civil action for breach of statutory duty to a wholesome property right in the form of a copyright since the year 1996. While performers' property rights are actionable in the same manner as the infringements of other property copyrights, the non-property rights have been distinctively treated as they can invite actions only for the breach of statutory duty. An important requirement under the CDPA, 1988 has been that the infringer in case of secondary infringements needs to know or should have reason to know that the act lacked consent in order to be found to have violated the provisions.[139] This expands the notion with respect to the culpability of the accused as it goes beyond the need for actual knowledge.

Fair Use Provisions

The provisions regarding the permitted acts and exceptions with respect to performers' rights had been provided for taking into account the peculiarities of the subject matter.[140] The first of the exceptions is for criticism and news reporting purposes.[141] Though what constitutes fair dealing is a matter of fact that varies according to the circumstances of each case.[142] Incidental inclusions of a performance in a sound recording, film, broadcast or cable program is not an infringement.[143] However music or other accompanying words that are

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[138] 191JA(1)(2).

[139] This is different from the position followed under the performers' protection act where in there was a requirement of the knowledge. The Courts under the previous acts required that the defendant had the actual knowledge of the lack of consent *Gaumont British Distributors Ltd.* v. *Henry* [1939] 2 K.B. 711. In the Peter Sellers decision it was found that the defendant did not have the actual knowledge but they had reason to believe so.

[140] It has not been verbatim reproductions of the CDPA Part I dealing with the fair use provisions of copyright protected entities such as literary and artistic works. While there are areas of broad similarity nevertheless there are differences molded specifically to suit the requirements of the subject matter. One can find variations with the exceptions suggested under the European commission E.C. Rental And Lending Rights Directive and the Rome Convention. The Act goes a long way forward than the exceptions accorded to literary and artistic works under the convention.

[141] Schedule 2.Para.2. (1).

[142] Richard Arnold, *op.cit.*, p.123.

[143] Schedule.2. Para. 3(1)

deliberately included are not considered to be incidentally included.[144] In such circumstances it appears to be irrelevant whether they are covered by copyright or not. Copying of a recording of a performance in the course of either instruction or preparation for instruction in the making of films or film soundtracks does not infringe either the performers' rights or the recording rights. The condition is that copying must be rendered by a person either giving or receiving the instruction. The exception does not extend to any subsequent dealing in such recordings, as they would otherwise be illicit recordings.

A sound recording, film broadcast or cable program played or shown at an educational establishment for the purposes of instruction before an audience consisting of teachers, pupils and persons directly connected with the activities of the establishment is not considered to be played or showed in public so as to infringe performers' rights or recording rights.[145] Recording by educational institutions for educational purposes do not constitute infringement. The exception will not extend to subsequent dealings based on the recording or copies made for educational purposes. Lending of copies by educational institutions does not infringe performing and recording rights. Lending of copies of recordings by libraries and archives are also exempt. Similarly it is not an infringement when the recording or copy is for deposit in a library or archival purposes. Any thing done for the parliamentary or other proceedings –judicial or for the reporting of such proceedings are also exempted. No rights are infringed by anything done for the purpose of the proceedings of royal commissions and statutory enquiries or for reporting such proceedings held in public.[146] The provision it appears does not extend to reporting proceedings held in private. Recordings, which are part of public records, may be copied. Any act done which is specifically authorized by an Act of parliament is not an infringement of performers' rights or recording rights unless the act so provides.

A Digital Friendly Exception

A significant provision pertains to a situation when a recording of a performance in electronic form has been purchased on terms which allow the purchaser to

[144] Schedule.2. Para. 3(3).
[145] Schedule.2. Para. 5(1).
[146] Schedule2. Para. 9(1).

make future recordings from it, a person to whom the recording is transferred may do any thing which the purchaser was allowed to do without it being construed as an infringement of performers' rights or recording rights.[147] This is provided in so far as there are no express terms which either (a) prohibit transfer of the recording by the purchaser, impose obligations which continue after a transfer, prohibit the assignment of any consent or terminate any consent on transfer or (b) stipulate the terms in which a transferee may do the things that the purchaser was permitted to do. A recording made by the purchaser, which is not transferred together with the original recording, will be treated as an illicit recording. This provision is important from the point of view of commerce of performances in their digitized form and this will permit transferees from the purchasers to make back up copies and also ensure that the back up copies are transferred together with the original.

However the sale or transfer of a recording alone or a back up copy alone at the same time retaining the original or the back up copy has not been considered as a likely loophole that can arise in the circumstances.[148] A recording of a song may be included in an archive maintained by a designated body. Subject to the condition that the words must be unpublished and of unknown authorship at the time the recording was made, the making of the recording must not infringe any copyright, and the performer must not have prohibited the making of the recording. Copies of the recording can be supplied by the archivist, provided, the person requiring a copy satisfies the archivist that he requires it for the purpose of research or private study and will not use it for any other purpose and that no person is furnished with more than one copy of the same recording. Lending of copies of films and sound recordings can be rendered upon an appropriate order by the Secretary of State subject to a reasonable royalty or other payment being made. Playing sound recordings as part of activities of a club, society or other organization. It is important to note that the exemption is applicable to sound recordings alone and not to films, broadcasts and cable programs.

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[147] Para.12 (2).
[148] See Richard Arnold, *op.cit.*, p.129.

Incidental Records

Incidental recordings for broadcasts or cable programs are not to be considered violating the performers' rights.[149] This is subject to the condition that the further recording must not be used for any other purpose and it must be destroyed within 28 days if it is being first used for broadcasting or cable program service.[150] A recording for supervision of broadcasts and cable programs is a permitted activity.[151] A most interesting exemption has been with respect to showing or playing in public of a broadcast or cable program to an audience which has not paid for admission.[152] However the audience is presumed to have paid for admission if they have paid for admission to a place where the broadcast or cable program is to be shown or goods and services are supplied at prices which are substantially attributable to the facilities for seeing or hearing the broadcast or program or exceed those usually charged at the place in question and is partly attributable to the facilities. Residents and inmates are exempt so are members of a club or society if this function is only incidental to the other main purposes of the club or society.[153] Reception and retransmission of broadcasts in cable program services are exempt.[154] Recordings for the sake of subtitling by designated bodies are not considered as infringements.[155] Recordings of broadcasts or cable programs for archival purposes are also exempt from the purview of performers' rights.[156]

Formalities

An important aspect of procedures prescribed under the Act is that unlike the need for writing to express consent prescribed in the prior performers' protection acts, the CDPA does not specify that the formality of writing needs to be observed in all circumstances of sanctioned exploitation. Oral and implied consent would suffice to quell the accusation of infringement. However in this regard a distinction has been made between the performers' property rights and the performers' non-property rights. The formality of writing with regard to

[149] Schedule 2.Para. 16(1).
[150] Schedule 2. Para. 16(2)(a)(b).
[151] Schedule 2.Para. 17(1).
[152] Schedule 2. Para. 18(1) and 18(2).
[153] Schedule 2. Para. 18(3). Richard Arnold, *op.cit.*,p.133.
[154] Schedule 2, Para. 19(1).
[155] Schedule 2.Para. 20(1).
[156] Schedule 2.Para. 21(1).

assignment and licensing is dispensed only with respect to non-property rights. In relation to secondary infringements, the consent is a defense either to the making of the recording or consent to the deal in question. Consent can be given by the performers' agent, the assignee, performers' estate by a person falsely so representing, or by the Copyright Tribunal. Consent with respect to the recording rights can be granted by the performer, by the owner of the recording rights, by the proper agent and by the Copyright Tribunal[157]. Besides this a 'defense of innocence" can be tendered on the ground that the alleged infringer did not have the required knowledge or reason to believe that the record was not sanctioned.

Remedies

Both civil as well as criminal remedies are offered to the performers' whose rights are violated. The civil remedies for the violation of the property rights include injunctions, damages or accounts for profit, delivery up, seizure and forfeiture[158]. With respect to the non-property rights, a civil action for infringement arises only as an action for breach of statutory duty[159]. Therefore the remedies available for a breach of statutory duty has been granted to the performers' non-property rights and they include injunctions, damage, delivery up, seizure and forfeiture. With regard to penalties prescribed for the different offences for infringing the performers' rights different penalties are prescribed for summary convictions and those for indictments.[160]

Persons having recording rights

It is noteworthy that persons having exclusive recording rights have also been granted similar protection against infringement (Sections 185 to 188 & Sections 198 and 201).[161]

Impact of the Developments in the United Kingdom

The evolutionary pattern points out to the inevitability of the recognition of the proprietary character of the performance despite the initial Act being solely

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[157] Richard Arnold, *op.cit.*, p.137.

[158] Section 191-I, Section 195-order for delivery up, Section 196 -right to seize illicit recordings.

[159] Section 194(a)(b) and for those with recording rights.

[160] While the summary conviction for making, importing and distributing illicit recordings carries imprisonment up to 6 months or a fine not exceeding the statutory maximum (presently 5000 pounds or both). The penalty on conviction on indictment is imprisonment for up to two years or a fine or both. The fine is to be limited to the offenders' means. There is the right to prosecute through initiation of parallel proceedings-that is civil and criminal proceeding s being allowed to progress or pursued side by side.

[161] Section 180(1)(b).

intended to provide a criminal remedy. The juristic, legislative and administrative developments in the United kingdom show that performers' rights in both audio as well audiovisual has become inseparable part of the intellectual property framework. The misgivings over the attribution of rights have been a great deal diminished with innovative legislative provisions and concepts being implemented in particular the concept of presumptive transfers (rental rights) and equitable remuneration. These are also ably supported by the inevitable constructs of collective administration societies ably scrutinized by Copyright Tribunals. It is important to note that the Act does not mention employer–employee relationship as scorching the rights of the performer (nor as a commissioned work) and therefore it provides rights to the performer in circumstances in which even literary and artistic workers do not possess rights. The unobstructed manner in which rights are being administered and enforced clearly point out that the provisions have not affected commercial interests. There have been no reported cases on this aspect since the provisions have come into effect. A drawback of the Act is with regard to the non-availability of moral rights. However the collective bargaining practices in United Kingdom seem to have taken notice of the same. The performer would have to take recourse to the common law remedies of either misrepresentation or passing off for either the right of credit or the right of integrity.

The aforementioned features of the law and judicial perspectives in the United Kingdom point out to the positive effort exhibited in tackling envisaged apprehensions and difficulties in administering rights. The legal concepts and mechanisms created to facilitate both the protection of rights as well as the unhindered exploitation of the commercial product realizes the intent of maintaining the balance of interests. The intent appears to have been to secure the maximum security for the performer without jeopardizing smooth commercial exploitation.

CHAPTER THREE
JUDICIAL AND LEGISLATIVE DEVELOPMENT OF PERFORMERS' RIGHTS IN THE UNITED STATES OF AMERICA

Objective of the chapter: The endeavor is to make an assessment of the status of performers' under the law of the United States in order to understand the legal mechanisms employed in a country with as prolific an entertainment industry, in particular audiovisual industry, as India has. It explores how common law has been innovatively used to find solutions to performers' concerns. Being a major cultural exporter today it reveals how the country has taken the technological challenges thrown at copyright seriously and is intended to point to the right infrastructure needed to work the rights either on a statutory or a collectively bargained platform.

The Copyright Act and the Performer

In order to assess the performers' claim for protection in the United States, it would be essential to analyze the range of subject matter protected and criteria of authorship to be fulfilled in order to decide on the likelihood of performers candidature to protection. While cinematograph had been explicitly recognized as a protected subject matter, the sound record was not given even limited copyright protection until 1971.[2] The sound records do not enjoy a performance right today other than a right confined to digital performances and deliveries. It is important to note that there is no quarrel in the recognition of the authorial prowess of the performer either with respect to cinema or with respect to the sound records. Prior to the amendment in the year 1994[3], one cannot point out any express indication of the performance sans fixation or otherwise singularly

[2] Doughlas John Williams, "Copyright Protection of Sound Recordings", 23 Drake L. Rev. 449.,p. 457. The sound recording is granted a limited protection in the nature of prohibition of an unauthorized reproduction of sound recordings. Thus the reproduction and distribution rights were alone vested with the sound record author. No compulsory license granted for the sound recording

[3] Through the Uruguay Round Agreement Act (URAA), 1994.

being granted protection as a subject matter with the performer as the author. However as there was no mention in the Copyright Act as to who is the 'author' of the cinematograph or the sound record, the attribution of authorship followed the logic of those that creatively contributed to the protected subject matter. In fact the word 'author' has not been elaborated in the US Copyright Act in respect of any of the subject matter that has been extended protection. Though the qualities that needs to be fulfilled in order to qualify for authorship has been indicated. Thus if the subject matter is extended protection under the copyright statute then authorship is attributed to whomever has creatively contributed to its creation. The authorship rights are transferred and settled by means of contracts entered between the producer and the respective creative authors to the cinematograph.

This open-ended characteristic of authorship is qualified by the '*Work for Hire*' principle incorporated into the United States Copyright law that endows on the commissioner or the producer of the cinematograph or debatably a sound recorder *ab initio* ownership in the work displacing the actual creator/s of the work from the ownership.[4] In these circumstances the actual contributors to the creative work or the authors do not have ownership rights[5]. It is noteworthy that for this to be effectuated a written manifestation of the intention needs to be made in the form of a written instrument clearly expressing that the work shall be considered as a work for hire. It is a significant feature that safeguards the creator from having to prove otherwise from implied circumstances that it was not a work made for hire.[6] This provision has driven and determined the status of actors in the film industry though not directly discernible with respect to the audio industry.

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[4] Section 101 (b) of the Copyright Act, 1976. It says that a Work Made for Hire is (1) a work prepared by an employee within the terms of his or her employment; or (2) a work specifically ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audio visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered as a work made for hire.

[5] Subathira Amarasingham, "Whose work is It Anyway? Interpreting Sound Recordings as Works Made for Hire Under Section 101(b)(2) of the U.S. Copyright Act 1976", [2002] 9 E.I.P.R 421.

[6] A work for hire contract essentially deprives the creator of the *ab initio* ownership as well as the opportunities provided under the United States Copyright Act, 1976, for reassignment back to the creator after 35 years. Section 203(a)(3).

The *Work Made for Hire* had not been consequently made applicable to the sound record productions[7]. However speculation with regard to the performer's is rife with amendments made in recent times with possibilities of the sound record contributors being covered by the work for hire provisions[8]. This has been read in indirectly by reason of '*Collective Works'* being made to come under the work for hire provision by means of an amendment rendered in the year 1999. However all the legal formalities required by the Act for instance the requirement of the format of writing in case it is a work for hire needs to be met. Further for contributors under *Work Made for Hire* upon exhaustion of the initial duration of copyright, they have a right to disallow further renewal by terminating the agreement at the end of the primary duration of the work. Thus the authorship vests back with the contributor who has worked under the terms of work made for hire. This is an important safeguard clause that might help the contributor to make gains from future profits and popularity of the album.[9] One of the important criticisms made has been with respect to the fact that if sound records are brought within the ambit of collected works then the records brought out by the individual performers would not be able to be called a work for hire. Thus these contradictions need to be addressed. The need for the agreement to be in ' writing' points to the positive feature of the statutory provisions that would afford more certainness with respect to the status of performer as an employee or worker for hire rather than leave it to conjuncture.

There does not appear to have been any confusion in the performers' status as an author of the sound records or in the films either in the common-law discourse or from the statutory plane but for the operation of the *work for hire* principle. For instance the *House Report of the Sound Recordings Act, 1971*, clearly recognizes the status of the performer as an author along with the producer. It

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[7] *Sound Records as Works Made for Hire*, Statement of Marybeth Peters The Register of Copyrights before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary United States House of Representatives, 106th Congress, 2nd Session, May 25, 2000, at <http://www.copyright.gov/docs/regstat52500.html> as on 19th November 2005.

[8] An express incorporation of sound records into the provisions on work for hire had been repealed in the year 2000. Subathira Amarasingham, *op.cit.*,p.421.

[9] *Ibid.*

was observed by the House Report that the copyrightable elements in a sound recording will usually, though not always involve authorship both on the part of the performers' whose performance is captured and the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, compiling and editing them to make the final sound recording. There may be cases where the contribution of the record producer is so minimal that performance is the sole copyrightable element and there may be cases otherwise too. An analogy with the motion picture industry is brought out when the report says " *as in the case of motion picture, the bill does not fix authorship, or the resulting ownership of sound recording, but leaves these matters to the employment relationship and the bargains among the interests involved".*[10] There fore in the absence of a contract to the contrary or the legal presumptions to the contrary by means of such provisions as the *Work for Hire* principle, the performer is identified and recognized as one among the authors of the performance recorded on either film or the sound record. The absence of the specified authorship clause cannot be considered a negation of the authorship of the performer or the other co-authors in the film. However this has not been the inference of the scholars with regard to this.[11] The issue has been safely dealt with by observing that the United States law does not attempt to 'characterize the performers' authorship' in the Law.[12]

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[10] Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, Vol. 9, Lexis-Nexis, San Francisco (2002), App. 18–7.

[11] Alan Latman, *Howell's Copyright Law*, BNA, Washington D.C. (Revised 1st edn.-1962), p.156., pp.156 –159. The lack of express non-attribution of authorship to the performer creates ambiguities. Though the Music Performance Trust Fund makes the record company pay into the coffers –it does not assure the control of the performer over the performance.

[12] Under the Copyright Act of the USA: the Copyright Act of the USA does not characterize audiovisual performers' contributions with respect to whether such contributions are copyrightable or not. There is no generally accepted understanding of the characterization of audiovisual performers' contributions as yet'. Ms Jane C. Ginsburg and Andre C. Lucas, *Study on Transfer of the Rights of Performers' to Producers of Audiovisual Fixations–Multilateral Instruments; United States of America; France,* WIPO, Geneva (April 30 2003), p.4. Paper presented at the Ad Hoc informal meeting on the protection of Audiovisual Performances, November 6 – 7, 2003, at < http://www.wipo.int/documents/en/meetings/2003/avp_im/doc/avp_im_03_4.doc >as on 1st January 2006.

Under the constitutional limits the subject matter of copyright has been limited to 'Writings' of an author[13] and therefore unless a record falls within this category of being 'writing', it could not be subject to copyright and a performance right could not be granted for the recording. This question was settled post Sound Recordings Act, 1971 scenario when the sound recordings were granted a limited copyright. The Supreme Court also reiterated the same in 1973 in the landmark decision in *Goldstein* v. *California*[14] The early case laws had expanded the concept of writings and included several entities as authors. This broad identification through the judicial process gave considerable impetus to the performers' identity as the author of the sound recording or the film as the case maybe- in case the subject matter fulfilled the eligibility of 'writings'.[15]

The Elusive Performance Right

The evolution of performers' authorship rights in the United States is marked by an imbalance between the performer in the cinematograph and the performer in the sound record. Even after the recognition of the copyright ability of the sound record, the statute has refrained from granting the Public Performance Right to the owner of the sound record, thereby depriving the performer and the producer of a lucrative remunerative avenue. While the cinematograph had been accorded all copyrights under the copyright canopy including the performance right, the sound record was denied an equivalent treatment until very late into the seventies. In this context the hostility in the United States to the adoption of the Rome convention was owing to the provision in the convention dealing with performers' rights in sound recordings. The question was whether the copyright law should recognize public performance rights in sound recordings including the rights of performers', rights of record producers or both to be paid for

[13] Gary L. Urwin, "Paying the Piper: Performance Rights in Musical Recordings", 5 Comm. & L. 36, W 1983.
[14] *Id.*,p.37. *Goldstein* v. *California*, 412 U.S. 546.

[15] There were moves during the time of constitutional drafting wherein the impetus was to be of literary authors alone. However the suggestion was dropped and merely the word author was used. Gary L. Urwin, *op.cit.*,p.38.

performances, broadcasts and transmissions of their recordings. Thus only limited copyright was granted in their sound recordings.[16]

The recommendation of the Register was in favor of performance rights.[17] The envisaged Bill (H.R.1805) granted performance rights to owners of sound recordings after Feb. 1972. It also provided for a scheme of compulsory licensing for the use of the recording and the setting up of the Copyright Royalty Tribunal and a collecting agency to distribute fees collected to authors including performers [18]. Interestingly the bill included performers such as instrumental musicians, singers, conductors, actors, narrators and others whose performance of a literary, musical or dramatic work is embodied in a sound recording and in the case of a sound recording in a musical work, the arrangers, orchestra and copyists who prepared or adapted the musical work for the particular performance. Though the bill failed it shows that but for practices of contract and work for hire principles the law and policy in the United States always recognized the authorship of the performer in the recorded work.

Judicial Perspectives in the United States on Performers' Rights

Whitesmith Publ. Co. v. *Apollo Co.*[19] was the first case law that revealed the difficulties in granting protection to music replicated through means other than literal writing. For the performer, the case was significant, as the recognition of the mechanical instrument would have a positive effect on the authorship to the

[16] Barbara Ringer, "The Unfinished Business of Copyright Revision", (1978) IPLR 317- 326. Most significantly performers' and producers made common cause in a concerted effort to establish performance royalties through a compulsory licensing system. Despite the added strength of the support for the performance royalties demonstrated at these House Committee hearings, it was also clear that the opposition of the broadcasters were equally strong and determined.

[17] Barbara ringer was an unequivocal proponent both during the 1975 Congressional hearings to the report that she submitted in 1978. By 1979, it was even intended to be applied to the cable television industry and this was approved by the Register of Copyrights, the Recording Industry Association of America, The American Federation of Television and Radio Artists and the American Federation of Musicians. Interestingly opposition to the move came from the Secretary of Commerce, The National Association of Broadcasters, Jukebox and Cable System Operators and the broadcasters and distributors.

[18] According to the revenue distribution plan envisaged in the Bill, one half was to be paid to the copyright holder and the other half to the aggregate of the performers. The royalties of a particular recording were to be distributed to the performers without distinction with regard to the nature, value or length of their respective contributions.

[19] 209 U.S. 118 (1908).

performance for the performer[20]. The case involved the claim for protecting the music replicated by means of a piano roll. It was the plea of the authors to restrain such reproduction but the Court denied relief on the ground that as the reproductions made were not 'written' copies they could not be considered as infringing. The regulatory control of exploitation of musical compositions began in right earnest from 1909 onwards when the composers were granted full rights to performance right in their musical compositions. The rider being that after the first recording they were to be amenable to a compulsory licensing scheme where by they were to be eligible for a royalty payable by the user. This spurred the need for activating collecting societies, as there were problems in monitoring the use of the works.

Waring v. *WDAS Broadcasting Station Inc.*[21]

Fred Waring an orchestra bandleader approached the Court in order to enjoin a broadcasting station from broadcasting phonograph records made by Warings orchestra for the Victor Talking Machine Company[22]. In accordance with the Waring -Victor license, the label on the records read: "*not licensed for radio broadcasts*". The broadcasting station held a license from ASCAP, which in turn held a public performing right in the musical compositions embodied in the recordings[23]. The station announced that the records they were playing were mechanical reproductions of the orchestra renditions. Very clearly neither the singer nor his band held any statutory copyright in the rendition.

The Court attempted to answer the question whether there was any common law property right in the performance of an actor or a musician in the absence of any statutory protection. The scope of its inquiry was further narrowed down upon the facts that it was not an imitation but the exact reproduction of the performance itself, transfixed by a mechanical process, for which protection was sought. The Court rationalized that as the recording of the single performance of the artist is

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[20] Though the facts of the case did not involve the question of performers' rights.

[21] 327 Pa.433, 194 A.6331 (1937).

[22] Cited and descriptively elaborated in Benjamin Kaplan and Ralf S. Brown, *Cases on Copyright, Unfair Competition and Other Topics Bearing on the Protection of Literary, Musical and the Artistic Works*, Foundation Press Inc. Brooklyn (1960), p. 561.

[23] Stanely Rothenberg, *Legal Protection of literature Art and Music*, Clark Boardman Co.Ltd. , New York (2nd edn.-1960),p. 210.

to be indefinitely heard over and over again it became important for the performer to guard against its indiscriminate reproduction. This was particularly important as against competitors. The Court also inferred that if the performer contributes anything of novel and intellectual value then the performer was undoubtedly entitled to a right of property. The Court found the answer to the problem posed by the ancient principle of equitable servitudes on chattels and said that modern day requirements had demanded a departure from such premises. The Court also pointed out the distinction between property in physical objects and in literary and artistic property and applied the analogy of the latter to performers' rights. The Court based its conclusion on the analogy and the notice on the record, as that was reasonably and fairly sufficient to make purchasers aware of the restrictions imposed upon the use of their records.

The Court also took note of the additional ground of unfair competition on the basis of the prior ruling in *Fonotopia, Ltd* .v. *Bradley.*[24] The relief was on the basis of the unfair appropriation of property. The Court borrowed from the wisdom of the judgment and observed that the jurisdiction of the Court has always been invoked to prevent the continuation of acts of injury to property and to personal rights generally. The Court quoting from the judgment said that the Courts of Equity had always entered into the area where the ground of legislation was uncertain or difficult to determine injury to property and personal rights generally.

Very significantly, one of the judges in the minority, sought to base the claim on the Right to Privacy.[25] According to him this right was a broader right than the right to property that was depended on by the other judges. The learned judge relied on the path-breaking treatise by Samuel D. Warren and Louis De Brandies in the essay on '*The Right to Privacy*'.[26] The authors characterized the infractions of literary and Artistic property upon legal premises as being violations of the right to privacy that inhered in them. The limits of the publicity to be extended to them were within the rightful volition of the creator. Relying on the treatise, the learned judge observed that it does not depend on the manner of expression nor on the nature or value of the thought or on the excellence of the means of expression. It

[24] 171 Fed.951 (EDNY, 1909). In this case an injunction was granted to a manufacturer of records (before mechanical rights in copyrighted music) against the manufacture and sale of duplicates made by taking a matrix from one of plaintiffs records and making copies there from.
[25] Justice Maxey. Stanely Rothenberg, *op.cit.*,pp.213-214.
[26] 4 Harv. L. Rev. 193-220 (1890).

was also asserted that it was not any theory of private property but the theory of inviolate personality. The *Warings* case, although one of the earliest cases arising for performers' protection relied on a number of premises for the grant of protection to performers' intellectual labor, namely, common law property, unfair competition and the right to privacy. The decision was infectious as it spawned considerable dissent in the following cases though it was finally the reliable rationale to fall back on to settle the question.[27]

RCA v. *WHITEMAN*[28]

A few reverses for the performer followed the Warings case, as there was derogation from the rationale spelt out in it in the following case of *RCA v. Whiteman*. It was an action by RCA Manufacturing Company against Paul Whiteman, the WBO Broadcasting Corporation and Elin Incorporated to restrain the broadcasting of phonograph records of musical performances[29]. The Appellate Court felt that even if the common-law properties in his recorded performance survived the sale of records on which they were inscribed, it was difficult for the Court to conceive how he or the maker of the records would be able to impose valid restrictions upon their resale. The Court was of the opinion that the common law property in these performances ended with the sale of the records and that the restriction did not save it and that if the restriction did save the common law property rights then the records alone could not be clogged with any servitude. The Court inferred that the copyright in the form of common law copyright or statutory copyright consists only of the right to prevent others from reproducing the copyrighted work and the defendant had only used these recordings. The Court opined that if the common law property in the rendition is gone with the publication then any one could copy it or use it. The Court found it

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[27] Stanely Rothenberg, *op.cit.*, p.214.

[28] 114 F.2d 86 (2dCir.1940), cert. denied, 311 U.S.712 (1940) cited and described in Benjamin Kaplan and Ralf S. Brown, *Cases on Copyright, Unfair Competition and other Topics Bearing on the Protection of Literary, Musical and the Artistic Works*, Foundation Press Inc. Brooklyn (1960), p.554.

[29] The questions that arose in the case were whether *Whiteman* or the RCA company had any common law musical property in the records which was violated by means of unauthorized radio broadcasting, whether *Whiteman* had passed over any of his rights to the RCA corporation, whether if they had such property in the musical performances in the record and whether the notices stuck on the records would have the effect of limiting the uses to which they were to be subject.

to be the height of unreasonability to forbid any uses to the owner of the record, which was open to anyone, who would choose to copy the rendition from the record.[30]

The Court opined that even if RCA or Whiteman did have a common law copyright which performance does not end, it would be immaterial unless the right to copy was also similarly preserved by means of a notice. Even with respect to books the Court found such inscriptions of restrictions nugatory. The Court noted that the question of dedication is not merely a matter of intent but the limits of the same are imposed upon the creator by the law. When the Copyright Act covers the period of dedication then the monopoly provided for a period by the law operates and when the period is over then the dedication would expire. The fact that they are not within the Act would not make any difference to this. The Court could not agree with the opinion in *Donaldson* v. *Becket* that works not copyrightable had a perpetual copyright within them. The Court wondered why the same Act that unconditionally[31] dedicates the common law copyright in works copyrightable under the act should not do the same in the works not copyrightable[32]. The idea, according to it was against the policy of the constitution. The Court felt that the onus should be on extending statutory copyright to such works rather than reading in a limitless perpetual copyright.

The Court differed from the stand taken by the Supreme Court Of Pennsylvania in the *Warings* case, which gave credence to the condition inscribed on the record. The Court observed that the effect of that judgment would be confined to those state territorial boundaries alone. The Court did not accept the substance of the arguments based on unfair competition as enunciated in the *INS case*[33]. It felt that it was best confined to the facts of the case. The Court most importantly felt that it was improper to take up the role of resolving the conflict of interest

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[30] Benjamin Kaplan and Ralf S. Brown, *op.cit.*, p. 557. In this regard the Court sought to analogize with the right of the composer in the musical score in accordance with law prevailing at that particular time.

[31] The Court failed to see that the dedication in the facts of the case was not without conditions. Further even within the terms of the copyright act during the period of monopoly, dedications could be made subject to conditions. *Id.*, p.558.

[32] The Court relied on the judgment in *Fashion Originators Guild* v. *Federal Trade Commission*, 2 Cir.,114 F.2d 80,p.560.

[33] *International News Service* v. *Associated Press*, 248 U.S. 215.

when both the common law as well as statutory law had not expressed its preferences[34].

Metropolitan Opera Ass'n, Inc. v. *Wagner Nichols Recorder Corp.*[35]

The plaintiffs moved for a preliminary injunction to restrain the defendants from recording, advertising, selling or distributing musical performances of the Metropolitan Opera broadcast over the air and from using the name Metropolitan Opera or any similar name which is calculated to mislead the public into believing that the records sold by the defendants are records of performances made or sold under the control or supervision or with the consent of the plaintiffs. The plaintiffs had granted a five-year contract to Columbia records to make and sell phonograph records of its operatic performances and to use its name and any other names identified therewith. The plaintiffs had acquired great reputation and goodwill. The exclusive nature of the contract was the essence of the contract. In payment for these exclusive rights the opera received royalty payments on the number of contracts sold with a minimum guarantee. Further the opera has to approve all the phonograph records of the performances before the sale of the same to the public. The exclusive right to broadcast the opera had been separately sold to American Broadcasting Corporation for a particular period of time.

The plaintiffs based their action on the principle of unfair competition. The Court pondered over the question whether the element of misrepresentation was indispensable in fulfilling the requirements of unfair competition. The Court inferred that unfair competition terms could be fulfilled even in the absence of any special factors such as misrepresentation[36]. The Court also relied on the wide principle of unfair competition relied on in the INS newspapers case. From these cases the Court inferred that an idea of palming off was not essential to a cause of action for unfair competition. The Court also came to the conclusion that the direct competitive injury need not be present to substantiate the claim on the basis of injury. The Court recognized the broader principle that " *property rights of*

[34] Benjamin Kaplan and Ralf S. Brown, *op.cit.*, p.560.
[35] Supreme Court of the State of New York, New York County, 1950,199 Misc.780, 101 N.Y.S.2d 483. *Id.*, p.562.
[36] The Court relied on the case of *Fonotopia Limited* v. *Bradley,* C.C., 171 F.951.

commercial value will be protected from any form of unfair invasion or infringement and from any form of commercial immorality and a Court of equity will penetrate and restrain every guise resorted to by the wrong doer".[37] The Court found that the conduct of the defendant amounted to unfair commercial conduct resulting in considerable injury to the property of the plaintiffs.

The court explored the character of the subject matter desired to be protected by the company. To the question whether there existed any property rights in the subject matter, the Court explored the character of the subject matter intended to be protected by the Metropolitan Opera Company and found that property rights inhered in it. The Court took into account the fact that the production of opera involved great skill, the engagement and the development of the singers, orchestra, the training of a large chorus and the fusion of all these into a finished interpretative production with such a creative element as the law will recognize and protect against appropriation by others. The Court inferred that neither the performance nor the broadcast over the American Broadcasting Corporation constituted abandonment of the plaintiffs right in the performance. Very significantly the Court held that at common law, the public performance of a play, exhibition of a picture or sale of a copy of a film for public presentation did not constitute abandonment nor deprive the owner of his common law rights. It cannot be deemed to be a general publication or abandonment. The Court relied on several case law precedents particularly involving sports performances and found that the artistic creation need not deserve a lesser protection.[38] The Court held that the fostering and encouragement of the opera and their preservation and dissemination to wide audiences by radio and recordings were in public interest. Any refusal to grant a property right to groups who expend time, effort, money and great skill in producing these artistic performances would be contrary to public law, inequitable and repugnant to public interest. According to the Court ,"*equity will not bear witness to such a travesty of justice and it will not countenance a state of moral and intellectual impotency*". The Court also found in favor of the plaintiff on the basis of unjustifiable interference with contractual

[37] Benjamin Kaplan and Ralf S. Brown, *op.cit.*, p.568

[38] *Rudolph Mayer Pictures, Inc.*, v. *Pathe News, Inc.*, 235 App.Div.774, 255 N.Y.S.1016, *Madison Square Garden Corp.* v. *Universal Pictures Co., Inc.*, 255 App.Div.459, 7N.Y.S. 2D 419, *Mutual Broadcasting System* v. *Muzak Corporation, Twentieth Century Sporting Club Inc., Trans Radio Press Service Inc.*, 165 Misc .71,300 N.Y.S. 159, *Pittsburgh Athletic Co.* v. *Kqv Broadcasting Co.,D.C.* , 24 F.Supp.490.

rights of the plaintiffs agreement with the Columbia records by the defendants conduct. The Court decided that the right of the parties to protect their interests in the contract against interference by the intentional acts of third parties is not limited by the analogy made to common law property rights alone.

Capital Records Inc. v. *Mercury Records Corp.*[39]

The facts involved the issue of unauthorized exploitation of records of musical works that were already in the public domain. The question was whether contractual exclusivity could be claimed by the plaintiff record company with respect to records that had already been sold in the public sphere particularly with the musical works recorded in it being also in the public domain. As the musical works recorded were in the public domain, the strength of the plaintiff's title could be based only on the performers' rights, which are in the interests of the performing artists and also in the interests of the initial recording company. Capitol Records sought to enjoin Mercury, which held parallel marketing rights in other parts of the world, from marketing records of the musical recordings in the United States on the basis of a prior signed exclusive contract. There was however no cause of action on the basis of passing off, confusion of source or the like.

The Judges[40] concluded that the plaintiffs had a substantial grievance. They inferred that the Congress under the copyright clause could constitutionally enact legislation granting copyright to the performer in his rendition of public domain music ernbodied in records. The Court observed that had the Congress passed such legislation then the Federal Law would have governed the question of dedication of the renditions. But as the Congress had not enacted the law as a federal legislation, the area had been left open for the state law to regulate. The Federal law had not been enacted to give statutory sanction to performers' right. Hence the state law if any would govern the matter. The Court noted or took into account the law of New York as identified and endorsed in the decision in

[39] United States Court of Appeals, Second Circuit, 1955,221 F.2d 657.

[40] Judge Dimock rendering the judgment with Justice Medina concurring.

Metropolitan Opera Association v. Wagner –Nichols Recorder Corp[41] recognizing the law of New York in this respect. The decision had taken into account the law in New York while recognizing a right in the renditions (under the head of unfair competition by which the performance rights are not dedicated or forfeited even by the sale of records embodying them[42].

The Court in coming to these conclusions traced the evolution of performance rights and status of phonograph in relation to the Copyright Act. The Court noted the lack of any statutory support to phonograph for a copyright status. It was also observed that through the 1909 amendment what was granted was the right of performance to the musical composer through mechanical contrivances. This granted the musical composer with the right to authorize the use of their music through contrivances[43]. But the record was not granted a copyright status, thereby denying both the performer as well as the producer of the phonograph any protection[44]. The judgment therefore clarified and laid to rest any ambiguity with respect to copyright status of the phonograph records that were nursed priorly by the Courts[45]. The Court found it appropriate to apply the state law in the absence of any federal law. The Court compared the decision of the Court in *RCA v. Whiteman*[46] and the decision of the Court of New York in *Metropolitan Opera*s and noted that the inescapable result of that decision was that where the originator or the assignee of the originator of records of performances by musical artists puts those records on public sale, his act does not constitute a dedication of the right to copy and sell the records.

In the audio segment, a case of some consequence after the *Capital Records* case had put on a stamp of finality to possibilities under common law principles for performers' rights was *Geiseking* v. *Urania Records, Inc.*[47] The late pianist

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[41] Supreme Court of the State of New York, New York County, 1950,199 Misc.780, 101 N.Y.S.2d 483.

[42] Benjamin Kaplan," Performers' Rights and Copyright", 69 Harv. L. Rev. 412.

[43] This was in fact an answer to the problem posed by the decision in *Whitesmith v. Apollo Company.*

[44]Benjamin Kaplan and Ralf S. Brown, *op.cit.*,p.578.

[45] *Id.*,p.579 ,the Court quoted from the H.R. Rep., 2222 ,60th Cong ., 2d Sess.10 following the discussion on Section 1(e) " it is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves ,but only to give the composer or copyright proprietor the control ,in accordance with the provisions of the bill ,of the manufacture and use of such devices."

[46] 114 F.2d86 (2dCir.1940), cert. denied, 311 U.S.712 (1940). Discussed earlier.

[47] 155 N.Y.S.2d 171 (Sup.Ct .1956).

Walter Gieseking had brought an action against Urania Record Company for making unauthorized reproduction of his recorded performances and for using his name in connection with the sale of these records. However the action was based on the Right to Privacy that was statutorily spelt out under the New York statute. It was decided that the performer had a property right in his performance and that it shall not be used for an unintended purpose and particularly in a manner that does not fairly represent his service. This case law reflects a respect for both the economic as well as the moral rights of the performer albeit through common law principles. Significantly, it was also held that putting the records for sale did not amount to forfeiture of the common law rights in the records [48].

Judicial Protection of the Audiovisual Performer in the U.S.

One of the landmark cases in which the rights of the performer in the audiovisual media was attempted to be protected was in *Zacchini* v. *Scripps –Howard Broadcasting Co.*[49] The facts involved a broadcasting company that filmed the performance of a 'human canon ball' at a county fair in Ohio much against the performers' wishes. The entire Act was later on shown on the local television news program. The performer brought an action for damages against the broadcasting company[50]. The American Supreme Court held that the First and Fourteenth Amendment did not immunize the broadcaster from liability for violating and televising the entire act [51]. The performer brought the action for damages on the ground that the respondent showed and commercially exploited the film without his consent and that such conduct was an unlawful appropriation of his plaintiffs' professional property[52]. The Court of Appeals had found an action

[48] Silverberg, *op.cit.*,p.154.
[49] 433 US 562, 53 L Ed 2d 965, 97 S Ct 2849.
[50] *Ibid.* The Ohio trial Court found summarily in favor of the company but the Court of Appeals reversed it on the ground that there was a cause of action but ultimately found that though the performer was endowed with the right of publicity for his performance under the law of Ohio, nevertheless, the broadcast was privileged as it came within the privileges bestowed on it under the First Amendment and the 14th Amendment of the American Constitution.
[51] *Ibid.* U.S. Supreme Court Reports. 53 L Ed 2d 965.
[52] It is to be noted that it was not against rerecording or broadcasting from a record that the performer was complaining about. That is only upon affixation can a copyright question arise. But here the exploitation was from a live performance and the filming was rendered without his consent.

in favor of the plaintiff for conversion and infringement of Common law copyright and even the right of publicity in the film was a ground. The majority held that the First Amendment did not privilege the press to show the entire performance on a news program without compensating the Petitioner for any financial injury. Interestingly the Supreme Court of Ohio rested the petitioners' cause of action under the state law of right to publicity value of his performance. It was based on the rationale that one may not use for ones own benefit the name or likeness of another whether or not the use is for a commercial purpose and secondly that the respondent would be liable for the appropriation of the property over the objection of the petitioner in the absence of a license or privilege.

The question whether the right to publicity supported the petitioners cause was never in doubt in the course of the assessment either by the lower Courts or during consideration by the Supreme Court. The only issue that was to be resolved was the conflict between the right to publicity and the freedom of the press. The Court spelt out the difference between the Right to Privacy and the Right of Publicity and also the similarities between the Right to Publicity and the philosophy underlying the Copyright and Patent based actions. The Court observed that the intent of the Right to Publicity action is to protect the proprietary interest of the individual and in part to encourage such entertainment. The Court also noted that the state interest is also analogous to the goals of patent and copyright law focusing on the right of the individual to reap the reward of his endeavors having little to do with protecting feelings or reputation.[53] Very importantly, the Court noted that in a right to publicity action the entertainer would have no objection to the dissemination or the widespread publication of his act as long as he gets the commercial benefit of such publication. The petitioner in the present case did not seek to enjoin the publication but was only interested in damages.

The Court inferred that the broadcast of a film containing the petitioners' entire act posed a substantial threat to the economic value of that performance. The act is the product of the performers' own talent and energy and an end result of much time, effort and expense.[54] Much of its economic value lay in the right of exclusive control over the publicity given to his performance. The rationale of the

[53] U.S. Supreme Court Reports 53 L Ed 2d 965., p.975.
[54] U.S. Supreme Court Reports 53 L Ed 2d 965., p.976.

Court was that if the public can see the act on television then there would be less likelihood of them wanting to see it at the fair. The Court rationalized that the intent of the right of publicity was to prevent unjust enrichment by the theft of good will. No social purpose is realized by the free use of the performance by the defendant. But goes to the heart of the petitioners' ability to earn a living. The Court recognized the circumstances as the strongest case for a right of publicity that involved not the appropriation of the entertainers reputation to enhance the attractiveness of a commercial product but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.[55]

The Court observed, that the attribution of the right to the performer provides him something more than a compensation for the time and effort in his work. It is an economic incentive for the entertainer to make a performance of interest to the public. The Court significantly drew a parallel with the rationale inherent in the patent and copyright laws and enforced by these Courts. The rationale was for encouraging individual effort by personal gain. The sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered[56]. The Court noticed that the constitution does not prevent the grant of this incentive to the performer for encouraging the production of this type of work. It is significant to note the equivalence placed between the copyright and other intellectual property laws and the doctrine of the right to publicity regarding the objective of both these legal means to secure the rights of the performer.

An Assessment of the Judgment

It is important to note that the endorsement of the Right to Publicity doctrine in the case – a species of unfair competition that had been treated as a disfavored means of protection due to the *Doctrine of Preemption* in Sears and Day Brite

[55] *Ibid.*

[56] The Court quoted from *Mazer* v. *Stein,* 347 US 201. ' The economic philosophy behind the clause empowering congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best was to advance public Welfare Through talents of authors and inventors in science and useful arts. Sacrificial days dedicated to such creative activities deserve rewards commensurate with the services rendered.

decisions[57], in relation to matters within the intellectual property legislative competence of the federal law, was being endorsed by the Supreme Court of America. From the decision it can be perceived that the right of publicity was attributed an equal value with copyright and patent laws. This was despite the fact that the State Courts of Ohio on a matter having implied significance to intellectual property concerns and federal state legislative power distribution made the pronouncement. Perhaps there was no opposition from the defense on this ground since motion pictures had already been granted a copyright status for a long time. This aspect would have given enough reason not to analyze and echo the same opinions with respect to motion pictures as were expressed with respect to sound records. This is also a pointer to the fact that the decisions in cases such as *Sears* and *Day Brite* (that influenced even the policy makers and caused confusion surrounding protection to sound records and the competence of the state Courts to take recourse to doctrines in areas like copyright or allied to copyright occupied by the federal law) involving certain other areas of intellectual property need not apply to the facts involving sound records or motion pictures. The defendant broadcasting company too did not rely on opposing the claim on the basis that there was no wrongful appropriation of personality rights or even performers' rights proper but rather sought to take cover on the basis of protection of public interest under the First Amendment constitutional clause.

Being a news channel, perhaps, the facts did not warrant an inference of crass commercial purpose like the sale of records or other commercial gain. The judgment for the performer was based on the loss caused to him rather than the actual commercial gain to the broadcaster. The recourse to the right of publicity could also be owing to the lack of performers' right in the performance recognized in the United States law particularly in live performances for the recording to constitute a statutory violation. Secondly, once affixed, the use of the same without a proper 'work for hire' contract could essentially violate the copyright as under the law of the United States. Authorship of motion pictures has not been pronounced but is something to be arrived at by means of a contract. While this would have essentially provided a cause of action, the use of the same for news

[57] *Sears Roebuck & Company* v. *Stiffel Co.*, 376. U.S. 225(1964) and *Compco Corp.* v. *Day Brite Lighting, Inc.*, 376 U.S. 234(1974).

purposes and not for any evident commercial motive like a sponsored television program would have made them take recourse to the right of publicity action on the basis of loss caused. Further their intent was not to claim authorship rights along with the producer but to preserve the utility of live performance as a breadwinner as well as an art form for the future because its true enjoyment and breath taking appreciation lay in the performance being rendered live than when recorded. Authorship rights and enjoyment of profits based on it may not equal the profits based on the popularity and reputation of Zacchini in the exhibition of his live performance.

Prior to Zachchini decision in the year 1977 there were decisions of importance that dealt with the extent of performers' rights[58]. The lack of an authorship to performances recognized under the Copyright Act was explicit in these decisions as well as the jurisprudence that emanated during this period from the decisions that dealt with performers' rights in sound records. Significantly, it can be perceived that no distinctive treatment of performers' rights can be found when dealing with audiovisuals or motion pictures, which in contrast with sound recordings had been granted copyright status for a very long time.

Republic Pictures Corp. v. *Rogers*[59]

In the *Rogers* case under contracts entered in 1937 and 1948 between Rogers and Republic Pictures, Rogers had granted to the producer the exclusive right to photograph or otherwise reproduce any and all of his acts, poses, plays and appearances. The performer also granted to the producer all rights of every kind and character whatsoever in and to all such photographs, reproductions and recordings and all other results and proceeds of his services hereunder perpetually and further the use of his name, likeness and voice for advertising, commercial and publicity purposes. However the actor reserved to himself the right to commercial tie-ups[60]. The grievance arose with regard to the unauthorized use of the footage for television. It was held by the Court that under the contract, the terms acts, poses, plays and appearances did not mean the

[58] Herbert T. Silverberg, "Authors and Performers' Rights", 23 Law & Contemp. Probs.150 [1958].
[59] 213 F.2d 662 (9th Cir.1954).*Ibid.*
[60] *Id.*, p.151.

same thing as name, voice, likeness and therefore the former dealt with the activities in the motion picture activities and the latter encompassed the non-motion picture reproductions of the characteristics of the performer. The latter term did not include the licensing of the film to the television and therefore it was not hit by restrictions with respect to likeness and the rest. The use of the film on the television, according to the Court, did not amount to unfair competition. The Court went by the interpretation of the contract and so there does not appear to have been any observations with respect to statutory or common law eligibility of performers' rights.

Autry v. *Republic Productions*[61]

The case involved similar facts as in the preceding case law but with significant differences. This was because the film had been used for the purpose of accommodating commercials. The case also involved the reputation of the performing artist as he alleged that the telecast or broadcast on television of a past film with him in outmoded clothes could lower and harm his reputation. Therefore the questions of moral rights too were raised among the issues. Further, it was alleged that the alterations would make the work substantially different from what it was. On similar facts the contract was interpreted as distinguishing between use of performers' voice, name and likeness and his activities in the motion picture. The Court inferred that the performer had granted all rights in his motion picture performances to the producer. The Court decided that all these questions including those regarding the reputation came within the ambit of the contractual terms entered into by the performing artist.[62] It is important to note that in both these cases, the Ninth Circuit Court did not deny or affirm the performers' property rights in their performances.[63] Though the argument was based on unfair competition principles. The dispute was resolved by recourse to contractual interpretation.

[61] 213 F.2d 667 (9th Cir. 1954). *Ibid.*
[62] *Ibid.*
[63] *Id.*, p.152.

Ettore v. *Philco Television Broadcasting Corp.*[64]

The facts of the case were about the efforts of the ex-pugilist to recover damages from a broadcaster for unauthorized telecast of his film depicting his boxing with Joe Louis. The plaintiff contended that he had not sold his television rights in motion picture for the fight and that therefore unauthorized televising of his performance amounted to unfair competition. The contract was signed and the bout was held much before the onset of commercial television. The third circuit held that the damages could be recovered for the telecast as the unauthorized telecast constituted injury to a property right[65]. One of the high lights of the case was that even though the performance of the pugilist may not be an intellectual creation and so not entitled to protection by common law literary property rights, a basis for the decision was founded on unfair competition.[66]

However the major premise of the petitioners were based on the right of privacy as embodied in Sections 50 and 51 of The New York Civil Rights Law. The Court held that the use of the plaintiffs name and the moving picture by the defendant made it less valuable to the plaintiff. However, there was nothing to show that the plaintiff had either lost or the exploitation restricted his right to privacy.

One can perceive in academic discussions and write-ups that no distinction between the two media and its statutory backdrop have been considered while debating performers' rights. The same ratio in the cases involving audio records has been resorted to in cases involving audiovisual exploitation as well. The principles resorted to under the state common law has been an ensemble of different common law principles ranging from invasion of plaintiffs right of privacy, unfair competition, unauthorized and uncompensated appropriation for commercial purposes if the plaintiffs right of publicity, libel and breach of contract

[64] 229 F.2d, 481 (3d Cir.). *Ibid.*

[65] There have been other decisions that have upheld performers' rights in a similar manner. *Granz* v. *Harris,* 198 F.2d 585 (2d Cir.1952) where in a presentation of his abbreviated versions of his work were held to be unfair competition and an invasion of his personal rights. It can be noticed that such questions have begun to spring up since the twenties. See *Fair Banks* v. *Winik* ,119 Misc .809,198 N.Y. Supp.299 (Sup.Ct .1922.) rev'd 206 App.Div .449 ,201 N.Y. Supp.487 (1st Dep't 1923). *Lillie* v. *Warner Bros, Pictures, Inc.*, 139 Cal. App.724, 34 P.2d 835 (1934). Cited in *Ibid* .

[66] *Id.*,p.153. A case following on the lines of the *Ettore* decision was *Sharkey* v. *NBC,* 93F.Supp.986 (S.D.N.Y.1950).

of quasi partnership on a joint adventure[67]. There has been a tremendous dependence on the cases involving personality rights in particular personality right of passing off with particular emphasis on the good will and the reputation of the personality. The cases did not merely involve the performance of the individual as a creator but was based on the appropriation of the goodwill associated with the personality. Thus the performers under common law was not confined to traditional understanding of intellectual creators alone but rather extended to cover any personality whose image, voice, name or likeness was being exploited.

A Significant Decision

Baltimore Orioles Inc. v. *Major League Baseball Players Association*[68]

In this case renowned basket players wanted to escape the mantle of copyright authorship in order to beget the advantages of the right of publicity[69] so that they may be amenable to rights not covered by their employment contracts. However this ruling clarified and provided a new status to performances and to performers who were unsure of their copyright character. The Federal Appeals Court held that the recordings were copyrightable audiovisual works. This was because they were fixed at the time of transmission and were therefore protected by Federal Copyright. Importantly, the Court held that only a modicum of creativity was required to make a work copyrightable. There was no need for any aesthetic merit. A recording requires the creative contributions both by the directors and other individuals responsible for recording the performance and this includes the

[67] *Id.*, pp.155-156. See the case of *Hogan* v. *A.S. Barnes and Co., Inc.*, 114 U.S.P.Q, 314 (Pa. C.P. 1957). The rationale of this case has been proposed as being applicable to cases involving the appropriation of performers' rights. The photograph of a famous golfer was displayed on the cover of a book without his permission. The Court refused permission on the ground of right to privacy, as the plaintiff was already a famous person. The Court said that what was found to have been exploited was the commercial value that was attached to his name. The plaintiff had a right to share in the income derived from the public exposure of his likeness and name. The plaintiff was also substantiated on the basis of unfair competition and that he had a property right in the commercial value of the goodwill and commercial value in his name and photograph. The right of publicity was another way of applying the law of unfair competition. . In this regard the Court was supported by the decision in *Haelean Laboratories* v. *Topps Chewing Gum* 202 F.2d 866 (2d Cir .1953).

[68] 805 F2d 663, (7th Cir. 1986), Cert Denied, 107 Sct 1593 (1987).
Cited in Stewart, *op.cit.*,p.661.

[69] *Ibid.*

performer when the performance is captured. The Court most significantly laid down that if certain works command the interest of the public then they have a commercial value. This may not be apparent to a person who is trained in law. Proportional equivalence was brought between the commercial value and the likelihood of modicum of creativity in it. This judgment virtually laid to rest any speculative inference that existed earlier about the copyright status of performances and the authorship of the performer or rather the co authorship status of the performer. Despite the claimants being sportsmen and the subject matter being sports, the Court found it suitable to identify the same with copyrightable subject matter. This is a judgment of far reaching consequence as the performer has been found entitled to a position of authorship under the existing provisions of the United States Copyright Act that does not provide a separate expression of protection to the performer. It would also automatically apply all the other provisions regarding the duration, rights, fair use and remedies within the provisions of the Act that is afforded to all the eligible authors under the Act. This would also operate the *work for hire* provisions as against the performers in the audiovisual thus providing no rights to them in the context of the relationship.

New Uses and Old Contracts

A scan of the decisions analyzed shows that the courts have had to resolve issues circumstances where in old performances have been put to new uses and in new mediums. In cases where authorization has been granted, the bone of contention has concerned the extent of authorization[70]. The grievance has been either against the use of the performance in a new medium like the television for which permission had not been granted or the manner of use in the new medium viz. the unauthorized commercial exploitation (using the footage interspersed with advertisements). While the Courts looked suspiciously towards the manner of use, the use in the new medium has not raised its eyebrows. However it can be said that all the decisions have revolved around contractual interpretations in these cases rather than an exploration of performers' rights and obligations

[70] Morris E. Cohen, "Old Licenses and New Uses Motion Picture and Television Rights", 19 Law & Contemp. Probs. 184 [1954].

based on common law principles. In other words no presumptions in favor of the performer can be discerned in the attitude of the courts.

In *Peterson* v. *KMTR Radio Corporation*[71], a performer in his status as an employee, failed to reserve the use of his performance for anything else than for the motion picture. He was disallowed from restraining the use of his performance on television. Though there was no express reservation, the ratio of the case was based on the status as an employee rather than the lack of express reservation or even a presumption. Perhaps in the circumstances his status as an employee did not allow or mandate the need for any greater substantiation on the basis of any other interpretation as engagement by means of a contract of service assumes the employer to be the owner of the creative product. Two other cases were decided on similar facts but their decisions were in conflict with one another.[72]

Performers' Moral Rights in United States

Despite the fact that American copyright law does not expressively provide any statutory rights in the nature of moral rights either to the performer or to the authors, the courts have read in moral rights in favor of the creators.[73] The only attribution of moral rights is given to qualifying works of visual art.[74] Even with respect to Berne implementation it was considered that federal and state statutes as well as common law was sufficient and no legislation was required to comply with Article 6bis. However several states have legislated. The sturdiest of the protection has been accorded by means of the contract law. The author's rights against third parties are less secure with the protection distributed between state unfair competition laws, state and federal statutory laws. The courts have interpreted that any unauthorized infringement would amount to infringement and

[71] *Id.*, p.190. Superior Court case no. 453-224, reported in 18 U.S.L. WEEK 2024(U.S. July 26,1949).

[72] *Id.*, p.191 *Autry* v. *Republic Productions* 104F. Supp 918(S.D. Calif. 1952) and *Rogers* v. *Republic Produtions* (104F. Supp. 328 (S.D Calif. 1952).

[73] Paul Goldstein, *Copyright*, Vol.1, Aspen Law & Business, New York (2nd edn. -2002), p.15: 179.

[74] 106 A of the Copyright Act, 1976.

accorded relief.[75] It has significantly been laid down that where an author does not expressly reserve the right to alter the work that is subject of an assignment or a license, the courts would at times imply an obligation in this regard.[76] This was with reference to insertion of commercials in the television that was found to alter or adversely affect or emasculate the artistic or pictorial quality of the film or destroy or distort materially or substantially the mood, the effect or continuity of the film. This was laid down even without a contract. Similarly the courts have warned that if the cuts in the film were found to be extensive then that would be considered to exceed industrial custom. Thus the courts have recognized norms in the nature of a moral right to integrity in the common law despite absence of any statutory dictum.

Limitations in Common Law Action to Beget Performers' Rights

The common law remedies of passing off and the common law right of publicity have long exposed their limitations in securing for the performer the protection that it can provide under its canopy.[77] While so it has been evident that the ambit of protection is definitely wider under the right to publicity in the United States but the inconsistencies are many.[78] For unlike the entities under the copyright canopy there is no necessity of any quantum of originality or labor that has to be shown when protection is sought for the performer or other persona. Secondly, the protection extends for performers and others alike. The duration of protection is unlimited. The only remedy affordable is under civil remedy and there is no criminal remedy for the same unless the states pass a specific statute. Further the reason for the violation can be the misappropriation of the any of the characteristics of the personality – the name, voice likeness or any popular characteristic. It need not be the performance as a whole or parts of the same alone. The value to be accorded to the characteristic depends on the reputation, the amount of business value and commercial goodwill of the personality seeking protection. For instance in *Hoffman* v. *Capital Cities /ABC, Inc.*, 59 U.S.P.Q. 2d.1363, the court held that exploitation of a public figure for

[75] *Gilliam* v. *American Broadcasting Companies Inc.*, 538 F.2d 14, 192 U.S.P.Q1 (2D Cir.1976).
[76] *Stevens* v. *National Broadcasting Co.* .148 U.S.P.Q.755, 7458 (Cal.Super.Ct.1966).
[77] Simon Smith, *Image, Persona and The Law*, Sweet and Maxwell, London (2001), p.43.
[78] *Id.*, p.25.

commercial purposes is not protected under the First Amendment and there has to be a show of malice to allow a public figure to seek redress. The court noted that the publication was meant to entertain rather than sell any thing and it could find no malice either in the use of the photograph that was not meant to sell anything. While the performer can also survive under the canopy of the right to publicity the uncertainty of the exact criteria and the factors determining the action will not aid the performer in all circumstances.

In countries such as United Kingdom the non assimilation of unfair competition principles as also the right of privacy as well as right of publicity clearly exposed the limitations of the only principle that could come to the aid of the performer – the right of passing off[79]. The imitation of the voice of the singer was not considered as an infringement under the passing off action because all the criteria of misrepresentation were not fulfilled.[80] The conditions of passing off included that a good will existed with the value exploited and that value should be put to use in rendering his services and some misrepresentation in the minds of the consumers must have been caused that would result in damages[81]. Further, not only in respect of the endless duration but also in respect of the categorical nature of the protection there can be difficulty in carving out exceptions. Like for instance the need of public necessity that has been crafted out for the defense of defamation. The relationship of an employer – employee character has not been spelt out as an exception to these common law remedies. Further though jurisdictions across the world do profess and endorse several of these common-law remedies but in a globalised market, the variations in perspectives impart unpredictability to decisions.

Digital Performance Rights and the Performer

A most noteworthy development has been the attempt in the United States to adapt to challenges of the digital age and the changing contours of technology. This was to be measured through an initiative undertaken to suggest measures to

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[79] Huw Beverley –Smith, The *Commercial Appropriation of Personality*, Cambridge University Press (1st edn.-2002),p.59.

[80] *Alistair Sim* v. *H.J. Heinz Co.Ltd.* [1959] 1 ALL E.R.547. The notion of goodwill in the voice was not was not dismissed outright.

[81] In *Lynngstad* v. *Anabas Products* [1977] F.S.R. 62. It was probed whether the petitioner was in the same line of business or was in the manner of usually licensing images and names.

overcome the new challenges that digital technology posed.[82] The requirement of greater access to protected works in balance with the need for security to the content provided over the digital medium, in particular on the Internet was stressed.[83] It had been realized that while the technology can provide solutions to secure both these ends –concerns of users and concerns of the creators, the law was required to adapt itself to these changed circumstances.[84]

The flow of information has become particularly immense with the application of the Internet technology[85]. With technology providing half of the answers for access as well as control to the works on the Internet, It is through a mix of technology and laws that a secure management of rights can be facilitated in the Internet operating world. [86] The need for change in the law was realized in the following words, "'Even though the 1976 Copyright Act was carefully drafted to be flexible enough to be applied to future innovations, technology has a habit of outstripping even the most flexible statutes."[87]

The study recommended amendments to the Copyright Act, to incorporate a transmission right taking into account the differences and peculiarities in the distribution of works in the digital medium as well as the attribution of a public performance right to the sound recordings. Both these were to have implications for the performer as these means of exploitation and distribution had immense ramifications on the high market potential in audio (sound records and through the audio visual both which are capable of being distributed through the Internet and other digital medium. The transmission right was advocated generally for all the works to cater to the intricacies of the digital environment where in several

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[82] Bruce A. Lehman & Ronald H. Brown, *Intellectual Property and National Information Infrastructure*, The Report of the Working Group on Intellectual Property Rights, Information Infrastructure Task Force, Washington, (September 1995), at
< http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii/doc> as on 1st January 2005.

[83] *Id.*, p.200.

[84] *Id.,p.*188.

[85] Bob Kohn, *The Law of Web Casting and Digital Music Delivery* in Barbara Hoffman (ed.), *Exploiting Images and Image Collections in the New Media, Gold Mine or Legal Minefield*, Kluwer Law International and International Bar Association, (1st edn.- 1999),.pp.177-179. Two kinds in which works are dealt with on the Internet - web casting and through sharing or delivery of computer files- the MP3 method.

[86] *Id., p.189.*

[87] H.R. REPORT. NO. 101-735, 101st Cong., 2d Sess. 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6938 (report accompanying legislation granting copyright owners of computer software an exclusive rental right). As cited in *Id* .,p.223.

traditional notions with respect to publication of copyrighted matter and use by the end user would differ. Thus it was intended to make a difference with respect to mode of distribution as well as the categorization of use. (For example the use in private had been traditionally held to be exempt from infringement liability but with the digital medium this needed to be qualified, as transmission and possibilities of exploitation could blur this distinction. The existing provisions were found adequate to deal with this medium but the need for a distinct transmission right was felt essential to qualify traditional notions.

Performance Right Mooted

A most noteworthy suggestion was the need for a Public Performance Right for sound recordings in the digital medium. The discrimination that sound records were subjected to in comparison to other copyright works including musical works by being denied a performance right is a stark self confessed aberration in U.S. copyright history[88]. This had tremendous repercussions on the fortunes of both the sound producers as well as the performers'. The immense possibilities of digital performance of sound recordings and the deleterious impact on the sound record sales industry was taken note of by the study and the incorporation of a right of public performance was recommended[89].

It is to be noted that, presently, other means of public performance (for instance through the analogue means) does not carry a public performance right. A mere transmission through the digital media could very well encompass a reproduction, distribution and a performance. However if the same is categorized a performance then the sound record thus transmitted would not be able to avail of any public performance benefit, as the performance right has not been granted to them. A need was felt to plug this anomaly.

[88] The lack of a public performance right in sound recordings under U.S. law is an historical anomaly that does not have a strong policy justification -- and certainly not a legal one. *Id.*, p.235.

[89] In the very near future, consumers will be able to receive digital transmissions of sound recordings on demand -- for performance in the home or for downloading -- from the so-called "celestial jukebox." *Id.*, p.234.

Legislations for the Digital Environment

These suggestions eventually led to the enactment of the and the Digital Performance of Sound Records Act[90], the Digital Phono-Record Delivery Act and Digital Millennium Copyright Act, 1998, that wrought significant amendments on the provisions of the Copyright Act, 1976, preparing the law to meet the digital demands made by international instruments and studies rendered by national institutions. The concerns of the performing artists were taken into account while drawing up the Digital Performance Right in Sound Recordings Act[91]. The effect that the new digital technology and distribution systems would have on core business without upsetting the long standing business and contractual arrangements among record producers, performers, music composers and publishers and broadcasters was taken into consideration. The endeavor was to craft a narrow performance right applicable to only certain digital transmissions available to subscribers. The report took into account the prevalence of celestial jukebox, audio on demand and interactive systems for the distribution of phono-records. The law at present was found inadequate and the need for a limited performance right for sound records was felt indispensable in the altered context.[92]

Certain Significant Exceptions

Very significantly the bill for performance right for sound records is applicable only to the digital subscription and interactive services but does not extend to broadcasting and related transmissions that are non-subscription and non-interactive services. This was because the danger to the recording industry was identified as being from subscription and interactive services. It was feared that these services would erode the copyright owners ability to control and be paid for

[90]PUBLIC LAW 104–39—NOV. 1, 1995 Digital Performance Right in Sound Recordings Act of 1995, <http://lcweb2.loc.gov/law/usa/us040039.pdf. > as on 21st April 2005. Also <http://www.google.com/search?q=cache:YLBsZcUJb-YJ:lcweb2.loc.gov/law/usa/us040039.pdf+digital+phonorecord+delivery+act&hl=en&ie=UTF-8> as on 21st April 2005.

[91] *House Report on the Digital Performance Right in Sound Recordings Act, 1995* (104th Congress House of Representatives Report, No. 104 –274) in Melville D. Nimmer, David Nimmer, *Nimmer on Copyright*, Vol.10, Lexis Nexis, San Francisco (2002), Appendix 45-2.

[92] *Ibid.*

the use of their work. Cable television subscription and interactive services would also fall within the bills ambit. The analogue media of television and radio broadcasts were not to be affected by the bill as they executed the role of promoting the sales of records rather than deleteriously affect the commercial potential. An important exemption along with the analogue broadcasts is the fact that digital transmissions of audiovisual works are also exempted. Non-subscription transmissions are exempt- those transmissions that are not controlled by the recipients or for which no consideration is required to be paid. This included non-subscription broadcast transmissions by radio and television unless they are part of an interactive service. Non-exempt non-interactive subscription transmissions are eligible for statutory licensing.

Highlights and Limitations

A fine balance between rights and public interest has been intended to be maintained by the limitations that have attached to the rights granted. The Act is principally based on their conviction that the free over the air services cater to the requirements of public interest and promote the interests of the artists by aiding the commercial exploitation of sound records. However this belief no longer holds true with respect to subscription and interactive digital transmissions that could debilitate the traditional industry. It is important to note the definition of subscription transmissions[93] and interactive transmissions[94] as it clearly delineates what is eligible for the right and not so eligible.

Some of the significant highlights of the act are as follows. It applies only to digital audio transmissions. Purely analogue transmissions are not covered by the right neither are digital transmissions of audiovisuals. Non-subscription transmissions

[93] Subscription transmission is defined as a transmission of a sound recording in a digital format that is controlled and limited to particular recipients and for which consideration is required to be paid or given by or on behalf of the recipient to receive the transmission or package of transmission including the transmission. Mechanism could be anything. Traditional over the air transmissions are not included. Melville D. Nimmer, David Nimmer, *Nimmer on Copyright*, Vol.10, Lexis Nexis, San Francisco (2002), App- 46, p.36.

[94] An interactive service is one that enables the members of the public to receive on request transmission of a particular sound recording chosen by or on behalf of the recipients. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make the service interactive. If an entity is both interactive and non-interactive service (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

are exempted unless they are part of an interactive service. Non-exempt, non-interactive subscription transmissions are eligible for statutory licensing. It guarantees a license to the user so long as they are ready to pay the royalties to the copyright owners.

The limitations have been impelled because it would make it commercially infeasible for some transmitters to continue certain current uses of recordings. Non-subscription broadcast transmissions are exempt unless they are part of interactive services. However these limitations (other than those with respect to grant of exclusive licenses) do not apply with respect to right to interactive services. Limitations are imposed on the right holder with respect to the grant of exclusive licenses. It is noteworthy that the greatest threat has arisen from the interactive service segment by studies conducted in the United States. Therefore no limitations have been proposed on the exercise of the right of the performance in the interactive segment. It is of note that the performance right of musical composers and sound recorders are not affected by the grant of this right.

Public Performance Rights as Distinct from Phono-Record Delivery Right

An important feature of the Digital Performance of Sound Records Act has been the fact that they must apply only to public performances through the digital medium. The right should exert no impact on the reproduction, public distribution and the rest of the copyrights. This aspect is dealt with under the Digital Phono-Record Delivery Act provisions can control these rights. A digital phono-record delivery does not result from a real time, non interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible[95]. For instance, the compulsory license provision in respect of digital phono-record delivery applies only to the reproduction and public distribution. That cannot be applied to the performance of the records. The difference is significant and the definition of the phono-record delivery bears this amply when it says that it is each individual delivery of a phono-record by digital transmission of

[95] Section 115(d).

a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phono-record of that sound record.

Phono-record deliveries are amenable to compulsory licenses. The statute specifically provides that the reproduction and distribution rights it confers through mechanical compulsory licenses apply to digital phonorecord delivery regardless of whether the digital transmission is also a public performance of the sound recording under Section 106 (6) of this title or of any non-dramatic musical work. Care has to betaken that the exemptions meant for one right do not fall into those of another.

Considerable caution has to be exercised has to be taken during the interplay and simultaneous operation of these digital rights. Where a transmission is a digital phono-record delivery as well as a public performance of a sound recording, the fact that the public performance may be exempt from liability under Section 114(d) (1) or subject to statutory licensing under Section 114(k) does not in any way limit or impair the sound record owners right and remedies under Section 106(3) against the transmission of the phonorecord of the sound recording.

On similar lines where an interactive digital audio transmission constitutes a distribution of a Phonorecord as well as a public performance of a sound record, the fact that the transmitting entity has obtained a license to perform the sound recording does not in any way limit or affects their obligation to obtain a license to distribute Phonorecords of sound recordings[96]. The characterization is decisive because performance is subject to one set of constraints and reproduction and distribution to a different set. It is also essential to determine which commercial conduct serves both characteristics.[97]

[96] Melville D. Nimmer, David Nimmer, *Nimmer on Copyright*, Vol.8, Lexis Nexis, San Francisco (2002), p.8-24 b.

[97] The parties may take advantage of these situations. They may attempt to characterize their conduct as 'delivery only' and hence exempt from the performance fee even if a particular song is delivered on a request to a particular paying customer alternatively they, may attempt to characterize their conduct as performance only and hence exempt from the mechanical royalties even if at the end of the day the customers can play all night long the particular song that they ordered. (8.24c). The legislators of the digital transmission act however intended that the disseminators pay for both the services rather than one alone. *Id.*, p.24-c.

Receipts of Share to the Performer

There was no previous body of law in existence when the performance right in sound recordings was introduced by the DPRA. The amendment also carried or had to carry the essential details with regard to payment of the fees and allocations of receipts. With respect to phono-record deliveries the act is silent in this respect. The reason for this omission with respect to phono-record delivery has been that the mechanical compulsory license to which the phono-record delivery rights constitute an addition already regulates these matters with the essential provisions. The additions of these rules do not impact on the existing means by which the mechanical royalty rate payable for the making and selling of physical phonorecords are administered and distributed.

Compulsory License on the Digital Medium

The mechanical rights of the songwriters and music publishers were intended to be consolidated in the new media as well. Traditional rights and means of reproduction and distribution had a condition of compulsory license appended to it. The new digital streaming did not have essential safeguards on this respect. Therefore compulsory-licensing mechanisms in this sector or platform had to be separately introduced. Only with regard to the rates no new chart was followed with respect to delivery but with respect to performance there were provisions that were separately set forth. The mechanical compulsory license when put into practice works as a ceiling. When it is invoked, the statutorily applicable rates are to be paid by the users. The users can also enter into deals with the record companies to pay less, customarily 3/4ths of the minimum statutory rate. The record company in turn obtains a non-monetary concession.[98]

Controlled Composition Clauses

These are agreements where in the singer or the Songwriter agrees to reduce the mechanical right payable when a record company makes and distributes

[98] See, *Papas Tune Inc* .v. *McLean*, 921 F.Supp.1154.1156 (S.D.NY. 1996).

phono-record containing their works. Another device that achieves the same result is for the author/ recording artist to agree to accept a payment cap from their record company limited to ten compositions even if a given album contains more than 10 compositions. These clauses have long raised objections. Very significantly, the DPRA regulates such situations with specific exceptions[99]. It has been specifically stated that license agreements voluntarily negotiated at any time between one or more copyright owners of non dramatic musical works and one or more persons entitled to obtain a compulsory license shall be given effect in lieu of any determination by the Librarian of the Congress. Thus the impetus has been placed on the freedom of contract. However a critical exception has been carved out of this free space and qualifies the activity in this sphere.

The rates mandated by the DPRA will be given effect in preference to any contrary royalty rates specified in any controlled composition clauses. For instance in a contract pursuant, to which a recording artist who is the author of a non-dramatic musical work grants a license under that persons exclusive rights in the musical work, under Section 106(1) and (3) or commits another person to grant a license to a person desiring to fix in a tangible medium of expression a sound recording embodying a musical work, the statutory effect over the controlled composition clauses is exempted in two instances. Notwithstanding its refusal to honor controlled composition clauses, the statute gives effect to any contract into which an artist /composer enters after the date that the sound recording is fixed in the tangible medium of expression substantially in a form intended for commercial release. But for this contract to be honored, the recording artist must at the time the contract is entered into retain the right to license reproduction and public distribution of musical work that is subject to the contract[100]. In effect the statute sets aside controlled composition clauses in circumstances where in the contract is entered into in advance of the artist performing in the studio. But it allows post recording controlled composition clauses provided the artist is effectively acting as their own music publisher. However a cut off date has been prescribed in order to avoid upsetting expectations, but this safeguard is lost when the contract is modified after that

[99] 115(c)(3)(e)(i).
[100] 115(c)(3) (e)(ii)(ii).

date[101] for the purpose of disadvantaging the artist by reducing her royalty rates or by increasing the number of musical works within the scope of the contract at reduced rates.

Rights Management Information

The DPRA demands respect for information pertaining to copyright status. In particular, the encoded information, if any relating to title, featured recording artists and related information (including information about the underlying musical work and its writer –author) must accompany the delivery [102]. The information is to be contained in the context of statutory licenses of subscription digital audio transmissions.[103]

The Digital Millennium Copyright Act (DMCA)

The DMCA was passed in 1998 in order to implement the WIPO Copyright Treaties[104] and saw the introduction of certain alterations and additions to rights of performers' and producers in the digital medium[105]. Disputes began to come to the fore between record companies and the online music service providers regarding liability to pay and the extent of payment. The DMCA was a clarifying legislation in this regard.

The Act amended Section 114 of the U.S. Copyright Act by renaming the subscription services covered by the DPRA as "preexisting subscription Services.[106] A new category of digital audio services that may operate under the statutory license schemes under Section 114 of the act was included. The three categories created by the DMCA are: (1) preexisting satellite digital audio radio Services, (2) new subscription Services and (3) eligible non-subscription transmission Services. The DMCA also amended Section 112 by adding a new

[101] 22 June 1995.
[102] 115(c) (3) (g).
[103] This is also subject to an exception like the one in Audio Home Recording Act, 1992.
[104] The WCT and the WPPT.
[105] Digital Millennium Copyright Act, WIPO Implementation Legislation, NMPA, <http://www.nmpa.org/nmpa/wipofinal.html> as on April 22 2005.
[106] Marc Jacobson, *Digital Performance Rights In Sound Recordings: The U.S. Experience,* <http://www.gtlaw.com/pub/articles/2002/jacobsonm02b.asp >as on 20th July 2003.

license that permits digital audio services to make ephemeral recordings of a sound recording to facilitate the transmission permitted under Section 114.The norms for the Procurement of a compulsory license were also revised. It mandated that the transmission be non-interactive[107], it should not exceed the sound recording performance complement, it should publish a program schedule or specify the songs to be transmitted, it should not automatically switch from one program channel to another and that it is accompanied by certain information, such as song title and recording artist. If a digital broadcaster does not fall under the non-interactive compulsory license, it must procure a performance license from each recording artist whose song it desires to play.

Licensors and Agents

A Major highlight of the provisions has been that the designation of common agents to negotiate, agree to pay receive payments has been recognized and legitimized. This is applicable not only to statutory licenses but for other licenses under section 106(6) for interactive services or performances that exceed the sound performance complement. However it is also specifically provided that the rights owners and users may license terms and conditions unilaterally not in concert or agreement with other rights holders. This is qualified in the Section pertaining to common agents for licenses other than statutory licensing, though there is nothing overtly suggestive that negotiations for statutory licensing should be through the process of collective representational efforts alone. Provision has been made for responsible collective licensing organizations to represent the interests of the producers and the performers' both at the Copyright Arbitration Royalty Panel that fixes the rates and for the purpose of collecting and distributing the revenue so earned. Representative agents can be appointed both by the rights owners as well as the rights users. For example at present an organization called *Sound Exchange* deals with these functions on behalf of the producers and performers' and primarily deals with non interactive subscription

[107] To be non-interactive, a site cannot allow a user to request songs to be played particularly for that user A site can, however, permit people to request songs, which are then played to the public at large. To satisfy the sound recording performance complement, a site can play, within any three-hour period, three cuts from a CD, but no more than two cuts consecutively. Or, a site can play four songs from any singer or from a boxed CD-set, but no more than three cuts consecutively.

transmissions[108]. Sound Exchange only handles the collection of royalties from compulsory licenses to *non-interactive* streaming services that use satellite, cable or Internet methods of distribution, and thus does not aid in resolving potential issues that may arise for *interactive* streaming services. As for the rest of the licenses, the web caster would have to approach the featured or non-featured artist or the record individually. There is no pronounced characterization of performers' rights in the United States copyright act other than the one introduced by the Digital Millennium Copyright Act, 1998.

DMCA and Online Intermediary Liability

Online service providers are exempted from liability when they indulge in activity in the nature of transitory communications, System caching, Storage of information on systems or networks at direction of users and information location tools.[109] Each of these limitations results in a complete bar on the imposition of monetary damages and restricts injunctive relief in various matters. The provider needs to qualify only for one of the limitations in order to qualify for the exemption.[110] The crucial feature of this legislation has been the fact that the petitioner can access the courts and get an order of subpoena in order to direct the service provider to divulge the name of the user or the infringe.[111] Importantly the privacy of the subscriber has been fully preserved, as the there is no compulsion on the service provider to monitor the material used. [112] Upon the fulfillment of certain conditions and exhibiting of certain characteristics, the limitations would operate in favor of the provider.

The test of criteria to be fulfilled would be to assess the neutrality of the provider as regards the service provided and the material relayed.[113] The test measures the quantum of involvement of the provider in the infringing material concerned. The transmission must be initiated by a person other than the provider. The transmission, routing, provision of connections, or copying must be carried out by

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[108]Kristin Thomson, "Sound Exchange: A Digital Primer", October 13, 2004, <http://www.futureofmusic.org/articles/soundexchange.cfm, > as on 1st January 2005, an interview with Neeta Ragoowansi, Membership Director of Sound Exchange.

[109] Title II of the DMCA adds a new Section 512 to the Copyright Act.

[110] In Section 512(j).

[111] In Section 512(h).

[112] This has been provided explicitly in the act Section 512(m).

[113] In Section 512(a).

an automatic technical process without selection of material by the service provider. The service provider must not determine the recipients of the material. Any intermediate copies must not ordinarily be accessible to anyone other than anticipated recipients, and must not be retained for longer period than reasonably necessary and the material must be transmitted with no modification to its content.

Retention of copies for longer periods has been permitted for the provider provided the material has not been supplied by the provider itself but by someone else other than the provider and transmitted to the subscriber.[114] The retention is merely for the treason of convenience in delivery of the material as considerable time can be saved in this way. This retention is specifically allowed upon the fulfillment of the condition that the material is not modified. The retained copy should be refreshed from time to time from the original copy. Deference must be paid to the technological provision that records the number of hits to the site and technical provisions such as need for passwords for access to the site should not be circumvented not disturbed in any manner finally any change of material in the original site must be translated into the retained copy upon notification from the site owner.

The most circumstance requiring definition is when the material supplied to be hosted was an infringing copy. The position of liability of the service provider who is to post the material in this circumstance is prone to vulnerability under the general rules of copyright act. However the DMCA makes special qualifications to exempt the unsuspecting service provider. The liability arises upon the fulfillment of certain conditions alone.[115] The state of the mind with the knowledge that the material is infringing excludes the provider from exemption. He must either have the actual knowledge or be aware of the facts and circumstances that the material could be infringing. If such knowledge can be attributed to him then he ought to respond to the realization by immediately blocking access or removing the material.

A noteworthy procedural stipulation is that the complainant should provide a notification to the designated agent of the service provider upon notice of the

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[114] Section 512(b).

[115] Section 512(c). *The Digital Millennium Copyright Act of 1998*, U.S. Copyright Office Summary (December 1998), p. 12.

infringing, material being found on the net.[116] The formalities need to be rigorously followed otherwise the ensuing proceedings would be deleteriously affected. The service provider is exempt from monetary liability if he brings down the material immediately upon receipt of notification. For a wrongful removal he is not to be held liable by the person responsible for posting the material in the first place.[117]

One of the major highlights has been the safeguard provided against fraudulent notifications. The provision provides for the subscriber to provide for a counter notification. The act of bringing down the material should be intimated to the subscriber. The alleger should initiate court proceedings within a stipulated period and if he does not do that then the provider would need top put the material back on the site after the elapse of ten to fourteen days fro the receipt of the counter notification. Penalties and damages can be elicited in case of misleading notices as well as counter notices.[118]

Similar conditions and limitations are provided with respect to hosting of information location tools by the service provider.[119] In relation to performers rights on the information superhighway these have got immense ramifications as it enters on an important area of great uncertainty in diverse jurisdictions. As such both the WCT as well as the WPPT has not been able to unequivocally state the exact limits of liability. Significantly an attempt has been made to define the term service provider in the act. It is important to note that the term has been defined differently to meet the demands of different circumstances.[120]

Copyright Management Information for the Performer

A profound feature of the DMCA from the viewpoint of the performer and his aspirations to an apparent and manifest moral rights recognition would be the copyright right management information[121]. Importantly for the performer the copyright management information has been defined as identifying information about the work, the Author, the copyright owner, and in certain cases, the

[116] Section 512(c)(3).
[117] Section 512(g)(1).
[118] Section 512(f).
[119] Section 512(d). This relates to hyperlinks, online directories, search engines and the like.
[120] Section 512(k)(1)(A).
[121] This is following up on the Art 12 of the WCT and Art 19 of the WPPT.

performer, writer or director of the work, as well as the terms and conditions for use of the work, and such other information as the Register of Copyrights may prescribe by regulation.[122] There is no need to provide information about the users of works, which is explicitly excluded. This provides a minimum prescription but scope for more in the future. It is appropriate to recollect that both DPSR and DPRA do provide for the need for the names of the featured artist and other information to be provided on the records. Both providing knowing or distribution of false information as well as the alteration or removal of information is considered as a crime. Those who disseminate knowing that the product contains false or misleading information are also liable. The prevalence of intent is extremely important to constitute the crime. As regards secondary contributors to this infringement knowledge and reasonable grounds that the crime could be committed would be enough to be made liable. In the absence of intent both cable systems and broadcasting stations are likely to be exempted from liability. Both civil and criminal remedies are available to the aggrieved with slight leniency (on the lines of Copyright Act) in case of lack of intent and knowledge.[123]

From the standpoint of the performers it is important to note that the comfort of their information being carried in the CMI is not an invariable one rather it is specifically provided in the provision that it would apply only in certain cases. However what are those certain cases has been spelled out but is left to the rule making of the register of copyright from time to time. Further it is not merely the name or identity that has to be carried but also the terms and conditions. This opens up a very large avenue though still amenable to the judgment of discretion regarding the limits according to facts and circumstances by the administering authority.

Protection Against Circumvention of Technological Measures

The obligation to provide adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works is

[122] Section 1202(c).

[123] It is important to note the seriousness with which the offense is looked upon with reference to the remedies provided. Under section 1204 penalties range up to a $500,000 fine or up to five years imprisonment for a first offense, and up to a $1,000,000 fine or up to 10 years imprisonment for subsequent offenses.

realized by the DMCA In the United States.[124] Circumvention of technological measures is disapproved against both accesses as well as against unauthorized copying. A distinction is made between the offence of circumventing technological measures designed to prevent copying and that designed to prevent access. The latter is thoroughly prohibited while the former is peppered with exemptions for fair use purposes. A most noteworthy provision of the DMCA in this regard is the identification of those devices that would be prohibited from any application if they exhibit certain characteristics. That is if they are primarily designed or produced to circumvent; they have only limited commercially significant purpose or use other than to circumvent or they are marketed for use in circumventing.[125] There is no mandatory stipulation that the manufacturers need to produce products equipped with a particular design in response to any particular technological requirement.[126] The streamlining of this apprehended activity reflects the seriousness with which the United States of America is viewing the impact of technology on copyright.

The prohibition against circumvention is however subject to exceptions. One of the major highlights of the exceptions have been that the continuous rule making clause which empowers the librarian of the congress to continuously monitor the requirement of prohibitions and in tune with the need prescribe or exempt activity likely to circumvent access control measures. This leads to a continuous evaluation of the threat posed by the technology or means considered as threatening or non-threatening.[127] There are six exemptions that have been clearly prescribed. Nonprofit libraries, archives and educational institutions are

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[124] Severine Dusolier, "Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright" [1999] EIPR 285.

[125] Section 1201. (Section 1201(c)(3)

[126] Despite this general 'no mandate' rule, section 1201(k) does mandate an affirmative response for one particular type of technology: within 18 months of enactment, all analog videocassette recorders must be designed to conform to certain defined technologies, commonly known as Macrovision, currently in use for preventing unauthorized copying of analog videocassettes and certain analog signals. The provision prohibits right holders from applying these specified technologies to free television and basic and extended basic tier cable broadcasts.

[127] Section 1201(a)(1)(B)-(E). The applicability of the exemption is determined through a periodic rulemaking by the Librarian of Congress, on the recommendation of the Register of Copyrights, who is to consult with the Assistant Secretary of Commerce for communications and Information.

permitted to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain authorized access to the work.[128] Another exception is provided to a person who has lawfully obtained a right to use a copy of a computer program for the sole purpose of identifying and analyzing elements of the program necessary to achieve interoperability with other programs. However this is allowed only to the extent that such acts are permitted under copyright law.[129] An exception is provided to facilitate smooth encryption based research that would lead to further understanding about the vulnerabilities of systems in place currently. Therefore circumvention of access control measures is an important exemption.[130] Anti circumvention measures can be exempted for the sake of protecting the minors from unsavory sites pr material. It is important to note that ' material on the Internet has been clearly cited.[131]

A significant exception has been with respect to situations where in the anti circumvention measures also have the tendency whether inadvertent or intentional to collect information that affects the privacy and security of the personal transactions on the Internet.[132] Measures to counter such technologies have been considered legitimate. A provision for enabling the testing of the security provisions of the computer, computer system or computer network has been provided subject to the condition that it is rendered with the authorization of the operator or owner.[133]These measures have raised fears about excessive obstruction to fair use of the disseminated material.[134] The continuous evaluation mentioned above is to evaluate whether additional exceptions need to be created from time to time.[135]

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[128] Section 1201(d). The wording is significant in that it does not guarantee a straight access to the work rather it is only to facilitate a good faith determination about the need for access.
[129] Section 1201(f). For facilitating reverse engineering.
[130] Section 1201(g).
[131] Section 1201(h).
[132] Section 1201(i)).
[133] Section 1201(j).
[134] Thomas Vinje, "Copyright Imperiled" [1999] EIPR 192. It has been pointed out that the need is not for a broad anti circumvention measures but as the measures are more than effective, the onus should be on the limits to such technical protection systems. Copyright has to devise proportionality between protecting rights and the need not to threaten the limits of viability of copyright limits and exceptions.
[135] *Id.*, p.204-205. See also Julie .E. Cohen," WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?" [1999] EIPR 236., pp.239-240. Raising important constitutional issues as well and critical of the oversight process.

State Participation and Supervision

The entire process is streamlined and scrutinized by the State Librarian of the Congress. The office initiates the process for determining reasonable terms and rates of royalty payments by the concerned parties. If no agreement can be arrived at then the office convenes a Copyright Arbitration Panel. That will decide, determine and publish the rates. The Copyright Arbitration Panel has to take into account the different audio transmission services in vogue for the other prevalent licenses. The tariff decided by the Copyright Arbitration Panel would be overwhelmed by the tariff arrived at mutually at a later date between the parties. Thus at all possible times the parties can sit down, negotiate and bring about a settlement and state tariff would have to give way to the voluntary terms.

Allocations from Receipt Collections

A major characteristic of the act is that it sets minimum limits in realms that are commonly considered as forming the zone of freedom of contract. For instance in the allocation of revenue earned and distributed the statute provides the portion to be given to the non-featured musicians and vocalists. Two and a half percentage of the revenue is to be managed by an independent administrator appointed by the sound record owners and American Federation of Musicians who are to exercise the distribution of the revenue to the beneficiaries.
However the featured artists and recording artists are to be allocated 45% of the receipts on a per sound recording basis. Thus it can be seen that with respect to the revenue generated from the administration of performance rights in digital subscription and interactive services, a distinction is made between artists with regard to the allocation of revenue.

The DMCA Provision for Screen Actors

The DMCA through Section 406 has sought to deal with contractual security of the author's, performers and artists by making their residual payments secure against third parties who were not part of the collective agreement assuring them

of residual returns.[136] Though assumption agreements are often entered into between the producers and the distributors nevertheless this does not always happen in practice. Therefore once the benefit of the exploitation is passed or transferred to a third party who is not in any position of privity of contract with the performer then the avenue for recourse are immensely slender to recover the residual. The section imposes on the third party transferees the obligation to honor the residual payments to be made to the performer in audiovisuals even if the original agreement was entered into between the transferor and the performer.

Web Casting Recognized

A most noteworthy amendment was the recognition of the fact that a lot of channels had begun the digital transmission of sound recordings over the Internet by applying streaming audio technologies. Upon a closer scrutiny it was found that the three categories recognized already by the DPRA were not sufficient to cover the incidence of web casting. The need for statutory license for subscription transmissions have been widened in order to include web casting as a new category of eligible non subscription transmissions.[137]

Rates at Fair Market Value

A significant addition to manner in which the rates have to be considered by the copyright arbitration panels was clarified with specific expression being made by the DMCA stipulating the fair market value to be taken into consideration.

An Additional Ephemeral Copy

While in the earlier provisions only a single ephemeral copy could be made the DMCA has facilitated the creation of an additional ephemeral copy upon the payment of a statutory license fee.[138]

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[136] *The Digital Millennium Copyright Act of 1998*, U.S. Copyright Office Summary (December 1998), p.16

[137] Section 405 of the DMCA amends the DPRA.

[138] Amendment effected to Section 112 of the Copyright Act.

The Lone Statutory Expression for Performers - U.S.-Uruguay Round Agreement Act, 1994 (URAA)

The TRIPS mandate was acceded to by the United States by enacting the URAA in the year 1994. This was single article enactment-incorporating section 1101 into the copyright act, 1976. It marked a distinct change in the United States attitude towards the neighboring rights entities.[139] It also marked a recognition of unfixed matters that was anathema to the constitutional understanding of copyright in the United States.[140] The Section regulates the unauthorized fixation and trafficking in sound recordings and music videos.[141] Section 1101[142] deals with the right of the performer in live musical performances. The rights conferred are distinct from that conferred under the copyright provisions (these are characterized as being different from copyright). The rights consist of the right to fix the live musical performance in a phono-record or in a music video and this includes both sounds of the live musical performance and sounds and images (audiovisual) of the live musical performance. The right to reproduce copies or phono-records of the fixed performance has been granted to the performer. The right to transmit or otherwise communicate the sounds of the live musical performance and the sounds and images (audiovisual) of the live musical performance has been granted. The right has been conferred to reproduce and distribute fono-records (sound recordings) or copies (music videos) of the live musical performance. Most significantly these rights are applicable no matter where the performance and/or fixation took place (e.g., not limited to the U.S), and apparently, without limit as to the date of the fixation (i.e., fixation right might

[139] In fact one can notice a change since the nineties in the United States with royalties being introduced for home audio recording and semiconductors being also extended protection.

[140] It is noteworthy that there was great stubbornness about the need for fixations and writings in American copyright history, the grant of recognition to unfixed entities such as performances marks a galactic move away from traditional perspectives that were mainly the prerogative of state statutes and common law.

[141] Act of December 8th 1994. Melville D. Nimmer, David Nimmer, *Nimmer on Copyright*, Vol.3, Lexis Nexis, San Francisco (2002), p. 8-E-5.

[142] Copyright Act, 1976. 1101. Unauthorized fixation and trafficking in sound recordings and music videos (a) UNAUTHORIZED ACTS. - Anyone who, without the consent of the performer or performers involved - (1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States, shall be subject to the remedies provided in sections 502 through 505 to the same extent as an infringer of copyright.

outlast copyright). It is of note that the right pertains only to the musical performances performed live. It does not apply to other performances in both their sound and audiovisual versions.[143]

Criticism

The Section 1101 has invoked the following criticism. It is not clear from the section as to whose permission is to be solicited for exploiting the performances. Further no stipulation of a written consent is mentioned. Therefore the extent of the consent still remains prone to speculation, as implied consent could be prone to be inferred from circumstances. The provision is non-speaking about circumstances where in the live performance is rendered for the employer. Even if the performers have not signed any contract with respect to subject session and even absent any written agreement it is a matter of conjecture whether those performers have given the essential consent. In other words, the issue arises whether the employer's consent would be sufficient.

The provision provides only limited remedies. Most of the civil remedies have been extended to infringements of the unfixed musical performances. However one can notice the absence of seizure and forfeiture to be read in from the language employed. Basically it has thrown up the question of registration of copyright as the copyright office had until now only extended protection to the affixed performances. This factor has not been clarified by means of any specific statutory language[144]. Further if the performance is in itself not legitimately based on authorized sanction from the musical copyright owner then the repercussions do not seem to explain from the plain terms of the enactment. Commonly works that are unauthorized used for making another work the latter work is not accorded protection under copyright laws.

A most vehement criticism has been that chapter 11 has not been provided the relief by way of fair use. Section 107 that elaborately deals the norms of fair use

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[143]In 1994, The Uruguay Round Agreements Act added Chapter 11, entitled ,"Sound Recordings and Music Videos," to title 17. Pub. L. No. 103-465, 108 Stat. 4809, 4974. see <http://www.copyright.gov/title17/92chap11.html> as on 20th November 2005.

[144] Melville D. Nimmer, David Nimmer, *Nimmer on Copyright*, Vol.3, Lexis Nexis, San Francisco (2002), p.8E-18.

is not explicitly extended to performances. This creates a lot of confusion as to the exact extent of permissible exploitation without consent. The issue of transferability has not been addressed.[145]

There is no specific statement about the regarding the retroactive application of the legislation. It has not addressed the issue of cut off date for protection nor any savings provision for those who have relied on the same. The criminal provisions for infringements are not the same as that applied for copyright generally. It is the criminal code that is applicable. This changes the equation of requisite mental factor required for culpability.[146] The same lack of clarity with regard to the application of the date from which civil liability is to commence plagues the criminal statute as well. Violations committed outside the country have also been liable to be tried within the United States.[147]

Summing up: Noteworthy Characteristics of. U.S. Protection

The aforementioned study reveals the remedies that the U.S. has molded for the protection of the performer using the common law principles as well as contractual and legislative means. The status of authorship of the performer has never been in doubt but the lack of an explicit enunciation of the same in the statute made the recourse to common law inevitable. This was particularly so with respect to the live performances. Further the practices based on statutory provisions such as 'work for hire' made the performers lose their rights of authorship in films and with some stretched interpretation the sound records as well. It is noteworthy that the need for formalities like writing to symbolize 'work for hire' safeguards the interests of the performer as in the absence of such formalities and clear intention of such a relationship, the authorship would be presumed to be vested with the performer or authors generally.

Despite the recourse to this relationship, the performers have been enjoying the returns from the exploitation through innovative balancing mechanisms and collective bargaining. Further, the alacrity with which the country has responded to the challenge of digital communications in particular with reference to the performer is noteworthy. It points to the fact that the threat and opportunity in the

[145] *Id.*, p.8E-19.
[146] *Id.*, p. 8E-24.
[147] *Id.*, p.8E-26.

market is high in the digital environment. The attribution of performance rights for sound recordings, the protection of performers contracts in films during third party transfers, the creation of copyright offices to scrutinize the compulsory licensing in the digital medium, the care taken to delineate between performance and digital phonorecord delivery and the supervision of the distribution of the proceeds through collective administration societies are significant developments that need to be emulated in other countries. Further the resolve to define temporary copying, clearly identify circumstances of liability of intermediaries and create provisions for anti circumvention measures and rights management information as well as exceptions for the same are instructive of the fact that solutions to these problems are practically possible without causing obstruction to commercial exploitation.

CHAPTER 4
THE PROTECTION OF THE PERFORMER IN FRANCE AND THE EUROPEAN UNION

Objective of the Chapter: The chapter seeks to explore the means adopted by a country sternly believing in Author's Rights to protect performers' interests. It reveals the three-pronged means employed to protect the performer. The chapter studies the path breaking European union initiatives both to apply as well as harmonize protective mechanisms in the digital age providing solutions and model for the future for protecting the performers' rights while at the same time creating the convenience of smooth exploitation of the performance.

The Evolution of Performers' Rights in France

The performers', in particular actors in France had suffered socially, economically and politically for centuries. The secondary status that was accorded to them slightly improved only in the eighteenth century with the Declaration of the Rights of Man. It is significant that the Declaration of the Rights of Man and the law of December 1789 gave the actors along with Jews, the protestants and executioners access to all civil and military occupations and made them eligible for election. It was only in 1849 that *Concile de Sessions* relieved them from ex-communication. It is pertinent to note that laws had emerged with respect to employment contracts generally.[1] Performers' were brought under the regime of service contract incorporated in the Labor Code and in the Social Security Code.[2] The highlight of which was that every contract in which either the natural or legal person secures the services of the performer for remuneration for the purposes of his or her production was deemed to be a service contract.[3] The presumption subsists whatever the manner and amount of remuneration or whatever may be the description made in the contract. This is so even if the performer retains the

[1] S.M.Stewart, *International Copyright and Neighboring Rights*, Butterworths, London(2nd edn.-1989), p.390.
[2] *Id.*,p.392.
[3] This is particularly so when the person does not carry on the activity that is the subject matter of the said contract or terms implying his registration in the register of commerce.

freedom of expression or if he is the owner of all the equipments and he employs one more person and also if he takes part personally in the performance. In other words, the status of an employee has been cast upon the performer under the labor code. This has enabled them and the professional bodies to organize the exercise of their rights obtained under contracts and have enabled the Courts to protect such rights by reference to the general law.

Some of the significant highlights of the French Service Contract had been that union membership has been never a sine qua non for the grant or for withholding the benefit under the collective agreements. Further there could not be derogation from the collective agreements though a higher bargain could be sought.[4] There are two articles in the Labor Code that concerns the artistic performers.[5] The provision stipulates that any contract where by the artist is engaged either by a physical person or by a legal entity would be presumed to be an employment contract.[6] Several benefits accrue to the artist from this presumed status in the like of social security benefits. Secondly this has necessitated confining the use of their performances to a determined activity.[7] The labor code requires the proceeds of the secondary uses to be provided to the performers. It specifically mentioned that the remuneration owed to the artist should not be considered as a salary when performance is exploited without the physical presence of the artist.[8] The provisions in the labor code also served to support the courts in their attitude towards the performers when they were fighting for justice against unauthorized exploitation.

Much has been granted to the performers' by means of the courts' generous interpretation of the law.[9] In this context it is important to note that even copyright law had developed mainly through the Court pronouncements based on skeletal enactments of 1791 and 1793. From identifying Moral Rights to drawing distinctions between reproduction of the work and the right to perform the work or

[4] *Id.*, p.393.
[5] Carole Callebaut, "The Legal Protection of Artist performers in France", 31 J. COPR. SOC'Y, 163(1983).,p.174.
[6] L-762-1 of the Labor Code.*Id.*,p.175.
[7] L-122 –9 of the Labor Code. *Ibid.*
[8] *Ibid.* L-762-2 of the Labor Code.
[9] The overall atmosphere was not as strict with regard to policy on issues with regard to copyright as in England for instance the French copyright law of 1985 is not reserved for any category of works or authors. Paul Edward Geller, Melville B. Nimmer, *International Copyright Law and Practice*, Vol.1, Lexis Nexis, San Francisco (2002), p. Fra-18.

fair use doctrines and conveyances.[10] In fact the 1957 Act could be said to have codified preexisting case law on such issues such as moral rights, economic rights and proportional representation. Even extension to secondary transactions was initiated through the Courts in France, in the absence of civil rights for a major part of the century; the performers were protected through contract and tort laws. For instance, no mention was made of performers' in the 1957 Act.[11] Though the facet of the Act that all creations of the mind could be eligible to protection and the non-exhaustive list of works and authors would have in all likelihood made performers as well eligible for protection. The reason being that the authors and the producers feared a possible reduction in their remuneration and also conflicts between the rights of performers' and the authors.

The Courts and the French Performer

Recognition of Economic Rights

Historically, it is significant that all judicial decisions except one[12] that preceded the coming into force of the law of 11th March 1957 had specified that the performer have no *Droit de Auteur.* The courts relied on the Civil Code to interpret contracts, as the Copyright Act of 1957 was silent with respect to performers explicitly. Difficulties surface in interpreting the contract when the terms are silent or unclear. There are instances where in the court has pronounced the judgment against the performer in such circumstances. These appear to have been without reference to the reality presented by the civil code rules.[13] Articles 1163[14], 1162[15] and 1135[16] of the Civil Code have commonly been used to support the performer. Thus the civil code has clearly stipulated that a most restrictive interpretation of the contract needed to be attempted. The

[10] *Id.*,p.Fra-11.

[11] However certain features existed in the copyright law of France that perhaps would have been traditionally conducive to even performances being eligible for protection. Writing was not made a sine qua non for protection and even works that were rendered orally could be protected. Even in cases were it had been required, it only enhanced the evidentiary value. *Id.*, p.16.

[12] Tribunal Civil Dela Seine March 1903, Gazette Du Palais 1903.1.468- cited in Stewart, *op.cit*, p.392.

[13] Versailles, Civ.Trib. (3rd ch.) 7/18/79, *Benezaraff v. Tessier du Gros*, J.C.P, 1980.Iv.137. Cited in Callebaut, *op.cit.*, p.170.

[14] However general the terms, in which an agreement is drawn up, it includes only those things to which it appears the parties proposed to agree.

[15] In case of doubt the agreement is to be interpreted against the one who has stipulated, in favor of one who has undertaken the obligation.

[16] Agreements bind the parties not only to what is expressed, but also to all the consequences which equity, custom or the law give to the obligation according to its nature.

courts have gone in search of the professional practices to read into the meaning to be appended to the ambiguous contract.[17] The courts found contradictory findings as to what was professional usage.[18] The prevalence of collective agreements that stipulated the need for further remuneration from exploitation contributed to the finding of professional usages in favor of the performer. Thus it was a combination of the general civil law and the professional usages that led to securing the performer against unauthorized exploitation.

Protection Against Third Party Exploitation

In the subsequent years, the French Courts granted performers' the right to oppose the unauthorized fixation and exploitation of their performances.[19] The reason for such a development in France is purely historical and based on philosophical underpinnings. Commercial reasons never really influenced continental civil law developments. Freedom of contract was skeptically viewed and it is generally accepted that the law should intervene to protect the weaker party to a contract. The Civil Code through 1382 comes to the rescue of the performer by stipulating that a person in the absence of a contractual relationship uses or reproduces an artists performance would be liable. The performer was provided relief in two significant decisions. Even the statement by the exploiter that the exploitation would inadvertently help the performer was not enough to defend him against the application of the article.[20] The recourse of unjust enrichment was also a recognized means if the other avenues did not help the performer.[21]

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[17] It is significant that the courts have not found anything in the French practices where in the silent agreement or ambiguous agreement passes over all the rights of exploitation to the producer. This was investigated in a case to understand whether the company had the right to use the sound tape of a movie without the authorization of the actress. Cass.Civ. (1st ch.), 1/30/74, *Orane Demassis* v. *Compagnie Mediterraneenne du Film*, J.C.P., 1974,IV .92. Cited in Callebaut,*op.cit.*,p.170..

[18] *ORTF and SNICOP* v. *SPEDIDAME* , CASS.Civ.(1st ch.),3/15/77,J.C.P.,1979.11.19153.–the court held that such practices were common. However in Cass.Civ. (1st ch.), 11/5/80, *SNEPA* v. *Radio France*, R.I.D.A., April 1981,107, cited in Callebaut. *Id.*, p171.

[19]Pascal Kamina, *Film Copyright in the European Union, Cambridge University Press (1st edn.-2002),* p.339.

[20] Cass.Div. (1st ch.), 1/4/64, *Soc.Urania Records* v. *Furtwangler's heirs*, Cass.Civ. (1st ch), 11/5/80, *SNEPA* v. *Radio France*, R.I.D.A, April 1981,107, cited in Callebaut, *op.cit.*, pp.173-174.

[21] The criteria to be satisfied were – the enrichment of the defendant, the impoverishment of the artist, the correlation between the two, the absence of legal justification for the enrichment, the absence of fault of the artist and the lack of any other recourse. *Ibid.*

Moral Rights

There was tremendous consciousness regarding moral rights pertaining to performers' through case law even before the Copyright Act had made advances. [22] Though the performer was never granted an equal status with the authors, the French nonetheless granted them quiet early in the absence of special provisions in contracts of employment and collective agreements two important rights, a moral right and a right to remuneration. The Courts recognized it before 1957 on the ground that every individual is entitled to respect for his personality, honor and reputation. This was so as early as 1931.[23] Even minute transgressions with respect to honor pf the artist was not spared. Even a wrong mention that a live performance was a recorded performance invoked the moral right of the artists. The high state of refinement of this right is evident when one perceives the subtle variations in which this right has been upheld. Some of the instances were when it was recognized by the courts that the artist had the right to the use of a pseudonym.[24] The right of integrity that safeguarded the work from being altered and modified without the consent of the artist was also emphatically observed. Subtle variations even with respect to quality of the recording from the original would suffice to constitute a violation and remedy granted to the performer.[25] The courts in several instances have also deprecated denaturisation of the work by mis-attributing and incorporating elements into the plot without the knowledge or consent of the actors. Instances like for instance where in the pornographic material was incorporated into the film[26] or the character turned out to be at variance from the brief given prior to the shoot was found to violate the right of

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[22] Pascal Kamina, *op.cit.*,p.289. For instance advertising cuts and film colorization led to exploration of common-law torts such as passing off, defamation and ingenious falsehood.
[23] State Council, 11/20/31,Franz, s., 1932.2.62. Callebaut, *op.cit.*,p.179.
[24] Seine. Civ.Trib. (3rd ch.), 2/19/55, *Francine* v. *Franco-London du Film*, J.C.P., 1955 .11.8678. *Id.*, p.180.
[25] *Soc.Urania Records* v. *Furtwanglers heirs*, this right was upheld when the record for broadcasting was found to be of less quality than that of the original produced for commercial distribution. *Ibid.* It is important to note that the decision was set down by the *Cour de Causation*, which is the highest court in France and the decision acted as a binding precedent for the other courts. See also Paul Edward Geller, Melville B. Nimmer, *International Copyright Law and Practice*, Vol.1, Lexis Nexis, San Francisco (2002), p. Fra-133.
[26] Paris, Civ.Trib.,(1st ch.),4/20/77, *Alers* v. *Unia*,S.,1977,610. Callebaut,*op.cit.*,p.180.

the performer.[27] A very significant right –the right of divulgation or the right to publish was also granted to the performer. The lack of trust in the production standards[28] or need for better standards of quality[29] could be enough reason for the artist to restrain the show. A very arbitrary right to correct their own show or retract their performances is also recognized provided the artist indemnifies the producer.

It is noteworthy that during the ensuing period the Court's refused to acknowledge the rights of the performer as being at par with the authors. However in the absence of special provisions in the contracts of employment and in the collective agreements two important rights – a moral right and a right to remuneration were recognized. A moral right was recognized prior to 1957 law in France on the premise that every individual is entitled to respect for his personality, honor and reputation.[30] The Court's also laid down that a non-use of a recorded performance also would constitute a possible breach of contractual provisions.[31] It was also laid down that all violations couldn't be treated as injury to moral rights violations but needed to be construed as violations of a tort or a contractual nature.[32] In short the genesis of copyright recognition can be said to have evolved from labor welfare based on standardized labor or service contracts. The process was aided by the non –institutional bodies for the collection and distribution of royalties for the primary and secondary uses of their

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[27] Cass.Civ. (1st ch.), 3/18/71, *Abadie v. ORTF*, J.C.P., 1955,11.16763. Cases of this nature are a legion in French jurisprudence. *Id.*, p.181.

[28] Paris,Civ.Trib.(1st ch,),5/19/82, *Dimi Tridau* v. *Soc. Radio France*, R.I.D.A, October ,1982,114. *Id.*,p.182. A singer's rehearsal in the privacy was taped when she did not feel her rendition was of an appreciable standard.

[29] Seine, Civ. Trib. (1st ch.), 7/7/38, *Huguenot* v. *Dufrene*, Gaz.Pal.,1938,676. Refusal by the actor to play his part as the production was found unsatisfactory.*Ibid.*

[30] 1931 Counseil d'Etat –Conseil d' Etat 10 November 1931; Sirey, 1932.2.62.
Tribunal Civil de la Seine (3rd Chamber) 23rd April 1937,Jurisclasseur Periodique 37. II.247, Sirey, 1938 .2.57.
Tribunal Civil de la Seine (18th Chamber) 19 November 1937, Gazette Du Palais, 1938 .1.230.Droit d' Autear 1940 ,p.118. Tribunal Civil de la Seine (3rd Chamber) Juris Classeur Periodique 1955.II.86 78, note Plaisant Paris Court of Appeal, 2nd June 1947,Gazette Du Palais, 1947 .2.91.
Furtwangler case: Tribunal Civil de la Seine, summary proceedings .19 December 1953,RIDA III Paris Court of Appeal, Court no 1, 13 February 1967,Juris Classeur Periodique 1957n .II. 9838.
Cour de Cassation, Civil Court no. I, 4 January 1964: Dalloz 1964 .321.cited in Stewart.*op.cit.*, *Id.*, p.394.

[31] *Spycket and another* v. *Ste discs*, Cour de Cassation, Chambre Sociale, 29 April 1976.Juris Classeur Periodique 1976, IV, 204, Dalloz 1976. IR.165. *Ibid.*

[32] *Spedidame* v. *ORTF and SINICOP,* Paris Court of Appeal)(4th Chamber), 230 November 1974 affirmed by Cour de Cassation (1st Civil Chamber), 5 March 1977, RIDA (July 1977). *Ibid.*

performances. Since the enactment of the law 70.643 of 17th July 1970, the decisions of the Court proliferated. In order to secure the lot of the performers' even non-use of the recorded performances came to be considered as violations of their rights.[33].

The French Intellectual Property Code provides the performer with strong moral rights provisions and these include the right to paternity and the right to integrity. The right is inalienable as well as imprescriptible. Quiet significantly, the right does not end either with the life of the performer or with the cessation of his economic rights and is to be enjoyed by the heirs of the deceased performer.[34]

This is a feature of striking difference from the approach of the Copyright System with regard to the moral rights of the performer. It has been seen that the French respect for the performers' moral rights prevailed even prior to the expression of the same in the Intellectual Property Code. The courts had upheld the right to attribution, distortion and even non-use of the performance rendered by the performer. It is expressly prescribed that the performer shall have a right to his name, capacity and performance. It is an unqualified right granted to the performer. The right is an explicit grant complemented by its attribute of inalienability and imprescriptible character. It is noteworthy that the right does not carry any durational limit and is transmissible to his heirs. The transmission to the heirs happens upon the death of the performer in order to protect the performance as well as the memory of the performer. This encompasses both the right to paternity, as well the personal honour of the performer and his reputation.[35] No distinction between the audio and the audiovisual performances has been prescribed in this regard.

One of the later reflections of this right was in the *Rostropovich* case[36], in which the performer, a famous cellist, protested against the use of his performance in a film soundtrack. The director of the film, Boris Godunov, had used the music by

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[33] *Ibid.*

[34] Article L212-2 of the Intellectual Property Code, France. A performer shall have the right to respect for his name, his capacity and his performance. This inalienable and imprescriptible right shall attach to his person. It may be transmitted to his heirs in order to protect his performance and his memory after his death

[35] Article L212-2 says that 'A performer shall have the right to respect for his name, his capacity and his performance. This inalienable and imprescriptible right shall attach to his person. It may be transmitted to his heirs in order to protect his performance and his memory after his death.

[36] Tribunal of First Instance of Paris, 10 January 1990. Cited in Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press (1st edn.-2002), p. 363.

modifying its volume level and added some sounds to the soundtrack of the music. The sounds included spitting by the priest, of some one urinating and the gasps of a woman. These were found to be derogatory from the standpoint of the performer-Rostrpovich. The tribunal justified the *locus standi* of the musician as it felt that the interpolation of some sounds could indeed harm the right of the performer particularly if the performer is famous. In consequence the tribunal ordered the insertion of a disclaimer. Even when there has been a conflict between the moral rights of the author and the moral rights of the performer, the courts in France have tried to evolve a balance of interests as is evidenced in the *Rostropovich* decision.[37]

Personality Rights

In the long line of cases the personality of the performer was protected as any one else's. The mere fact of making use of a performance, unauthorized or unremunerated cannot alone be regarded as causing injury to the performers' personality but should involve contractual or tortious liability on the part of the user. A person was entitled to forbid the use of his performance for any other purpose other than the one for which he has authorized. In other words by 1974, the Courts had evolved their own norms. The performer was free to determine the use that is to be made of his performance. He determined the scope of the contract-express qualifications were needed to restrict the agreements. Any subsequent use without authorization constituted breach of contract or tort as the case may be.

Labor Law and the Performer

Articles I-762-1 and I-762-2 of the Labor Code would govern the authorization and the remuneration derived from it. This amounted to recognition that the contract relating to artists performance is presumed to be a labor contract either in individual or common to several artists performing the same number or

[37] The Paris Court of Appeal, 21 September 1999 in *Adam De Villiers* v. *TFI*, though not in favor of the performer, reported another decision on moral rights. Cited in Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press (1st edn.-2002), pp. 363-364.

participating in the same performance.[38] The law No.60-1186 of 26th December 1969 enumerated on a non-exhaustive basis that they were to be regarded as entertainment artists. It established a presumption that was virtually impossible to rebut that the performers' are to be employed under a service contract even when the said performer does not carry on the activity of the said contract on terms implying the registration in the register of commerce. The written authorization of all the performers' was required for group performances.[39]

The performers' rights can be said to have found statutory expression in the Statute of France in 3rd of July 1985.[40] The 1985 code was influenced by the agreements and had also borrowed from the prevailing system. Where it has not been possible to sign the special agreement or the amending agreement some employers took the precaution of stating in the individual contracts of employment that they reserve for the future, the right to exploit the services of the performer in certain ways or by particular means of utilization or reproduction, subject to the conditions of such collective agreements, special agreements or amending agreements as the case may be.[41]

Even though ancillary performers have been excluded from the definition under the 1985 Act nevertheless it is important to note that ancillary performers did beget protection under the Labor Code. The beneficiaries of the law are those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts. It is important to note that under the law of 1985, there was a presumption of transfer of the performers' right to the producer that the contract shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer. Such contract will contain separate remuneration for each mode of exploitation[42]. The 1985 code was regrouped and adapted to the needs of the new technological environment in 1992 and was called as the French Intellectual Property Code.[43]

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[38] *Id.*, p.395.
[39] Stewart, *op.cit* .,p.392.
[40] *Id.*,p. 391. Thus until 1985 a copyright oriented program cannot be found. It was only by the amendment in 1985 that the performer was granted a neighboring rights status.
[41] Stewart, *op.cit.*,p.393.
[42] Though the agreements already specified supplementary remuneration for each mode of exploitation of a television work but no agreement was reached within the fixed term in the cinema field.
[43] <http://www.legifrance.gouv.fr/html/images/english.gif >as on 10th January 2004.

The aforementioned genesis of French performers rights points out the multi-pronged approach devised to protect the performers without compromising on the administrative convenience of exploitation. Despite theoretical constraints like questions of quantum of originality that the French were faced with in granting rights to new entities in the context of the rights enjoyed by the traditional entities a semblance of protection was extended to the performer.

Legal Status of the French Performer Today

Employee Status Maintained

One of the major highlights of French law has been the fact that fundamentally the performer has been considered to be an employee under the French law.[44] Though independent contracting is allowed this is a rare occurrence. This is also starkly different from the British approach where in it is made sure that there is no confusion with respect to the status of the performer as an independent person. The performers' status in France is determined by the collective bargaining agreements and by the statute law that includes the authors' rights law as well as the labor law.[45]

Traditional Rights Safeguarded

The safeguard clause has been enjoined in the Intellectual Property Rights Code (adopted in the year 1993) there by safeguarding the traditionally recognized authors rights from the novel extension covering related rights.[46]

Definition of the Term 'Performer'

The French law makes a qualitative distinction with respect to the performers' in the audiovisual. It appears to be because of the multitude of performers' in the

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[44] The Articles L-212-3, L-212-4 and L-212 –5 bear abundant testimony to this.

[45] Article I-762-1 of *Code de Travail*- Labor Code France. Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press (1st edn.-2002),p. 357.

[46] L-Art.211-1. Neighbouring rights shall not prejudice authors' rights. Consequently, no provision in this Title shall be interpreted in such a way as to limit the exercise of copyright by its owners.
See <http://www.legifrance.gouv.fr/html/images/english.gif> as on 10th January 2004.

audiovisual production. The French law has sought to resolve this issue by making or attempting a subtle distinction between interpreting and performing artists on one hand and artists considered as complementary in the professional practices. Only the interpreting artists are considered as eligible entities under the French intellectual property rights code that is those who act sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety circus or puppet acts.[47] The definition is broader than that in the Rome convention. The exclusion of ancillary performers has been found to create difficulties as practices were of little guidance. The courts have pursued diverse criteria to infer whether the actor was ancillary or not. If the role is essential then it has been inferred that the performer is not ancillary.[48] In another instance duration and importance of the character was taken into account. The courts even relied on the quantum of originality to make this distinction[49]. Thus, the definition of the term performer is narrow and a closed one with specific reference to literary and artistic works and a specifically enumerated list of those unconnected with literary or artistic works.[50] This distinction is reflected in the labor code provisions as well. The value of artistry is attributed to a performer who speaks not less than 13 lines. The complementary artists should claim that they have made an artistic contribution if they have to be provided the same privileges.

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[47] Article L212-1of the Intellectual Property Code says that " Save for ancillary performers, considered such by professional practice, performers shall be those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts". <http://www.legifrance.gouv.fr/html/images/english.gif >as on 10th January 2004.

[48] Paris 26 November 1986,Juris –date no. 028705,comm.com. Elec.1999, comm.No.42, note Caron, cited in Paul Edward Geller, Melville B. Nimmer, *International Copyright Law and Practice*, Lexis Nexis, Vol.1 (2002), p. Fra-134.

[49] Cass.Civ.I, 6 JULY 1999(Telema C.Leclaire), juris –date no. 003057,Comm.com.elec.1999, comm.No.42, note Caron J.C.P. 1999, IV, 2661,D.1999 Inf.rap.213 cited in *Ibid.* This has also been criticized on the ground that originality was never a requirement for protection of neighboring rights.

[50] Ms. Mary Saluakannel, *Study on Performers' Contracts and Remuneration Practices in France and Germany*, published by WIPO, Geneva (2003), p.5, presented at the ad hoc informal meeting on audiovisual performances held on November 6 and 7th 2003, Available at <http://www.wipo.int/documents/en/meetings/2003/avp_im/doc/avp_im_03_3b.doc> as on 1st January 2005.

Need for Written Authorization

French law has granted the performers' the whole scope of rights and the exclusive nature of these rights has been tempered by making their exercise partly conditional on labor legislation. In the French law the rights of performers' are intertwined with the collective labor agreements. The law requires that the agreement between the performer and the exploiter of his performance should be written.[51] The written authorization shall be required for fixation of his performance, its reproduction, and communication to the public as also for any separate use of the sounds or images of his performance where both the sounds and the images have been fixed.[52]

French Intellectual Property Code

Exclusive Rights Enjoyed by the Performer

Under French Intellectual Property Code, performers' are granted exclusive rights to authorize:(1) The fixation of their performance;(2) the reproduction of the fixed performance;(3) The communication to the public of the fixed performance; and (4) the separate use of the sounds or images of their performances where both the sounds and images have been fixed. This provision is complemented by the provision in Article L.762-1 of the labor law, according to which an employment contract must be individual. The contract may, however, be made for several performers' in cases where several artists are employed for the same performance or musicians belonging to the same orchestra. In such cases, it is important to note that the contract must mention the name, and specify the individual salaries, of each performer. One of the artists may sign this contract on behalf of other artist presupposing that he has a mandate from them to do so.

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[51] Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press (1st edn.-2002), p.357.

[52] According to the law,*"[t] he performer's written authorization shall be required for fixation of his Performance, its reproduction and communication to the public as also for any separate* Use of the sounds or images of his performance where both the sounds and images have been fixed. Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press (1st edn. -2002), p. 357."Such authorization and the remuneration resulting there from shall be governed by Articles L. 762-1 and L. 762-2 of the Labor Code, subject to Article L. 216-6 of this code. Article L. 212-3.

This presupposition shows the inclination to ease the mode of exploitation particularly when there is more than one performer involved in the same performance.

Norms for Presumptive Transfer of Rights

In order to ensure that the producer holds all rights relative to the audiovisual work in their hands, the French authors' rights law provides for the assignment of performers' rights to the producer of the audiovisual fixation by signing a production contract. According to the law the signature of a contract between the performer and a producer for the making of an audiovisual work shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer.[53] It should be noted that the same presumption is not applicable with regard to the sound recordings. The law further provides that this contract shall lay down separate remuneration for each mode of exploitation of the work.[54] In other words, the French law provides for a sort of legal assignment of rights in audiovisuals, a *cessio legis*, to the producer of the work after the performer has signed the employment contract. By virtue of the fact that the performer has accepted to sign an employment contract for an audiovisual production with the producer, performers' rights are assigned automatically, by operation of law, to the producer. It should be emphasized that if no written contract exists, there is no assignment of rights and the presumption rule is not effective.[55] It is significant to note that the no right is provided to the producer to separately assign the rights of the authors and the performers in the audiovisual. [56]

[53] Article L-212-4 of the Intellectual Property Code, France.
[54] *Ibid.*
[55] There have been several court cases regarding interpretation of requirement for a written agreement as a pre-condition for the presumption rule to enter into effect. These court cases have dealt with the rights of musicians to the soundtrack of the film, and the outcome of different cases has been somewhat different. The final say with regard to these issues lies with the French *Cour de Cassation*.

[56] Article L-215-1. This is specifically spelt out only with respect to the video gram producers. This provision vindicates the rights of the video gram producer to assert that he does not fall into a separate category from that of the audiovisual producer or creator of the audiovisual work.

Transfer Accompanied by a Fair Compensation

However, this assignment of rights is compensated for within the law itself, which contains a complex regulatory framework to ensure that a performer receives fair compensation for all further uses of her fixed performance. Accordingly, the contract between the performer and the producer must specify a separate remuneration for each mode of exploitation of the work.[57] The remuneration may be determined either in the individual contract or in a collective agreement. If neither the individual contract nor a collective agreement mentions the remuneration for one or more modes of exploitation, the law refers to the common tariffs established in each sector under specific agreements between the employees' and employers' organizations representing the profession.[58] Moreover, the Author's Rights law (Art. L212-6) provides that Article L762-2 of the Labor Code shall only apply to that part of the remuneration paid in accordance with the contract that exceeds the bases set out in the collective agreement or specific agreement.

Broadcasting and Communication to the Public

While with respect to the audiovisual a presumptive transfer of right operates and administers the exploitation in various modes, a different arrangement works with regard to the performer in the phonograms. When a commercially published phonogram is either exploited via broadcasting or simultaneous integral cable retransmission or through the means of communication to the public neither the performer nor the producer can oppose the same but they are entitled to a remuneration based on the revenue from the exploitation.[59] The remuneration is to be equally shared between the performer and the producer. The contractual arrangement regarding the remuneration is similar to that pronounced with respect to audiovisuals in that collective organizations shall enter into agreements. The users would have to make available the precise program of

[57] Article L. 212-4 of the Intellectual Property Code, France
[58] Article L-212-5of the Intellectual Propert Code, France.
[59] Article L-214-1 of the Intellectual Property Code, France.

uses and other documentation.[60] In the absence of agreements the state sponsored committee that will decide and lay down the rates by a majority vote.[61]

Difference Between Salary and Remuneration Stressed

The French law emphasizes the difference between the initial salary paid and the consequent remuneration received from the exploitation of the recording so that there is no confusion or passing off between one and the other. This means that part of the remuneration received by performing artists for the sale or other exploitation of the recording of their performance after their physical presence is no longer required is not considered part of their initial salary for the performance but as remuneration from the sale or exploitation of the recording. Whether this remuneration is considered as complementary to salary, that is, as a salary or as copyright remuneration, would be determined in the following manner: -
First of all, three conditions laid out in the law must be satisfied: there must be a recording of the performer's performance; the remuneration must be paid relative to the sale or exploitation of the recording even when the physical presence of the performer is not required for the exploitation of the recording. Depending on the fulfillment of these three conditions, the remuneration paid for the performer may or may not be considered as a salary. According to Article L-762-2 of the Labor Code the remuneration is not regarded as a salary if it is in no way determined as a function of the initial salary paid for the production of the performance and its recording, but only relates to the monies received from the exploitation of the recording. Thus, the determination of the remuneration may not in any way, even indirectly, relate to the initial salary and it must also be derived directly from the sale or exploitation of the recording. In all other cases the remuneration forms part of the performer's salary.

Old Contracts –New Uses in France

The law regulates the status of contracts concluded prior to entry into force of the

[60] Article L-214-3 of the Intellectual Property Code, France.
[61] Article L-214-4 of the Intellectual Property Code, France.

Law. According to Article L.212-7 contracts concluded prior to January 1, 1986, between a performer and a producer of audiovisual works or their assignees should be subject to the preceding provisions [of the law] in respect of those modes of exploitation, which the parties have excluded. It is further provided that the corresponding remuneration shall not constitute a salary. This right of remuneration shall lapse at the death of the performer. In practice this means that if the old contract had excluded certain modes of exploitation, the remuneration for performers' shall be calculated according to the new law for these modes of exploitation. After the death of the performer the right of remuneration for these modes of exploitation cease to exist.

Mandatory Application of Agreements

The law further provides that 'the provisions of the agreements referred to in the preceding Articles may be made compulsory within each sector of activity for all the parties concerned by order of the responsible Minister'.[62] In practice the only exception to this arrangement is of collective bargaining agreements for musicians. The Minister of Culture has made the collective bargaining agreement relating to performers' rights in the film production mandatory. The collective bargaining agreement for television has also been extended by the Minister of Labor to cover non-represented parties as well. If the parties are not able to reach an agreement with regard to assigning performers' rights to the producer and with regard to remuneration for each mode of exploitation as required by the law, the law provides for a judicial process for establishing the level of remuneration.[63] In case the contract or the collective agreement does not

[62] Article L-212-8 of the Intellectual Property Code, France.

[63] According to Article L.212-9 of the law: "[f]ailing agreement concluded in accordance with Articles L212-4 to L212-7, either prior to January 4, 1986, or at the date of expiry of the preceding agreement, the types and bases of remuneration for the performers' shall be determined, for each sector of activity, by a committee chaired by a magistrate of the judiciary designated by the First President of the Cour de cassation and composed, in addition, of one member of the Conseil d'Etat designated by the Vice President of the Conseil d'Etat, one qualified person designated by the Minister responsible for culture and an equal number of representatives of the employees' organizations and representatives of the employers' organizations.
"The Committee shall take its decisions on a majority of the members present. In the event of equally divided voting, the Chairman shall have a casting vote. The Committee shall decide within three months of the expiry of the time limit laid down in the first paragraph of this Article.
"Its decision shall have effect for a duration of three years, unless the parties concerned reach an agreement prior to that date."(*foot note contd.next page*)

mention remuneration for one or several other modes of exploitation, the remuneration has to be determined by reference to the schedules established under the specific industrial agreement concluded in each sector of activity.[64]

THE E.U. DIRECTIVES AND THE PERFORMER IN THE EUROPEAN UNION

The European Commission Directives have the force of law and therefore the countries that are part of the European union do not have much option but to apply the Directive within a time frame after its promulgation in the European Union. There fore it is significant that the European block including the United Kingdom and France discussed before are determined by these Directives. The developments in Europe with regard to harmonization of copyright and neighboring rights in the face of digital revolution have been significant.[65] The significance in analyzing the changes therein lies in the fact that prior to the initiation of the harmonization measures the European block consisted of an amalgam of countries composed of divergent copyright systems.[66] In preparation of these changes the normative value played on the copyright and policies particularly with respect to audiovisual and authorship underwent a change.[67] It

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If a performance of performers' is accessory to an event that constitutes the main subject of a sequence within a work or an audiovisual document, the performers' may not prohibit the reproduction and public communication of their performance
(Article L.212-10).

[64] Article L212-5 says that where neither a contract nor a collective agreement mention the remuneration for one or more modes of exploitation, the amount of such remuneration shall be determined by reference to the schedules established under specific agreements concluded, in each sector of activity, between the employees' and employers' organizations representing the profession.
Pascal Kamina, *Film Copyright in the European Union*, Cambridge University Press (1st edn.-2002), p. 358.

[65]

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/95/798&format=HTML&aged=1&language=EN&guiLanguage=en > as on 1st January 2005. The process began with the Green Paper on Copyright and Related Rights with the onus being on the need for making the legal frame work more confidence inspiring on the information superhighway that already was capable in terms of technology and the infrastructure but only required further investment. Investment in these new inter-active services, such as distance learning, remote health care, audio and video-on-demand and tele-shopping, itself depends on investors being satisfied that a suitable legislative framework exists.

[66] Bryan Harris, "Copyright in the EEC-the Dietz Report" [1978] EIPR 2-7.

[67] Julien Rodriguez Pardo, "Highlights of the Origins of the European Union Law on Copyright" [2001] E.I.P.R. 238-240. The European commission had noted that the cultural sector is socio

can be noticed that a framework for improving quality of life of the artist was put in place.

The performers were granted rights both in the sound recordings as well as in the cinematograph or audiovisuals. It was also accompanied by a radical overhaul of the redistribution of authorship in audiovisuals.[68] The conferment of rights was also accompanied by the forging of legal mechanisms and concepts where in the plethora of rights granted in a work could be exploited without any adrninistrative difficulties. It is important to note that all those grounds of opposition that were voiced down the century regarding the grant of rights either to the performers or others were voiced by different interests and countries during the preparation of these Directives as well. One of the worst fears being that the problems associated with exploitation of the works as the grant of several rights would essentially raise obstacles by one or the other of the rights holders.[69] The

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economic constituted by people and enterprises dedicated to the production and distribution of goods and cultural provisions. This policy should not be considered as a cultural policy but as an approach to the social and economic problem of the workers. This was stated as early as 1977, Nov 22,*l' action communautaire dans le secteur culture*. Copyright came to be seen as a social and a workable right and not simply a property based one. The right was due not merely because he owned it but it was the fruit of his labor and it gave him an adequate means of living. Another important feature was the recognition of the audio visual as an important medium of the future. The creation of an audio-visual policy was attempted together to curb the incidence of piracy. The need was to profit both economically and culturally from new audiovisual media. The advent of the new communication technologies also led to the proposition for

[68] Article 2(2) of the Directive 92/100/EEC of 19/11/2002 provides for the principle director to be recognized as one of the authors of the film. Report from the commission to the council, then European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the community- /*COM/2002/0691 final */. <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52002DC0691&model=guichett> as on 25-1-2004. also <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52002DC0691&model=guichett> as on 12-10-2005

[69] Executive summary of the Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community /* COM/2002/0691 final */ at <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52002DC0691&model=guichett >as on 25-1-2004 <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52002DC0691&model=guichett> as on 12-10-2005. In the context of the re-designation of authorship of film authorship it was found by different reports and commissions that the grant of principal directorship would not be a obstruction to the exploitation of the work nor in the checking of piracy or in the unauthorized uses of these works. The reports found no evidence that would substantiate such a fear. Transfer of rights arrangement to the producer countered the complexity that was envisaged either by operation of law or by means of collective or individual contractual arrangements. The contractual freedom also minimizes the difficulties posed by the variations in the laws of the different countries in the European union. Till date these arrangements have not posed difficulties in the administration of rights. The European endeavor was fostered by the growth of channels of exploitation in an information society and the need to meet the management of rights in this context.

Directives introduced and transformed the traditional positions and attitudes towards performers or neighboring rights holders. The finding and the objectives enshrined in the Green Paper on Copyright and Challenge of Technology led to the adoption of five Council Directives of which three pertain to the status of the performers.[70]

The Rental and Lending Rights Directive that was adopted and implemented in the year 1996[71] provides a higher level of Protection to the performer in the European union. The rental and lending right covered all the works including the neighboring rights holders but with a few qualifications. The Directive maintained that the reproduction, distribution, rental and lending rights are to be proprietary rights. The Directive also granted an equitable remuneration to be paid to the performer for the public performance and broadcasting of recordings of their audio performances. The assignment of rental rights to film and sound producers was also to give them an equitable remuneration. The Directive therefore was way ahead of all corresponding national and international commitments. From the performers stand point it was a substantiation of the resolve to increase the control over his performances in particular post fixation.

Certain other features of this Directive are important to be noted. There is nothing stopping the countries to extend the rebuttable presumption of transfer concept to other exclusive rights provided they are going to be compatible with the international conventions (the Rome convention). The Rome convention it may be recollected speaks nothing against the rebut table presumption of transfer. However this freedom appears to hint that such an arrangement envisaged would be with the mandatory minimum provision of equitable remuneration. More protection than the minimum that is envisaged under the Directive can be implemented by the respective nation states.

The exclusive right to authorize or prohibit rental and lending is provided to the performer in respect of the fixations of his performance. The author, the

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[70] Silke Von Lewinski," Rental Right, Lending Right and Certain Neighboring Rights: the E.C. Commissions Proposal for a Council Directive" [1991] EIPR 117.

[71] See for an analysis of the propositions leading to the right, Paul Edward Geller, "Proposed E.C. Rental Right" [1992] EIPR 4., pp.4-8. See for the total contents of the Directive- <http://europa.eu.int/ISPO/ecommerce/legal/documents/392L0100/392L0100_EN.doc> as on 1st January 2005.

phonogram, producer and the film producer are also vested with a similar right[72]. It is important to note that with respect to the performer no discrimination is shown between the performer in the audio and the performer in the audiovisual. The highlight is the presumption of transfer of the rental right in case of performer in a film production. The performer would be considered to have transferred subject to contract to the contrary.[73] However this transfer has an effect only if it is accompanied by equitable remuneration to be paid by the producer or his transferees.[74] The intent is to guarantee the remuneration for the performer and assuring the producer of fluidity of exploitation. The equitable remuneration is an avenue of remuneration that can never be waived by the performer. This secures the performer from the unfair bargaining contracts where in market forces would seek a waiver from the weak performers. Considering the non-extinguishable nature of the equitable remuneration rights, provision is made so that the only transfer can be made to a collecting society. The member states had been given the freedom to decide to extent of regulation of these collecting societies and the mandate as to from which the remuneration has to be collected.[75]

The same concern with regard to rental is not seen in regard to lending of performers performances. The remuneration has been maintained for the authors alone. Further there is no strict mandate that there cannot be derogation from the lending right. Derogation from the lending right is allowed subject to the condition that the authors are provided remuneration. Besides the rental and lending right, the Directive grants the performer and others the right to fixation of their performances and the right of reproduction of the fixations.

A most significant right is that of broadcasting and communication to the public for both audio as well as the audiovisual performer from the live performances.[76] But it is a qualified right as regards the performers as the right is only from a live performance. The right does not extend to broadcasts from fixations or from performances already broadcast. An important point to be noted is that no

[72] Art 2(1) of the Directive.
[73] Art 2 (5) of the Directive.
[74] Art 2(7) of the Directive.
[75] Art 4(4) of the Directive.
[76] Art 8(1).

mention is made whether the fixation or the broadcast earlier made needs to be legitimate one or not. This can result in the possibility that all performances broadcast or fixations of performances is susceptible to be broadcast whether or not those have been validly procured in the first instance.

The audio and the audiovisual performers are treated differently in the grant of this right. A reproduction of a phonogram or a phonogram published for commercial purposes if used for the purposes of broadcasting or communication to the public calls for the provision of a single equitable remuneration to the performer and the producer.[77] The states are asked to ensure that this right is shared between the performers and the producer. The states are endowed with this duty if the performers and the producers have been unable to come to an agreement with respect to this. Therefore with respect to contractual freedom in fixing the remuneration the parties are provided the right and there is no state intrusion but in the absence of that then the state is given the mandate to intervene. Thus sound recording performing artistes can expect a single equitable remuneration for their performances broadcast or affixed for the broadcast and the communication to the public. However it is to be noted that the mandatory need for collecting society or the fiction of a presumption of transfer is not introduced here. Nor the clause on non-waivability hat had been specified with regard to the rights provided with respect to the broadcasting and communication. It is important to note that the right is not termed as broadcasting and communication right perhaps because of its qualified nature. (Unlike the fixation, reproduction and the distribution right). There is no restriction on transferability. Thus even sound recording artistes would be in an uneven bargaining plane as a complete assignment of single remuneration right can negate the utility of these provisions. Thus the consequences and conditions in which single equitable remuneration of the performers rental right functions is vastly different from the manner in which the single equitable remuneration of the performers in the broadcasting and communication right is to be exercised. Further the presumption of transfer with respect to the rental applies only to the performer in the audiovisual. Here for the broadcasting and communication to the

[77] Art 8(2).

public there is neither a right nor a provision of single equitable remuneration for the audiovisual performer at all.

In the midst of the grant of these rights, it is significant that the Directive makes special mention of the need to take care of the position or status occupied by the copyright holders. It is specifically provided that their status shall not be disturbed by the grant of these rights to the related rights entities.[78] The duration of the rights performers as well as those of the related rights holders has been laid down as being a minimum of twenty years. This is the same as that granted under the Rome convention. Though this is less than the minimum guaranteed under the TRIPS. The countries are free to provide for longer terms.

Satellite and Cable Retransmission Directive

The possibilities in trans-border dissemination of programs due to the satellite broadcasting technology and cable retransmission revealed the need for extending the protection already granted to the performers to this sphere as well[79]. This was particularly owing to the fact that the trans-border transmission required the need for assuring the rights of the performers as violations could very well happen across the borders and the identification of liability could emerge as problematic issue. The reasons impelling the formulation of the satellites Directive was that there were differences between European nation states thereby resulting in legal uncertainty. The holders of rights are exposed to the real possibility of exploitation of their rights without payment of remuneration or the situation of individual holders of rights blotching the exploitation of their rights. The legal uncertainty could create problems in the unhindered circulation of programs. It was realized that there was no longer any need for any distinction between communications satellite communication and communication to the public by means of direct satellite. An important question that required an answer was whether broadcasting by a satellite whose signals could be received affects rights in the transmitting country alone or in all countries of reception. Since communication satellites and direct satellites are treated alike for all purposes this legal uncertainty affects all program broadcast in the community by satellite.

[78] Art.14.

[79] Satellite and Cable Retransmission Directive No. 93/83/EEC of 27 September 1993.

This is made more complex with the retransmission by cable networks. The cable operators cannot be sure that they have acquired the entire rights program. The acquisition of rights also is bothersome, as parties in different countries are not obliged to refuse without valid reasons. This Directive was considering the importance placed upon the idea of a single audiovisual area laid down in Directive89/552/EEC. The Directive brought to the fore the need to adapt contracts to the concept of communication to the public via satellites. There was a need to take into account the actual audience, the potential audience and language version. The country and the laws of the country into which the satellite will beam the programs needed to be taken into consideration in order to appreciate the contracts in this regard. [1]There was need to protect the rights already secured to the performers, phonogram producers and broadcasters in the previous Rental Directive. Particular emphasis was placed on the need to check varied statutory licensing methods in the countries of the union.

The need was to check the practice of broadcasting organizations relocating their activities in order to see to it that divergences were exploited to their advantage. Most importantly from the perspective of performers the remuneration rights granted to them by the prior Directive was to be aligned to the communication to the public via the satellite envisaged by the present treaty. A most noteworthy assertion was that the rights of the performers and other rights holders would extend to cable retransmission thereby opening up an avenue of remuneration through communication to the public. The need to have recourse to a collecting society taking into account the special features of the cable retransmission without affecting the right of cable retransmission which would be still susceptible to assignment. Thus the spirit of conserving the rights of the holders while bringing in administrative convenience is preserved in the Directive. It is also firmly borne in mind that the collective society and administration should not prejudice the contractual freedom for negotiation of the rights. Keeping in mind the competition rules and the abuse of monopoly.

From the performers standpoint the satellite and cable retransmission Directive through its definition of the term satellite[80] and the identification of the point of liability in transmission clearly enhances the rights of the performer[81] and secures their position further.[82] The right and the equitable remuneration there from stands extended to the communication and cable retransmission from broadcasts from satellites. Cable retransmission has been defined by the Directive as meaning the simultaneous, unaltered and unabridged transmission from another member state by wire or over the air including that by satellite of television or radio programs intended for reception by the public. It is important to note that these definitions and clarifications tend to secure the rights of the performers against the new avenues of cross border communication and exploitation. Even a situation of communication to the satellite occurring from a non community state is covered by the criteria of the uplink station being in a member state and in the absence of an uplink station in a member state then the country where in the or the member state where in the broadcasting organization has commissioned the act of communication to the public by satellite shall be deemed to be the occurring state.[83]

The interests of the performer as secured by the Rental and Lending Directive and protected by its specific articles stand protected under this Directive covered by the communication to the public by satellite.[84] It is specifically provided that broadcasting by wireless means shall include communication to the public by satellite. The significant point is that the broadcasting and cable transmission has been split into two different activities in the chain of communication. The rights under the Directive are secured in the cable retransmission, which means that the rights of rights holders need to be secured by the cable operators and not by the broadcasting organizations alone. It is noteworthy that the idea of statutory

[80] Art 1 (d) of the Directive, satellite means any satellite operating in frequency bands which under telecommunications law are reserved for the broadcast of signals for reception by the public or which are reserved for closed point to point communication.

[81] Art 1(2)(b) The act of communication to the public by satellite occurs solely in the member state where under the control and responsibility of the broadcasting organization, the program carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

[82] Art 1 (2) (a) Communication to the public by satellite means the act of introducing under the control and responsibility of the broadcasting organization the program carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

[83] Art1 (2)(d)(i)(ii).

[84] Art 4(1)(2).

licensing is slowly intended to cease and proper rights need to be administered keeping the collective administration societies to administer on behalf of the performers and others.

It is most significant that the exercise of the retransmission rights can be exercised only through the collecting societies. This is a major divergence from the position from other rights wherein remuneration played a role. Either the individual or the collecting society could be administering it but with respect to the cable retransmission right only the collecting society can exercise the same. It is noteworthy that the right to grant or refuse cable retransmission can be exercised only through a collecting society.

Even where the performer does not transfer his rights to a collecting society, a collecting society that manages rights in the same category shall be deemed to exercise the rights on his behalf. Thus this is a kind of compulsory handover of administration of the right to license. The collecting society can grant or refuse to grant the right. But it will have its own limitations, as that would be governed by rules and supervision by the Copyright Tribunal or other office established for the purpose of scrutiny. In other words with respect to the sound record performers they would not possess the right to refuse or grant the right other than through the collecting society. This is ostensibly to facilitate easy exploitation. This unavoidable delegation of representation with respect to exploitation of rights is unique as it is compulsory imposition of a rights manager on the performer unlike the administration by means of exercise of the volition of the performer.

It is important to note that broadcasting organizations are exempted from this mandatory delegation of responsibility even if the rights of performers and the others have been transferred to the broadcasting organization. Thus the Directive proceeds on a presumption that the broadcasting organization would not stand as an obstacle to making the program available for retransmission. In case of disputes the use of mediators has been proposed. They would look into questions of refusal of consent.

The Duration Directive

The harmonization endeavor covered a very important area in intellectual property protection viz. the duration of protection granted to the copyright and related rights entities[85]. Till this resolve, problems existed with regard to the divergent terms of protection in different countries in the European union. A union without unanimity in this regard would create manifold difficulties in the exploitation of the works and in the freedom to exploit the works. With regard to the performers this not only introduced uniformity among the countries but also initiated the observance of a minimum term of protection from the date of performance and another from the date of publishing. This is radically a different approach, which has the effect of actually increasing the period of protection to somewhere beyond the lifetime of the author in case of published works. The application of this extended protection has not been confined to the performers alone but includes the phonogram producers, film producers and broadcasting organizations.[86] This imparts equal justice to the neighboring rights entities who were until now granted only a fifty year term of protection. This is also an acknowledgement of the creative content and original authorship of the performances akin to those granted to copyright entities. The move accompanies the grant of the right of co-authorship to the Principal Director of the film that is also an acknowledgement of the originality and authorship in the film.[87] The important factor to be noted is that a film had begun to be recognized at two tiers, one at the level of copyright and the other at the level of related rights.[88] In the former the term of protection granted is 70 years after the death of the last of the surviving persons who are designated as coauthors (whether or not the following are listed as coauthors. the principal director, the author of the dialogue and composer of music specially created for use in the cinematographic or audio visual work). The producer on the other hand gets a term of fifty years from the fixation and upon publication a term of another fifty years. The 'naturalization' of the film can be witnessed in this development which until now had been seen as

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[85] Council Directive No. 93/98/EEC of 24th November 1993.

[86] Article 3 (1) (2) (3) (4).
[87] Art 2(1)(2).
[88] See Art 2 in comparison to art 3(3).

a technical arrangement or recording. The works in its unpublished and published formats can be seen protected cumulatively for a period of 100 years. This need not really drastically make any change in the term of durations of protection as most of these products of the entertainment industry are today meant for instantaneous consumption and therefore publication occurs within a short period of either the performance or the fixation.

Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society-Directive 2001

The Directive of 2001 seeks to amend and consolidate the process of harmonizing the Copyright and Related rights in an information society.[89] It qualifies the afore-detailed three Directives influencing the rights of the performer. It sets out clearly the exact ambit of the terms and the exceptions to the rights including the liabilities of the intermediaries in the distribution of programs.[90] Besides endorsing the earlier sentiment in the prior Directives concerning the performers[91], there are great many qualifications useful to the administration of rights in the digital environment. A great deal of discussion went through the proposals while framing the Directive.[92]

The Directive saves the rights provided by the previous Directives.[93] Importantly the Directive through Article 3(2)(a) provides for the performer with respect to their fixations the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. Thus the on demand online environment is taken note of by the Directive and the peformer bestowed with a right. A distinctionis not made between the audio and audio visual segment.

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[89] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.
[90] <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> as on 16-10-2005.
[91] Article 1, Directive 2001.
[92] Michael Hart, "Proposed Directive for Copyright in the Information Society, Nice Rights, Shame About the Exceptions" [1998] 20 EIPR 169.
[93] Article2 (b)(c)(D).

The most conspicuous provisions are the right of reproduction granted to authors in their works, performers in the fixation of their performances, for phonogram producers, of their phonograms, for the producers of the first fixations of films, in respect of the original and copies of their films and for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite. It is noteworthy that the word reproduction encompassess both temporary as well as permanent reproduction and direct as well as indirect reproduction. Temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.[94]

This alleviates the concerns of innocent intermediaries to a great extent who until now without exception would be accused of having infringed by temporary inadvertent reproductions. The clause (b) appears to carry an aura of mystery, as it requires some construction to figure out what is a lawful use without independent economic significance. There is a further enumeration of exceptions to the right of reproduction taking into account the manner of application in the digital medium but these are left to the discretion of the contracting states to opt. But mostly these appear to be the shadows of the exceptions carved out in the existing copyright act. [95] The exceptions are also extended to the distribution rights.[96] It is specifically mentioned that the exceptions should not conflict with a normal exploitation of the work or other subject matter and should not unreasonably prejudice the legitimate interests of the rightholder.[97]

The states are obliged to bring in measures to protect the anti-circumvention technological measures undertaken by the rights holder as well as the need to

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[94] *Ibid.* Article 5(1) of the Directive, 2001. This had been criticized, as the words independent economic significance was not present together with lawful use. It would have made it difficult to distinguish between a legitimate activity and an act of copyright piracy.
[95] See Art 5(2)(a) to (o) of the Directive2001.
[96] Art 5(4).
[97] Art 5(5).

protect the rights management information incorporated by the rights holder.[98] The Member States are obliged to provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.[99] It is significant that knowledge is an important factor in this respect. In the absence of this factor a circumvention is not considered as having been attempted. Member States are also to provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which are(a) promoted, advertised or marketed for the purpose of circumvention of, or(b) have only a limited commercially significant purpose or use other than to circumvent,[100] or(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures[101]. Thus secondary infringements in the nature of facilitation and abetment are also taken into account.

The Directive make the States obliged to provide for adequate legal protection against any person knowingly performing without authority[102] (a) the removal or

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[98] Art 6(3) explains that the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

[99] Art 6(1).

[100]Michael Hart," Proposed Directive for Copyright In The Information Society, Nice Rights, Shame About The Exceptions" [1998] EIPR 169-171. This provision has been criticized by the music industry for being limited to commercially significant purpose or use other than circumvention. It is argued that copyright pirates will amply add commercially significant purposes to the circumvention devices to avoid suspicion. From the performers perspective the concerns of the industry and the performers are synonymous once authorization rights are provided. If the device has a limited commercial significance then the law can check the same but if the commercial significance is more than its utility in being used for circumvention then the inference would be otherwise. Yet another criticism of the provision had been that it would encompass all equipment, which include ordinary personal computers, or consumer electronic equipment. Legitimate equipment makers cannot be expected to make their equipment operate with 3rd party protection devices of which there might be several.

[101] Art 6(2).

[102] Art 7(1).

alteration of any electronic rights-management information[103] (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under the Directive or under Chapter III of Directive96/9/EC from which electronic rights-management information has been removed or altered without authority,if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive96/9/EC. It is noteworthy that the element of knowledge is incorporated for the first ground and for the second, both knowledge as well as reason to believe has been incorporated.

It is significant that the protection for technological measures as well as rights management information are qualified by the exceptions permitting fair use under circumstances specified (these are similar to the ones exempting and limiting permissive temporary reproductions). In case the issue of exceptions and limitations are not dealt with between the parties by means of contracts then the state is mandated to take measures in this respect. However it remains vague as to how the anti-circumvention devices can be overcome and qualified use(fair use) identified and filtered through state intervention to be of use to the beneficiary unless there is an effective technology in this regard or the private rights holder is willing to invest and provide time to manage the same otherwise.

Another uncertainity and justified criticism could be on the fact that other than one exception /limitation as regards temporary reproduction with respect to all the rest the states are endowed with the discretion to opt and choose tto exempt themselves.

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[103] Art 7(2) says that for the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directiveor covered by the sui generis right provided for in Chapter III of Directive96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The highlight of the Eurpean Directives is that within a time frame the countries of the union are obliged to prepare their laws in tune with the Directives formulated by the European commission.[104] Therefore from the year 2002 the said provisions are fully applicable in Europe. In a short period that has elapsed since its implementation, the Directives along with its constant upgraded and qualified versions have not met with any insurmountable difficulties in implementation. There is a continuos evaluation that is undertaken periodically to assess the effectiveness of the measures.[105]

Among the criticisms pointed out has been the fact that the Directives do not make any propositions to counter the prevalence of standard buy out contracts by which contributors are made to assign their rights commonly.[106] Further nothing is stated regarding the non-transferability of the right of equitable remuneration. The transfer to the collective administration society is only optional. Non-waiver character is only with respect to the enjoyment of the right, it cannot be considered to extend to further transaction of the right granted. Only with respect to cable retransmission there is a deemed entrustment on the collective administration society. Thus this has been left to the nation states concerned. Further the moral rights question has not been addressed so far owing to differences among nation states despite the fact that European Community wished for a WPPT model even at the audiovisual protocol Conference. .

Summing Up the Advantages of the System of Protection in France and European Union

One of the striking highlights of the French system is the three pronged protection based on labor law, copyright law as well as collective bargaining used for the protection of the performer. It is noteworthy that these are not distinct means but their interdependence is expressed in the statutes concerned. While the labor law provides labor security and welfare benefits, the copyright framework provides for security against unfair exploitation of creative effort. Particularly with respect to audiovisuals the presumptive transfer is qualified by specified need for

[104] See Art.13 (1) of the Directive 2001.
[105] See Art. 12.
[106] Bernt Hugenholtz," Why the Copyright Directive is Unimportant, and Possibly Invalid" [2000] E.I.P.R. 501-502.

written agreements with uses and duration specifically inscribed along with the rates for the same separately mentioned. This is in addition to the basic salary that is prescribed for the labor expended by the performer. The scrutiny of labor and copyright administration by the state offices further safeguards against monopoly abuses by the societies formed for the purpose and provides alternatives. The European Commission Directives with its compulsive nature heralds a revolutionary harmonization of performers' protection in Europe. It provides almost all the rights at par with the WPPT (WIPO Phonograms and Performances Treaty) with the complement of non discrimination against the audiovisual performer. Though the rights are not at par with the audio performer nevertheless it speaks for the audiovisual performer which is in contrast to other international instruments. There is profound impetus on equitable remuneration as well as collective administration with noteworthy limits on the individual administration as well as transferability of the right to a collective administration body. The intent of a fine balance between the rights for the performer and the convenience of commercial exploitation has been effectively realized.

CHAPTER 5

COLLECTIVE BARGAINING AND ADMINISTRATION OF PERFORMERS' RIGHTS IN AUDIOVISUALS

Objective of the chapter: The chapter endeavors to explore the means adopted by the performers and industry interests in the three most prolific film making and rights conscious countries to implement and administer the rights and obligations of the performers. The intellectual Property ingredient being accepted in their collective bargained contracts as well as in their statutes, it provides lessons at managing these rights in the future in India. It also aids in pointing to factors that are absent in the Indian entertainment industry while planning for any intellectual property based paradigm in India for the future. It is pointed out that agreements referred to in this chapter have been entered into a particular point of time but these are subject to periodical revision in these countries. However the analysis draws on the major characteristics displayed by these agreements.

An Overview of the Residual System and the Benefits to the Performer

The status of the performer was to a great extent enhanced by the opening up of a new channel of remuneration based on the reuse of the contributed work.[1] The concept of residuals commenced in the entertainment industry in different parts of the world quiet early as an offshoot of collective bargaining process. In the United States and in several western countries securing royalty and residual rights based payments became a feature in the agreements brought about by the unions and producers with the aim of securing better returns to the artists. Every contributor ranging from artists to directors and musicians have a residual laced agreement with the producer interests in media that includes theatrical, radio,

[1] Robert W. Gilbert," Residual Rights Established by Collective Bargaining in Television and Radio," 23 *Law & Contemp. Probs.*102 (1954). The practice of residuals can be seen to have occurred in the film and the sound record industry in the early part of the century around the 1930's.

television and today the Internet as well.[2] The highlight of the residual earnings has been that even without any proprietary interest in the programs, the performer receives compensation, as it is an output of contractual bargains. Even during the time when the performers or others such as the directors never had any statutory or common-law rights in the affixation after their initial payments the bargain had a concept of residuals that kept pouring in the returns.[3] Another highlight is that even if the individual contract entered into doesn't contain a provision regarding the residuals, the benefit of residuals arises to him under the canopy of the collective bargaining agreement. Residuals represent extra compensation for services rendered by the recipients in the course of their employment, in addition to their basic wages, salaries or fees.[4]

The residual agreement helps the majority of artists who cannot bargain individually. It helps the producer in that he does not have to spend time crafting contracts with each performer as the collective deal works to the benefit of the performer. Most significantly it brings in a form of profit sharing and deferred payments until the costs have been recovered. This reduces the costs and the risks while at the same time opening up revenues from new outlets of entertainment[5]. The residuals percolate from the reuse or re-exploitation or the reruns of the works into which the artist has contributed. The residuals from such usages usually are calculated from the percentage of their wage rate, salary or fee applicable to the type of services or period of employment for which the participating employee was engaged. The residuals for the reruns can be based on the geographical terrain or even without any limits though the rates are commonly based on the place of exploitation. Care is taken to see that clauses are incorporated so that all future technological changes in the mechanical means are covered (both audio as well as video portions of the broadcast

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[2] The class of economic benefits derived by their membership has been loosely referred to as residual rights.

[3] *Id.*, p.103.

[4] *Ibid.*

[5] Ms. Katherine M. Sand, *Study on Audio Visual Performers' Contracts and Remuneration Practices in Mexico, The United Kingdom and the United States of America*, Presented at the Ad Hoc Informal Meeting on The Protection of Audio Visual Performances, Geneva, June 18 To 20, 2003, WIPO, p.25.
Available at <http://www.WIPO.int/documents/en/meetings/2003/avp_im/pdf/avp_im_03_3a.pdf> as on 26th December 2004.

material). The organizations representing the residual beneficiary do not cater indiscriminately to all the artists. Classifications are made be with reference to actors or writers or directors. For instance extras are not entitled to residual payments.[6] Even sale or transfer of the rights would not take away the rights of the beneficiary from a third party who comes to acquire the title. An assumption agreement becomes sine qua non to be entered into with the producer.[7] The individual agreement can only be better than the residual agreement and cannot be derogating from it disadvantageously.[8] Both musicians and the actors into their residual contracts have specifically incorporated limitations on the type of use and on the number of uses as well as the periods of use. [9] Incidental uses are also strictly regulated and limitations are cast on them. In order to guarantee the payment of the residuals, security for the payment of the residuals have to be executed by the producers with which the talent guilds enter into any agreement. The aforementioned assessment of the residual system points out to the massive change in the economic and consequent social status that it has brought to the performer in particular the audiovisual performer the world over.[10] The mode of reuse and the rates may vary but the overall character of the residual payment will remain with these substantial administrative safeguards.

Collective Bargaining Practices in the United Kingdom

In the United Kingdom, performers' are treated as self-employed or as independent contractors for taxation purposes and therefore are entitled to separate rights.[11] In other words they are not exempted from the purview of rights by bringing them under the canopy of being employed.[12] The producers

[6]Robert W. Gilbert,*op.cit.*,p.107.
[7] *Id.*,p.114.
[8] *Id.*, p.115.
[9] *Id.*, p.117.
[10] See *Id.*, p.121 for an overall assessment. It is important to note that this assessment has been done around the time of the inception of the residual system in the United States.
[11] The performers' rights granted to the performer under the 1988 act does not exempt a performer from the purview of rights owing to the employer-employee relationship or by a categorization into a commissioned work category.
[12] Ms. Katherine M. Sand, *Study on Audio Visual Performers' Contracts and Remuneration Practices in Mexico, The United Kingdom and the United States of America*, Presented at the Ad Hoc Informal Meeting on The Protection of Audio Visual Performances, Geneva, June 18 To 20, 2003,WIPO,p.8.At<http://www.WIPO.int/documents/en/meetings/2003/avp_im/pdf/avp_im_03_3a.pdf> as on 26th December, 2004.

have to negotiate with the performer as to the manner in which the rights would be dealt with by the performer. This is a wonderful amalgam of separate platforms of protection to realize an effective intellectual property rights security for the performer. In spite of this independent personality, the labor law in Great Britain bestows on the performer, the eligibility to be a member of a trade union. This enables him to negotiate with the producers much more efficiently than he would have otherwise done singularly or individually.[13]

The need to join a trade union is optional on the part of the performer and there is no compulsion that only a member of a union can be engaged artist in an audiovisual. However, a serious performer best exercises the option of taking the membership, as the membership in the trade union would make him amenable to enjoy the benefits of collective agreement entered into with the producers by the trade union. By agreeing to be a member, the performer is bestowing on the union the right to negotiate on behalf of him all the minimum terms and the manner in which the rights granted to him by the law need to be exploited. While the trade union cannot compel any one to be a member of the union and be subject to its terms, it can be strict on the members so that in the post membership period the obligations of the contract are unfailingly adhered. It is important to note that no rights are handed over to the trade union or needs to be transferred to the trade union for its due administration.[14] The rights therefore still vest with the performer despite his membership in the trade union that decides only on the standard terms for dealing with those rights.[15]

Despite the standard agreement, the performer still has to individually enter into a separate contract with the producer. Any deviation from the standard terms for lesser benefit is disallowed by the trade union[16]. They cannot deviate from the terms set down by the organization. Any alteration in the wake of exceptional circumstances can only be rendered with the prior sanction and notice of the trade union. The performer can negotiate for more favorable terms than what has

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[13] *Ibid.*

[14] *Ibid.*

[15] Therefore the trade union does not behave as a collecting society as in the latter case the rights are vested with the collecting society to be dealt with on behalf of the performer. However in the collective agreements entered into by Equity, the trade union of actors, the transfer if rights including any future rights and uses are crucially tied to the existence of a collective agreement and a standard individual contract and under these agreements the future uses cannot be assigned.

[16] *Ibid.*

been agreed upon between the producer and the trade union. This safeguards the performer from contracting out of the terms agreed upon by the trade union with the producers.

The Representative Character of Equity

The Equity[17] is the sole representative of the performing artists' as a trade union in negotiations with the producers. It represents actors, singers, dancers, variety and circus artists, stunt performers' and walk on and supporting artists (also known as extras) as well as a number of non performer groups that include choreographers, stage managers, theatre directors, designers and theatre and film fight directors. The membership is open to foreign performers as well[18]. The Equity covers the issue of rights in all the new technologies that are exploiting the performances including through the Internet (web medium).

The Ambit of the Agreements

The Equity enters into major agreements for films, television, radio and the Internet.[19] The range and content of these agreements are illustrative of how incisively and meticulously the British legal and labor system are seeking to earnestly safeguard the rights of the performing artist. Some of the significant clauses in these agreements are as follows-

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[17] The equity was formed in 1930 by actors working on the London stage and over the years has become representative of the diverse interests in the entertainment industry. It's membership is around 35000.

[18] <http://www.equity.org.uk/start.htm> as on 1st January 2005.

[19] <http://www.equity.org.uk/start_ftvr.htm> as on 1st January 2005. BBC Agreement for Main and Walk On Artists, ITV Agreement for Main and Walk On Artists, PACT Agreement for Independent Television Productions for Main and Walk On Artists, PACT Agreement for Cinema Film Productions (Main Part Artists only), TAC Agreement for Main and Walk On Artists working on Welsh Language Independent Television Productions, BBC Radio Agreement 1998, BPI Pop Video Agreement, BPI Gramophone Recording Agreement (non-classical), BPI Gramophone Recording Agreement (classical), Electronic Arts Interactive Media Agreement ,Radio Independents Organization Agreement, Central Office of Information Fillers agreement. National Film and Television School Agreement, BBC On Line Agreement. Guidelines for use include Radio Commercials (recorded by radio stations) Rate Card, Radio Commercials (recorded by agencies) Rate Card, Guidelines for Classical Public Concerts, Non-Broadcast Video Guidelines, Guidelines for Educational Publishing, Guidelines for Performances on CD-ROMs and other Interactive Media Devices, Guidelines for Spoken Voice Cassettes for Language and Educational Use, Dubbing Guidelines for Members working on TV commercials made solely for the USA Concert and Session Singers' Rate Card and a Guide to Walk On rates.

The Copyright Consent Clause

A very important component of the individual contracts entered between the performers with the producer is the qualified copyright consent clause. The United Kingdom collective contracts concerning the performers' contain standard consent clauses that form part of the individual contracts signed by the performers' with the producers. The consent draws a link with the right granted to the producer and the rights reserved in terms of the agreement between the producer and the trade union acting on behalf of the performers[20].

Remuneration Model

In order to gain an understanding of the remunerative possibilities embellished in these contracts and its broad characteristics, a perusal of the major agreements between the Equity and the producers would be rewarding.[21] Besides the minimum rates for daily work for the different categories either of the two options can be exercised: - a percentage of income from all sources once the initial investment in the film has been recouped, or to be shared among the performers on a points system or a percentage of gross receipts from sales to television broadcasters and from sales of videos and DVD's[22], to be shared among the performers on a points system.

Payments for Secondary Uses

Complementing these aforementioned provisions with respect to basic payments the performer will receive a percentage of the profit from the film by the producer according to a criteria and formula agreed upon. Accordingly the receipts from

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[20] Katherine Sand. *op.cit.*, p.12. For example in the Equity/ITV agreement the copyright clause runs thus: the agreement requires that the artist consents to the use of his rights as follows- " I agree to and give every consent necessary under The Copyright, Designs And Patents Act, 1988 or any amendment to or replacement there of for the use worldwide of my performance but only as provided for in the main agreement and in any other agreement current sat the time of such use between the companies and equity in relation to any means of distribution now known or herein after developed". Similarly the PACT /Equity television production agreement states as follows, "the artist grants all consents under the Copyright, Designs and Patents Act, 1988 or any statutory modification or reenactment thereof for the time being in force which the producer may require for the making and use of the production subject to the restrictions on use of the production contained in the agreements".

[21] Katherine Sand. *op.cit.*, p.13 (the rates with the maximum percentage limits of the residuals is also provided ,< http://www.equity.org.uk/content/629.htm > as on 1st January 2005.

[22] This is in line with the Screen Actors Guild agreement.

the film from opportunities such as sales to television and sales of video and DVD's are to be shared among the performers' according to a points system. Thereby ensuring that performers' share both the risks and the success of the film being made.

A Pivotal Distinction

A distinction is made between the large budget and the small budget films. For large budget films, performers' will receive a residual payment – i.e. a subsequent and ongoing payment as the film proceeds through and profits from various markets–which is based on a percentage of the performer's original salary. The Performers will then receive payments based on the extent of their participation in the film.

Payments for Secondary Uses for Low and Very Low Budget Films

Very significantly the agreement postulates a categorization between low budget films with a budget of less than 3 million pounds and very low budget films that have budgets of one million. This distinction in turn provides the producers with different payment options and recognizes very different conditions in producing low budget films as distinct from large productions. The secondary payments to actors are also agreed on the basis of this difference. The use fees are calculated on the basis of a basic daily wage rate. The basic daily rate is a minimum payment and the use fees are calculated as percentages of that rate. Other payments and fees are not included within this calculation. Equity's agreement recognizes the fact that producers of low and very low budget films may not have the logistical ability to pay performers' on an ongoing basis once the film is released and therefore they can pre-purchase the rights they need to be able to guarantee finance for the film up-front. The performer then receives additional payments that are percentages of the basic salary (up to a maximum of 280%). These percentages recognize the difference in value of various uses and markets around the world and are included here in illustration of those values. The pre-

purchase percentages up to the 280% maximum reflect the differing values placed upon the markets.[23]

Regulation of Working Conditions

Besides the elaborate provisions with regard to residuals, the agreement provides for regulation of working conditions. Besides providing for the minimum wages it lays down the rates payable for overtime work. A strict deadline is provided for the payment to be made and if that were defaulted then penalty would have to be incurred by the producer. Payment should be on a weekly basis and due by Friday of the week following that in which work is done. Penalty payment would be imposed on default.

Artists and Others on Television

The Agreement Between Equity And The Producers Of Television programs have been categorized on the basis of the character of the programmer. Thus there is a specific agreement with BBC[24], The Independent Television and the PACT (Producers Alliance for Cinema and Television)[25]. A feature of these agreements ranging from films, television to the Internet is the prevalence of minimal payments complemented by residual fees. At times the minimal payments include a particular kind of use for a particular period or for within a particular geographical extent. The residual fees are based on the kind of uses, technology, duration and extent of geographical application. The content of the agreements varies with different modes of productions and applications. Further the beneficiaries of protection that is the performers of different categories do not always beget the same treatment in these agreements. Thus it can be seen that while back ground performers, walk-ons and singers might be eligible for the

[23] Katherine Sand, *op.cit.*, p.14. For instance for the purpose of theatrical use (i.e., playing in cinemas) USA/Canada 37.5%, Rest of World (including the UK) 37.5%, UK Television Rights (excluding Theatric & Videogram), UK Network Terrestrial television 20% UK Secondary television 5%, USA Rights (excluding Theatric & Videogram), U.S. Major Network 25%, U.S. Other than a Major Network 10% U.S. Pay television 20%, Rest of the World Television Rights including pay, cable and satellite (excluding world theatric, world videogram and all UK and USA rights), Rest of World 10%, Videogram 90%.

[24] See <http://www.equity.org.uk/content/541.htm> as on 1st January 2005, the agreement as drawn up on *August 16th 2002. Inferences are based on agreements entered into on this date.*

[25] See <http://www.equity.org.uk/content/484.htm>. New Agreement April 2002.

repeat fees in BBC, they are not so eligible in ITV productions. An analysis of these agreements reveals the factors taken into account to arrive at the right repeat fee structure.

Highlights of BBC Television Agreement

Repeat Fees or Residuals

Besides provision for the basic wages and additional payments for overtime, provision is made for the payment of residuals in tune with reuse and repeats of the program. Normal repeats fee are 80% of the residual basic fee for programs made within two years. The agreement also covers old repeats being shown in peak and off-peak hours. There are also special arrangements for repeats going out two times in the week and for school programs. Overseas Sales and sales to the UK Secondary Market (e.g. UK) also carry a royalty. There is a 17% royalty of the sales price obtained by the BBC divided amongst the performers. In the case of the first sale to the UK secondary market a £50 advance is paid. Walk-ons and Supporting Artists are also eligible to qualified residuals for repeats[26]. For older programs there is an enhancement. Those engaged under this part of the agreement do not carry additional fees for overseas sales etc.

Equity-PACT Television Production Agreement[27]

The Artist shall be paid an engagement fee of not less than £424 for the first day worked in each and every consecutive seven-day period whilst on first call to the producer. The engagement fee, which acquires non-theatric rights and the first UK Network Transmission, is negotiable and should reflect the Artist's status, role

[26] While the supporting Artist receives - £73.60 and the walk on £91, both a nine-hour day, only the walk-on receives repeat fees, which are 100%, and if a further broadcast in the same week is 50%.

[27] Artists are engaged under the Equity/PACT Television Production Agreement where a broadcaster i.e. BBC1, BBC2, ITV, C4 and C5 commissions an independent producer, the agreement is also used by non-UK production companies and broadcasters i.e. American producers. The current Agreement (dated 2002), provides the minimum terms and conditions for all artists (including actors, singers, dancers, voice-over-artists, stunt performers' and stunt coordinators) employed in productions commissioned by and produced primarily for exhibition on television and shall apply irrespective of the source of finance, means of production or of ultimate use.

and length of engagement in the production. In addition to the engagement fee(s), which includes the first day worked in any consecutive seven-day period, the Artist shall be paid a non-negotiable production day payment of £47 for each subsequent day worked beyond the first[28]. At the time of contract the Artist shall receive a compulsory pre-purchase of Rest of the World rights excluding all UK and USA uses at a rate of 35% of their aggregate earnings, which will cover a period of seven years. The PACT Agreement contains provisions for regional productions, the Artist is engaged in the same manner as above but the minimum regional engagement fee is £106. In addition to the engagement fee any days worked beyond the first, within a seven consecutive period, the Artists shall receive a production day payment of £47. There are a number of methods of engagement available within the Agreement i.e. nominated periods, unspecified periods, eight weeks or more continuous engagement; there are also specific provisions for one-day only engagements. In appropriate cases artists receive multi-episodic fees, based on their original engagement fee. The working day is based on ten hours with one hour for unpaid lunch break; any hours worked in excess of these hours will attract an overtime payment.

Repeat Fees Structure

The Agreement contains an additional use fee structure; repeat fees are a percentage of the Artists aggregate earnings.[29] The Agreement contains provisions for an out of time escalator for older productions being repeated. Artists receive a share of a 17% royalty for sales of productions to UK cable, satellite and digital channels. Significantly, Voice over Artists receive a minimum session fee of £153 for a four-hour session, the repeat structure is applicable on such engagements. Similarly, Singers performing out of vision receive a minimum session fee of £153 for a three-hour session; again the repeat structure is applicable on such engagements. Stunt co-coordinators receive a daily fee of £470 and/or a weekly fee of £18.80. Stunt performers' receive a daily fee of £353 and/or a weekly fee of £1412. The repeat structure is applicable on such

[28] Example of Work over a consecutive seven-day period, 2 days Engagement fee plus a production day at £47,6 days Engagement fee plus five production days at £47.

[29] For example for the 2nd UK transmission 55%, 1st USA Network 75% and USA PBS 15%.

engagements, except that the 35% rest of world payment is incorporated in the Artists original fee(s). The Equity/PACT Walk-on and Background Artists Agreement provides for the terms and conditions for the engagement of such Artists anywhere within the UK (but outside of a radius of 40 miles from Charing Cross).[30] A walk-on Artist shall receive a day rate of £86, where appropriate the walk-on Artist shall receive multi-episodic, night rate and repeat payments. A Background Artist shall receive a day rate of £64.10. It is significant that amongst the different categories who are entitled to basic and repeat fees, the background Artists are not to be entitled to any repeat fee payments.[31]

Details of ITV Agreement

Program Fees and Repeat Fees

In addition to the attendance day payments artists receive a negotiable Program Fee for each episode of a program that they appear in. This fee covers one transmission on UK terrestrial television. The program fee is structured to reflect where the program is broadcast. The program fee pays for one broadcast on stations covering up to 25% of the ITV Network.[32] A program broadcast on the whole of the ITV Network (100%) is four times the program fee.[33] Repeat Fees based on the artists program fee are paid for UK terrestrial broadcasts; these are enhanced for older productions. Artists receive a share of a 17% royalty for UK cable, satellite and digital channels, overseas and video sales. Singers performing out of vision receive a minimum session fee of £108.80 for a three-hour session with overtime paid at £31.00 per hour. Payment of the session fee provides for one terrestrial transmission in up to 25% of the ITV Network. An additional payment of £63.00 allows payment across the whole of the ITV Network. Repeat fees are paid at 100% of the original total recording fees and the original network payment if appropriate. Voice over artists can be engaged in

[30] A walk-on Artist shall mean an Artist who is required to exercise their professional skills in relation to a cast actor and/or in close up to camera and be required to impersonate an identifiable individual and/or speak a few unimportant words which shall not have an effect on the overall script or outcome of the story.

[31] Background Artist shall mean an Artist who appears in vision (other than members of the public in actuality scenes) who shall not be required to give individual characterization or speak any dialogue except that crowd noises shall not be deemed to be dialogues in this context.

[32] The minimum fee is £87.50.

[33] A minimum of £350.00.

a number of ways. However, there is no mention of any repeat fees. Stunt Performers' and Co-coordinators receive a minimum daily rate. Stunt coordinators normally receive a higher daily rate than that paid to stunt performers'. For engagements of one day only to work on one program there is a minimum payment of twice the negotiated daily rate. There are three categories of Walk-on Artists under the ITV Agreement with varying wage rates. No mention is made of eligibility for repeat fees.

It is significant and of note that the categories eligible for repeat fees under the BBC or the PACT agreement do not find mention under the ITV agreement. Thus the performers' under the Independent Televisions own program productions are not provided repeat fees in the same scale and class as the performers' in the productions of PACT or the BBC.

Guidelines - Productions Specifically for the Internet[34]

In step with the changing technological possibilities ushered in by the digital media, Equity and the Personal Managers' Association have issued guidelines to performers' working on projects specifically for the Internet. There appears to be no guidelines so far evolved with respect to adaptation or transmission of film and television programs on the Internet. The recommended artist's fees, which allow producers to show the work on the Internet for up to 6 months on one UK website, are as follows: a Daily Rate of £100 for working days of up to ten hours (including 1 hour meal break). A Weekly Rate of £500 for five working days. Overtime is paid at one fifth of the Daily Rate. The Wardrobe fee has been fixed at £50 for up to four hours. Rehearsal/ read through £50 for each day or part thereof. ADR £50 for up to 2 hours. If the producer wishes to extend the 6 months limit or show the work on more than one website then there are additional fees to be paid. There are also other payments to be paid for other uses. Special rules apparently have not been published regarding the usage of audiovisual productions meant for theatre or television or video through the Internet streaming media. But the saving of the right of the trade union to bargain for and extend its jurisdiction to present and future technological possibilities of

[34] See <http://www.equity.org.uk/content/383.htm >. Rates as on October 2001, site as on 26th December 2004.

exploitation keeps the jurisdiction for collective bargaining and terms of contract open.

It is noteworthy that even voice over artists have been streamlined by these agreements. With respect to these categories it is important to note that the scale of minimum payments encompasses the repeat uses as well. Thus with a single down payment, the producer purchases the rights of either the specific application of the dubbed voice or gets to use it for a particular period of time or gets to use it in a area. Particular rights for specific minimum payments have been set down in the tariffs table.[35] The valuation of the artist is measured according to the number of words and the kind of situations he has to manage.

Equity Members' Pension Scheme[36]

This scheme allows Equity members to invest for the future and is the only scheme into which the BBC, ITV, PACT and TAC companies, BBC Radio and West End theatre producers plus The Royal National Theatre, The Royal Shakespeare Company, The Globe and Disney (UK) Theatrical pays. Equity members who sign up to the scheme have the personal pension in their name and hold all the policy documents.

Collective Administration of Performers' Rights in the United Kingdom

Audio Rights

The administration of audio rights in recorded audio performances of the performers' in the U.K. are entrusted for administrative purposes to two organizations called PAMRA (Performing Artists Media Association) and the other AURA UK (Association of United Recording Artists). PAMRA was set up in the year 1995 in anticipation of the proposed law by which the performers' in the sound recordings were to be eligible for royalty payment upon broadcast or performance of the record in public. This law reached the public space in the year

[35] < http://www.equity.org.uk/content/947.htm> as on 1st January 2005. . The agreement also deals with payments for rendering multi episodic work.
[36] *Ibid.*

1996(December 1996)[37]. The membership of the organization is open to both citizens and non-citizens of the United Kingdom who have a commercially released recording [38]. Performers' are divided into the following categories for the purposes of administration and distribution: non-featured performer[39], featured performer[40], contracted performer[41] and other featured performer[42].

PAMRA in association with PPL collects the income generated from the broadcast of commercially released recordings from broadcasters and public performance venues which is shared between the record companies and the performers' who have contributed to the recordings[43]. The distribution system only pays out on tracks that have received airplay. There is only one distribution scheme in operation in the UK and it applies to all performers' whether featured or non-featured (session players). The arrangement of granting PAMRA the representation of the performer is beneficial to the performer because PAMRA has a team of specialists working in the realm of complicated royalty claims with an in-depth knowledge of musical copyrights in the national as well as international terrain[44]. The management is tuned in on the play lists of broadcasters and public performance venues and therefore there is no default as the trail of the record is always followed by the collecting society any where in the world. This is facilitated because of the understanding reached with sister

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[37] <http://www.pamra.org.uk/pamra_explained_main.htm> as on 1st January 2005.

[38] <http://www.pamra.org.uk/new_members_main.htm> as on 1st January 2005.
This may be because they are citizens of a qualifying territory or because, though ineligible as performers' themselves (for example they may be a US national or resident) they recorded some of their tracks in the UK.

[39] *Ibid.* Commonly known as session musician or singer. A performer who has been engaged for a fixed period of time, specifically to make one or more recorded backing performances which subsequently are included in the sound recording or whose performance is included in a sampled sound recording.

[40] *Ibid.* all performers' who do not fall within the non-featured category as described above are treated as featured performers'. The interim distribution scheme provides for two categories of featured performers'.

[41] *Ibid.* A Featured Performer who is bound by an exclusive agreement entered into directly or indirectly with the record company producing a recording, to perform on it but excluding agreements to do session work.

[42] *Ibid.* This includes those who are not either non-featured or contracted performer, Guest artists or non-contracted members of a featured band or artist, fall into this category

[43] <http://www.pamra.org.uk/faq_main.htm> as on 1st January 2005.

[44] Since 1996 PAMRA has succeeded in signing exclusive agreements with Japan (CPRA) and Switzerland (SWISSPERFORM) and reciprocal agreements with Austria (LSG), Belgium (URADEX), Canada (ACTRA), Croatia (HUZIP), Denmark (GRAMEX), Estonia (EEL), Germany (GVL), Greece (APOLLON), Republic of Ireland (RAAP), Italy (IMAIE), Malaysia (PRISM), Mexico (ANDI), The Netherlands (SENA), Poland (STOART), Romania (CREDIDAM), Russia (ROUPI) and Spain (AIE). Between 1997 and 2004 PAMRA secured over £7.5 million in overseas revenue from these agreements.

societies across the world in other countries. It does not charge the members additionally for the overseas services. The team working in this regard are also experts in account management that maintains a state of transparency in its management of the performers' accounts. A major high light of PAMRA has been the fact that there is absolutely no joining fee and the functioning is streamlined or supported by indirect means of apportioning the proceeds from the U.K royalties -9.5% of the total proceeds as administration fees. The organization works alongside key lobbying groups both in the United Kingdom as well as in the international zone for effective representation of the members' interests[45]. The close rapport and interdependence that is required between the performers' organizations and the producers and the other factors is reflected in the initiative for new ties and bonds in this respect.

The performers' forum was formed in the year 2001 bringing together all the diverse performers' organizations in order to interact with the Phonographic Performance Limited. This has been reflected in the new scheme of unifying the collection and distribution of UK and overseas royalties into a single service[46]. The PAMRA also has a user friendly method of the performer being communicated the play list and exploitation and remuneration from the same[47].

Distribution Policy of the Society

Under the distribution policy of the society, distribution to featured performers' and non-featured performers' is to be treated separately and only one

[45] <http://www.pamra.org.uk/international_main.htm> as on 1st January 2005.
The claims are automatically registered with overseas societies where operational agreements are in place, ensuring up to date, global coverage. All foreign equitable remuneration collected through the bilateral reciprocal agreements is paid through without deduction and payments are not subject to withholding tax in the country of origin. PAMRA agreements enable to access overseas societies' play lists. PAMRA search these both by computer as well as manually to find income for our members. This allows it to proactively correct any track information where performers' are incorrectly credited. PAMRA has been a key player in designing and developing a track based exchange system known as SIREX, but also actively uses the SCAPR exchange format known as SDEG in order to maximize revenue for UK performers' by using all technological exchange mechanisms in use by each society. .

[46] *Ibid.* Since the beginning of 2004 PAMRA has begun the process of transferring its existing agreements and negotiating all new agreements with overseas societies through the Performers" Forum. This 'single pipeline' will take care of the collection and distribution of overseas revenue for all UK performers'.

[47] *Ibid.* <http://www.pamra.org.uk/instructions_main.htm >as on 1st January 2005.

contribution per track would be recognized for each performer[48]. The two reserve funds previously established - one for featured performers' and one for non-featured performers' will be maintained by taking a small percentage (fixed at 5% for revenue year ending November 1999) of the revenue allocated to each relevant track at the time of distribution. These funds will be used to meet certain claims, e.g. where a performer subsequently proves his/her performance on a recording whose play was not reported to PPL. The percentage to be retained will be reviewed from time to time. It is intended that, where feasible, performers' on a given track, where they all agree, may decide how they want their revenue to be shared and must then notify their agreement to PPL[49]. The agreed distribution rules are applied to all performers. If a performer does not agree to the rules or how they have been applied, he/she can bring the issue to a Mediation Committee. This does not, however, affect a performer's statutory right to make a reference to the Copyright Tribunal. The distribution rules provide that the featured performers' will be allocated 65% of the performer revenue allocated to a track, except where the conductor is the only featured performer, e.g. on a symphonic work, the conductor's allocation will be 32.5%. Allocation is on a per capita basis but a contracted featured performer shall be allocated double the share received by each other featured performer. The balance (35% or 67.5%) is allocated to a non-featured performers" fund. Non-featured performers' are paid from this fund according to how many performers' are on the track and on an agreed range of percentage shares. It is also carefully provided that Interest accrues to all undistributed performers' allocations. The minimum payment level to an individual performer is £25. Money allocated to the performer from all sources will be held on account until it reaches this minimum level (by the addition of subsequent allocations and interest), when payment will be made.

Audiovisual Rights Administration

Depicting an interesting amalgam of collective administration and collective bargaining agreements, the British performers' trade union in the year 1998

[48] <http://www.pamra.org.uk/distribution_scheme.htm> as on 1st January 2005.
[49] Performer Share Agreements (PSA): Procedures to offer these facilities are still under discussion.

undertook to commence the administration of rights acquired by the performer through the collective agreements entered into by Equity on behalf of them and to administer the same in their behalf. The collective administration society was called as British Equity Collecting Society[50]. It was appointed as the direct agent for collecting the dues of remuneration to the members in accordance with the terms set down in the memorandum of association and articles of association. Remuneration has been defined as any income or remuneration arising or payable to the performer. Performers' Remuneration is defined in the BECS Memorandum of Association. It means any income or remuneration arising or payable to performers' arising from: The rental of a film recording or a sound recording in the UK by way of the exercise of the rental right or in the alternative by exercising the right of equitable remuneration for rental in the United Kingdom[51] and in any other countries. The rental of film recording, any blank tape levy or other levies on copying media or devices, cable retransmission of programs incorporating their performances and any other right of a similar collective character, which the BECS Board of Management resolves that it should be collected by BECS.[52]

Income of the Society

Other than represent the members in the collection of their dues, BECS does not take an assignment of rights from the members allowing the members to retain the individual or collective right to bargain the transfer of certain rights.[53] The members also have the freedom to withdraw at any time from their entrustment to the collecting society. BECS also enters into agreements with other societies where those societies do not have the ability to identify performances individually. In such circumstances BECS would enter into an agreement with the society for the entirety of the British repertoire and then distribute the revenue collected to all performers' involved whether members or not, without in any manner of discriminating or penalizing non members or non British performers' who appear

[50] <http://www.equitycollecting.org.uk/equitycollecting/About.aspx > as on 1st January 2005.
[51] Under S 191 and 182C of the 1988 Act or S 191G of the 1988 Act.
[52] <http://www.equitycollecting.org.uk/equitycollecting/HowToJoin.aspx> as on 1st January 2005.
[53] <http://www.equitycollecting.org.uk/equitycollecting/SourcesOfIncome.aspx> as on 1st January 2005

in British fixations. Societies are also expected to take all efforts to identify the performers' of nonmembers and for whom on whose behalf the society holds revenue.[54] To facilitate this objective the society exchanges crucial data with its counterparts in other countries.

Collective Bargaining and Administration in France

One of the major highlights of French law of protection extended to the performer has been the fact that fundamentally the performer has been considered to be an employee under the French law. This is also starkly different from the British approach where in it is made sure that there is no confusion with respect to the status of the performer as an independent person. The performers' status in France is determined by the collective bargaining agreements and by the statute law that includes the authors' rights law as well as the labor law[55]. The safeguard clause has been enjoined in the authors' rights code or the intellectual property rights code adopted in the year 1985 there by safeguarding the traditionally recognized authors rights from the novel extension covering those in the relate rights[56]. The audiovisual performers' in France have been provided with rights to equitable remuneration under the French authors rights law. The following instances invoke the right to equitable remuneration.

Private Copying

Under French author's rights law, remuneration from private copying is instituted as a legal license by virtue of which remuneration is collected from makers and importers of blank audio and video recording media. The remuneration is a compensation for authors, performers' and producers for the loss of income caused by private copying in the music and audiovisual sectors[57]. A commission composed of high-ranking judges; representatives of rights holders and users fix

[54] <http://www.equitycollecting.org.uk/equitycollecting/Distribution.aspx> as on 1st January 2005
[55] Article I-762-1 of *code du travail*- Labor Code France.
[56] (Art.211).
[57] The remuneration for private copying of videograms is between 0,43 € and 8,80 € per blank commercial recording medium.

the remuneration amounts. The remuneration is collected for rights holders by two agencies: SORECOP[58] and COPIE FRANCE[59]. These agencies represent the three different groups of rights holders such as authors, performing artists and producers. In the audiovisual sector performers' are represented by ADAMI[60] and SPEDIDAM[61].

According to Article L. 311-7 of the French Intellectual Property Code, remuneration from private copying in the audio sector is to be divided in the following manner: 50% to authors, 25% to performers' and 25% to phonogram producers. According to the law the remuneration from private copying in the audiovisual sector is to be divided in the following manner: 1/3 to the authors, 1/3 to the performers' and 1/3 to the producers. The remuneration is inalienable, which means that right holders may not assign it contractually to another party. Remuneration due to performers' represented by ADAMI and SPEDIDAM is divided in the following manner: – Audio sector: 50% to SPEDIDAM and 50% to ADAMI. The division in the audiovisual sector is 20% to SPEDIDAM, 80% to ADAMI.

Cable Retransmission

With regard to cable transmission of existing television programs and simultaneous and unabridged re-transmission on cable, there is a collective agreement between the television channels (TF1, France 2 and France 3), ANGOA (a body representing film producers' associations) and performers' trade unions (SFA).[62] ADAMI has been appointed by the parties to represent

[58] Société *de perception et de répartition de la rémunération pour la copie privée sonore.*
[59] *Société de perception et de répartition de la rémunération pour la copie privée audiovisuelle.*
[60] *Société civile pour l'administration des droits des artistes et musiciens interprètes* (ADAMI).

[61] *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse* (SPEDIDAM).

[62] Syndicat Français Artistes-interpreters (SFA) – French trade union of artistes –interpretes. It was founded in the year 1890. It had collaborated with the British Actors Union to found the International Federation of Actors. It has played a major role in consolidating opinion related to issues with respect to performers in audiovisuals in the European union. It has under its head the all of artiste –interpretes other than orchestra and the instrumentalists. It is due to the work of SFA that the presumption of wage earning rights, rights of use on recorded work as well as rights related to ownership of authorship have been bestowed on the artistes. ADAMI- the trust company of the rights was created by SFA in the year 1955.(*F.N.contd.on next page*) . See <http://216.239.37.104/translate_c?hl=en&u=http://www.lefcm.org/membres/sfa.html&prev=/searc

performers'. The agreement is administered by ADAMI. The level of remuneration is determined as a percentage of the turnover of the television channel from cable distribution and is distributed individually to performers'. Performers' are compensated for cable retransmission of their performances under collective bargaining agreements as a percentage of the revenues from exploitation. Remuneration is regarded as a supplement to their salary. Performers' do not receive additional remuneration for cable retransmission under author's rights law.

Individual Standard Agreements

Television

There exists no standard agreement for performers' in film production in France. With regard to television there exists a model standard agreement, *'Contrat d'engagement d'artiste-interprète'* which is drafted in conformity with the collective bargaining agreement for television and forms an addendum to the collective bargaining agreement.

Advertising

In the realm of advertising, there exists an individual standard agreement.[63] The purpose of the contract is to serve as a model agreement for contracting parties in the advertising sector. The contract is concluded between the performing artist and the production company of the advertisement. In the contract the performer authorizes the advertiser and/or agency to exploit the audiovisual work according to the terms of the contract. The exploitation license of the audiovisual recording covers exploitation in the following media:(1) Television both in France and abroad;(2) Cinema theatre distribution;(3) Cable distribution;(4) Satellite distribution;(5) Broadcasting in a local television network;(6) Broadcasting in a closed television network;(7) Video, CD-ROM; CD-I; Internet exploitation; and (8)

h%3Fq%3DLe%2Bsyndicat%2Bfrancais%2Bdes%2Bacteurs%26hl%3Den%26lr%3D%26ie%3D UTF-8> as on 1st February 2005.

[63] "Contrat artiste-interprète pour l'utilisation d'enregistrements publicitaires audiovisuels". This contract has been drafted with the participation of representatives of the Syndicat français des artistes-interprètes, ADAMI, l'Union des annonceurs and L'Association des agences de conseils en communication.

use of images or recorded sounds constituting a part of an audiovisual work[64]. The recommended types of payments in the model agreement are all based on the types and frequency of use (annual lump-sum payments, payments per transmission etc.). No buy-out payments are mentioned in the model contract. It is significant that there is no collective bargaining contracts in France with respect to the field of advertising but the standard individual contracts have been formulated for this area of work for the artist. However there are no such model agreements for the performing artist in films.

Collective Administration of Rights

Collective administration of performers" rights in the audiovisual sector under French law is divided between collective bargaining agreements negotiated by performers' and producers' trade unions on the one hand, and collective administration of certain rights and remunerations by performers' collecting societies. Performers' in the audio visual sector in France are almost always working as employees in audiovisual productions and their rights and obligations are thus determined in the first place by collective bargaining agreements and individual employment contracts. The field is marked by three prominent collective bargaining agreements in the audiovisual sector for actors. The oldest of the lot is the *Convention collective de travail de la production cinématographique (*actors*) that dates* from September 1967.[65] It is an annual renewable agreement[66]. Some of the prominent features of the agreement are as follows.

Ambit of the Agreement

The ambit of the agreement covers producers who are headquartered in France. The Convention regulates the rights of producers and actors for productions of

[64] According to the model contract remuneration for performers' should be paid according to the terms of a protocol signed by the contracting parties on 28 April 1986. In practice this has often not been the case.

[65] In addition there exist three specific collective agreements for musicians. Ms. Mary Saluakannel, *Study on Performers' Contracts and Remuneration Practices in France and Germany*, published by WIPO, 2003, presented at the ad hoc informal meeting on audio visual performances held on November 6 and 7th, 2003, p.11.

[66] It has been concluded between *La Chambre syndicale de la production cinématographique française* on the one hand, and *Le Syndicat français des acteurs* and *Le Syndicat national libre des acteurs* on the other.

which the producer has its headquarters in France. It applies to all productions taking place in France and its territories, and to French productions taking place abroad. However, this is subject to the condition that it would not be contrary to the law or professional practices of the place where the film is being shot. It also applies to all foreign films or parts of films being shot in France by a foreign producer, regardless of the language of the film. This is significant provision as foreign actors acting in French productions or French actors acting for French productions outside the state would be covered by the terms of the agreement provided the membership norms are fulfilled. The language of the film does not create any exception to this rule[67].

Format of Agreement

One of the fundamental prerequisites of engaging an actor under the terms is that the all engagements of actors must be made through written agreements before work has begun.[68]

Non-Derogation

There should not be derogation from the minimum guarantees envisaged in the convention. All individual contracts must refer to the Convention or incorporate it in its totality or in a condensed form. No clause in the individual employment contract may be in contradiction to the Convention.[69]

Remuneration

The Convention provides for the minimum remuneration to be paid for daily work in employment relations of different lengths, or for other kinds of engagements. It also contains specific clauses with regard to remuneration for post-synchronization work.

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[67] Ms. Mary Saluakannel, *Study on Performers' Contracts and Remuneration Practices in France and Germany*, published by WIPO, 2003, presented at the ad hoc informal meeting on audio visual performances held on November 6 and 7th, 2003, p.11.
[68] Art. 9.
[69] Art. 10. Ms. Mary Saluakannel, *Study on Performers' Contracts and Remuneration Practices in France and Germany*, published by WIPO, 2003, presented at the ad hoc informal meeting on audio visual performances held on November 6 and 7th, 2003,p.12.

Assignment

A most conspicuous omission is that the Convention does not contain any clauses with regard to assignment of rights to the producer[70]. Though it does provide a safeguard that if the individual employment contract does not stipulate otherwise, the producer has the right to re-assign part or all of its rights. (It can be said that this does carry an element of presumption of assignment). In this case the assignee of rights is liable to the performer for fulfilling the terms of the agreement. The producer or other assignor of rights remains in any case jointly liable to the actors for fulfillment of the contract[71].

Authors' Rights Implementation Agreement

The highlight of the second agreement was that its implementation rationale was the execution of the French authors rights law of 1985[72].

A Mandatory Agreement

This agreement has been made mandatory by the decision of the Ministry of Culture. Therefore there is no possibility of contracting out of this agreement. The agreement fixes the minimum remuneration to be paid by the producer to the performer that varies according to the purpose[73]. This salary is subject to revision according to the applicable professional agreements.

Returns Supplemental to the Salary

A distinguishing feature of this agreement from the aforementioned agreement is that, as a supplement to this salary the producer must pay to a collecting society

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[70] Perhaps the reason could be that the French law supplements the silence in this regard. Further this is more of a conventional agreement with labor norms being at the center of the deal. The aspect with respect to secondary uses or extent of assignment has not been given impetus.

[71] Art. 17.*Ibid.*

[72] *Accord spécifique concernant les artistes interprètes engagés pour la réalisation d'une* oeuvre cinématographique .In particular sections 19 9art 212-4 and article 20(art L212-5). It was concluded between La Chambre syndicale des producteurs et exportateurs de (*f.n.continued*) films français, L'Association française des producteurs de films, L'Union des producteurs de films, on the one hand, and the Syndicat français des artistes interprètes (SFA-C.G.T.) and Syndicat des artistes du spectacle (SY.D.A.S. -C.F.D.T.).

[73] According to the 1990 agreement the fee (cachet) must be a minimum of 1,637 FRF or 900 FRF for cinema theatre distribution in public cinemas, 560 FRF for broadcasting, 177 FRF for video distribution for private use.

an amount of two percent of the net returns from exploitation after the film production has broken even. The monies received by the collecting society are distributed to performing artists on a prorata basis with regard to their initial salaries. However a ceiling has been placed on the fees exceeding a particular limit.[74]

Criteria of Break Even

In order to facilitate the distribution of this revenue a significant criteria needs to be fulfilled. It is only upon a break-even being achieved from the revenues of the film that the return supplemental to the salary needs to be distributed. The film production costs to be taken into account in determining the break-even point of the production. This is rendered by means of a separate ministerial decision[75]. Importantly the producer must inform the collecting society about the cost of the film. The producer must deliver to the collecting society the following information about the costs of the film: List of the interpreting artists engaged in the production of the film, the number and the amount of fees (cachets) paid to each performing artist taking into account the eventual maximum amount of fees as defined in Article 1 of the agreement, the amount of net revenues collected by the producer in France for each exploitation mode and the amount of net revenues collected from foreign exploitation[76]. The information must be produced after six months have passed from the first act of exploitation of the film. The amount of net income and eventual payments need to be paid annually to the Collecting society.

Arbitration Commission

This was established following the mandate of the authors' rights law.[77] The objective of the commission is to be a forum before which the parties submit their disagreements with regard to interpretation and application of the agreement. This commission is required to convene within a period of 30 days after the other union has submitted a case to arbitration. In default of the commission not being

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[74] The fees surpassing seven times the current minimum fees, or a daily fee over 11,459 FRF are not, however, taken into account.

[75] Ms. Mary Saluakannel, *Study on Performers' Contracts and Remuneration Practices in France and Germany*, published by WIPO, 2003, presented at the ad hoc informal meeting on audio visual performances held on November 6 and 7th, 2003, p.12.

[76] Ms. Mary Saluakannel, *op.cit.*,p.13.

[77] Article L.212-9 of the Intellectual Property Code.

convened by the stipulated time, the parties are entitled to take recourse to the competent jurisdiction or forum.

Artiste's in Television

The rights of performers' employed in television broadcasts (emissions de television) are regulated by a collective bargaining agreement concluded between the unions representing performing artists[78] and French television channels.[79] The Convention regulates the relationship between the employing organizations having signed the contract and performing artists employed for production of television broadcasts.

Subject Matter and Jurisdiction

The categories of programs, which are considered as television programs in terms of the Convention, are dramatic programs, programs consisting of reading aloud, programs other than dramatic, lyric or choreographic, lyric programs and choreographic programs.

It is important to note that the satellite transmission of programs is subject to special agreements, forming addendums to the present Convention, between the concerned audiovisual communication organizations and the contracting unions. For all other secondary uses performing artists are entitled to supplementary remuneration as agreed in an annex to the Convention.[80] Besides other rights provided to the artist the agreement provides remuneration for secondary uses of the programs. It covers regional and national rebroadcast of television programs. Importantly the secondary remuneration is not dependent on the break-even devised with respect to films (discussed earlier) rather it is a complement to the

[78] Convention collective nationale 1992-12-30 des artistes-interprètes engagés pour des émissions de télévision. L'Institut national de lacommunication audiovisuelle (INA), L'Union syndicale des producteurs de programmes audiovisuels and La Société Pathé-télévision on the other hand (hereinafter the Convention).

[79] Le Syndicat français des artistes-interprètes, Le Syndicat des artistes du spectacle, Le Syndicat national libre des acteurs and Le Syndicat Indépendant des Artistes-Interprètes.

[80] An agreement (Accord "Salaires") was concluded on 20th July 2002 between the employers' and employees' (performers") organizations fixing remuneration for secondary uses, national and regional re-broadcasting of television programs and for cable and satellite transmission of television programs.

salary and is calculated as a percentage of the net income of the producer. The percentage that is to be taken into account is set down by a legal mechanism.[81] The producers' net income is taken to be the gross revenue reduced by a lump sum of the 20% of the total covering the cost of assignment of the rights. It is noteworthy that digital media uses like pay per view and video on demand is like wise remunerated as included under secondary uses.[82] The Convention includes special provisions with regard to retransmission of recordings of events, which means broadcasting an event either directly or by delayed television broadcast. Performers' are remunerated for these retransmissions under the conditions specified in the Convention.

It is important to note that a few uses are included automatically as having been consented for exploitation by the performer upon the receipt of the initial salary. For instance the first analogue broadcasting on national territory and the simultaneous retransmission of this broadcast by one of the means of transmission covered by the agreement.[83]

Ambit of the Agreement

The Convention is applicable in France and abroad in respect of programs financed and produced entirely by one or more of the employers or at their request .The Convention stipulates in detail the conditions of employment, which must be included in the individual employment contract. According to the Convention the remuneration covers first transmission in France made by an employer having signed the Convention, by every mode of transmission covered by the Convention (broadcasting, cable retransmission...), or once on the French territory, or several times in certain regional or local areas as defined by the Convention. In exceptional circumstances and after having consulted the Unions the Convention may also cover first simultaneous transmission by all means of transmission (broadcasting, cable, collective antennas etc.) If the program is not meant for first transmission by any means of transmission for which the

[81]Ms. Mary Saluakannel, *op.cit.*, p.17.
[82] *Ibid.*
[83]Ms. Mary Saluakannel, *op.cit.*,p.17.In addition to this agreement, which replaces in part the addendum 1 of the Convention, The Convention includes seven other addendum fixing remuneration for different kinds of uses of performances by one or more of the employing audiovisual organizations. All this remuneration is supplementary to salaries.

contracting employers are entitled, the contract of the performing artist shall define the means of permitted television exploitation.[84] The agreement has also listed a version of permitted exploitation. Non-commercial uses of television programs are covered by the contractually agreed remuneration.[85]
According to the Convention the restrictions relative to uses mentioned above need to be communicated to the users, who must agree not to use the recordings for other than the permitted uses and not to reproduce or re-assign them to a third party with or without payment. In cases where the parties or performing artistes do not belong to the contracting unions then the provisions concerning remunerating authors as specified by the ministry of labor will be applicable. This guarantees a minimum of security to the performing artist, as the absence of a collective contract would not make them vulnerable to exploitation. In order to be protected by the labor law measures or other governmental initiatives thee is no need to be a union member.

Musicians

Three agreements influence the remuneration patterns of musicians' contributions to films and television.[86] There is an agreement to streamline the remuneration and work of the musicians in cinematograph films.[87] Besides

[84] Article 5.2.2.

[85] (a) Use of programs in connection with professional markets, exhibits and events, in which either of the contracting organizations is represented or television as such is featured (*être mise en valeur*);
(b) use of television programs for technical experimentation purposes without communicating them to the public by normal means;
(c) exceptional use of programs by public interest organizations other than *maisons de la culture*, museums and educational establishments–in connection with specific events for the purposes of raising the knowledge in specific cultural or social sectors under certain strictly defined circumstances;
(d) Use of programs in exceptional circumstances by French governmental representatives in connection with events promoting French culture and organized on their own initiative. This use may not consist of transmission by television channels or exhibition in commercial cinemas.

[86] Ms. Mary Saluakannel, *op.cit.*,p.18 .

[87] *Convention collective nationale des artistes musiciens de la production cinématographique (Convention collective nationale 1964-07-02.* It is concluded between the Chambre syndicale des producteurs et exportateurs de films français and the Chambre syndicale des éditeurs de musique légère on the one hand, and the Syndicat national des artistes musiciens de France et d'outre-mer (S.N.A.M.) and Syndicat des artistes musicians professionnels français de Paris et d'Ile-de-France, on the other hand.

stipulating the working conditions including the duration and the remuneration to be paid for the work[88]. It lays down the conditions for further use and lays down the necessity that further use other than that stipulated by the terms of the agreement would essentially require a separate agreement. This collective convention from 1964 regulates the rights of musicians in respect of recording their aural performances or instrumental performances of musical works in connection with cinematographic works intended for world-wide distribution. One of the drawbacks critically noticed in this agreement has been that it has not been extended in its sphere of application to non-parties. Further the exact jurisdictional ambit of the agreement and to what extent it is still being used.

Commercial Use of Film Music

There is a specific distinct agreement with regard to secondary use of film Music[89]. The agreement regulates the use of film music for the making of commercial phonograms. If the use of film music for a commercial phonogram exceeds 20 minutes, a separate remuneration is due to the musicians having participated in that recording. The remuneration is paid by the phonogram producer, and is defined as a lump sum depending upon the number of musicians participating in the recording. This agreement is administered by the collecting society SPEDIDAM on behalf of musicians. This agreement too is handicapped by lack of clarity in its application to non-parties and the extent to which it is applied in practice.[90]

The rights of musicians employed to perform in television programs are dealt with in separate collective bargaining agreement. The agreement sets the terms of the basic remuneration (cachet initial), and all complementary remuneration is subsequently calculated in relation to this basic remuneration.[91] The structure of

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[88] Remuneration is based on the type, length and time of day of the recording session. The remuneration schedules depend on the type of instruments played.

[89] Protocole d'accord concernant l'utilisation secondaire des enregistrements de la musique de films (Protocole d'accord 1960-07-29). This memorandum of understanding is concluded between the same parties as the collective convention for musicians' rights in film production.

[90] Ms. Mary Saluakannel, *op.cit.*, p.18

[91] "Protocole d'accord du 16 mai 1977 modifié par l'avenant du 5 mars 1987 relatif aux conditions d'emploi et de rémunération des artistes musiciens employés dans des émissions de télévision". The agreement is concluded between the Syndicat *national des artistes musiciens* (SNAM)[91] and *Syndicat des artistes musiciens de Paris et de la région parisienne* (SAMUP), (*F.N. Contd.*)

remunerating musicians in the agreement is based upon the same principles as the corresponding collective bargaining agreement with actors.

A distinctive format of remuneration is followed for services relating to recording of sound from that followed for television services. For recording of sound the basic recording session shall not exceed 20 minutes, after which a complement of five percent of the basic remuneration for each minute surpassing 20 minutes must be paid to musicians.[92]

It is noteworthy that the initial salary also covers the grant of rights for a particular extent of initial use. With regard to television services the basic remuneration covers the first broadcast on French territory and over-sea territories and simultaneous cable transmission for the same territory.[93] The duration for which the musicians are entitled to this remuneration is for a period of fifty years. It is calculated from the period following the first broadcast. The musicians are entitled to a complementary remuneration for further uses of their fixed performances according to the terms of the Agreement.[94] For a complete retransmission of the program musicians are entitled to 25% of their initial payment.[95] The musicians are entitled to a supplementary remuneration as agreed between the European Broadcasting Union and the International Federations of Musicians and Actors for licensing the program among Eurovision countries.

A separate tariff policy is in place for commercial uses of the musicians' performances. Musicians are entitled to 37.5% of the net income of the assignment. The remuneration is paid pro rata in relation to the initial remuneration for each musician.[96] Musicians are entitled to a supplementary remuneration to be negotiated between musicians' unions and the commercial exploiters of their programs for the following modes of exploitation namely commercial cinema theatre exhibition or video transmission in a cinema,

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and on the other hand, the former public sector broadcasting societies, *"Télévision francaise 1* (currently TF1)", *"Antenne 2* (currently FRANCE 2)", *"France régions* (currently FRANCE 3)" and *l'Institut national de l'audiovisuel* (INA).

[92] Article 4 of the Agreement.

[93] Article 17 of the Agreement.

[94] Ms. Mary Saluakannel, *op.cit.*, p.19.

[95] See Article 18.

[96] Articles 20 (exchange of programs) and 21 (other commercial uses).

exploitation in the form of derived rights such as producing a commercial phonogram and commercial video exploitation for entertainment programs.

Non-Commercial Uses of Programs are Covered by the Initial Remuneration[97]

Non-commercial uses are defined in the same manner as in the corresponding collective bargaining agreement for actors. Musicians are paid a certain percentage for the pre-sales of programs to commercial television channels, cable networks, local stations and to TV5. The percentage is based upon the number of spectators or satellite connections, and the number of emissions determined separately for each television channel.[98] A significant feature of distinction between the collective bargaining agreement for actors and the collective bargaining agreement for musicians is that the rights of the latter is not to extend beyond the parties to the agreement. To sum up it can be inferred that the musicians are paid for the use of their performances in television programs separately for each use and all additional payments are supplementary to their salaries and thus include the corresponding social security benefits.[99] Even if this agreement is handicapped by its non extension to non-parties, it seems to be in use by the majority of television channels and thus it acts as an example for remuneration practices for television channels not bound by the agreement.

Agreements Concluded Between Producers and Third Parties

Performing artists are not usually aware of the contracts concluded between producers and third parties.[100] It is the producer of the audiovisual work who is responsible for fulfilling the contract towards performers'. The initial producer remains liable even in case she has transferred her rights totally or in part to a third party. Because this principle has not always worked in a satisfactory

[97] Ms. Mary Saluakannel, *op.cit.*,p.20 .

[98] Articles 24-1 and 24-2.
[99] Ms. Mary Saluakannel, *op.cit.*, p.20.
[100] *Id.*,p.22.

manner, performers' would wish that their rights be transferred to a collecting society for administration on behalf of the producer.[101]

Collective Administration of Rights by Collecting Societies

The central collecting society administering performers' rights in the audiovisual field is ADAMI.[102] In general terms it can be said that ADAMI represents actors who are entitled to a credit in audiovisual productions. This includes both actors and musicians having central roles in audiovisual productions. The other collecting society representing performers' in the audiovisual field is SPEDIDAM,[103] representing backstage performers' and other performers' not entitled to credits in the productions. In this connection we should also remember that the French author's rights law also makes a distinction between key actors and supporting actors.

Rights Administered by ADAMI -Remuneration from Secondary Rights

ADAMI has been given mandates from private producers for administering rights in television programs. In the field of cinema ADAMI collects and distributes remuneration for all uses of films in its application of the collective bargaining agreement relative to cinematographic production (l'accord conventionnel cinema). This Convention has been extended to cover all rights holders in film production, including those not represented by the contracting parties. In this connection it is important to note that under the collective bargaining agreement residuals are paid as salaries, which means that they include all social security benefits. Thus residuals paid out as part of salary are more advantageous to performers' than copyright. SPEDIDAM deals with remuneration from private copying, equitable remuneration and general rights or exercise of exclusive rights.[104] A most significant highlight of the collective administration pattern has

[101]Ms. Mary Saluakannel, *op.cit.*, p. 35.
[102] *Société civile pour l'administration des droits des artistes et musiciens interprètes ((*ADAMI). In total, ADAMI administers over 200 000 individual accounts of right holders.
[103] *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse*
[104]See,
<http://216.239.39.104/translate_c?hl=en&u=http://www.spedidam.fr/3_spedidam/31_perception.

been that any use of the recording other than those envisaged in the agreement would require a fresh written authorization. It also assuredly invokes the right of the performer to the complementary remuneration for the fresh exploitation. For instance when the performances authorized for use in sound records are used for the films and vice versa.[105] The royalties and remuneration received by the collective administration society is distributed directly between the recipients. The overhead expenditure of the organization is recovered by means of the deduction made of a reserve meant for this purpose.[106]

The distribution is proportional to the participation in the recordings carried out by the *artiste interpretes*. This is attested by the attendance sheets of the artistes. The distribution is also based on the surveys based on different kinds of music like popular, film and traditional.[107] With respect to the distribution of equitable remuneration too the participation in the recordings is taken into account[108]. Further the duration of the diffusion of the sound records and the number of times is also taken into account. In the absence of a statement regarding the diffusion, the amount to be disbursed is calculated according to the participation of the performer in the recordings. Percentages fixed by the board would be multiplied with the recording statistics of the artiste interpretes. Any other uses not covered by the rights of private copying and those of equitable remuneration are administered by SPEDIDAM.

Internet Uses and Collective Agreements -SPEDIDAM

The availability of the music to the public on the Internet in that they are recordings not intended initially for this use constitutes a secondary use. This requires a written preliminary authorization of the SPEDIDAM acting on behalf of

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htm&prev=/search%3Fq%3DSPEDIDAM%26hl%3Den%26lr%3D%26ie%3DUTF-8> as on 1st February 2005.

[105] *Ibid.*

[106] The distribution between the recipients (or not associated associates) is carried out during the first quarter following the exercise concerned. A second distribution can intervene in the current of the year.

[107] Proceeds from private copying.

[108] See,
<http://216.239.39.104/translate_c?hl=en&u=http://www.spedidam.fr/3_spedidam/32_repartition.htm&prev=/search%3Fq%3DSPEDIDAM%26hl%3Den%26lr%3D%26ie%3DUTF-8> as on 1st February 2005.

the concerned artist-interpreters.[109] The fact of using such a recording without this authorization is a violation of article L 335-4 of the Code of the Intellectual Property (C.P.I.) and a penal offence punishable with two years of imprisonment and 150.000 € of fine. It is consequently essential to contact the SPEDIDAM before any use of recorded service of artist-interprets on Internet. As an example, the illustration of an Internet site using extracts of recordings disco graphic or video graphic or the offer of remote loading of sound or audio-visual recordings constitutes secondary uses of the services of the artist-interpreters being reproduced on the aforementioned recordings. This entitles all people who interpret in an unspecified way a work considered by the C.P.I. as artiste-interpretes.[110] Authorizations need to be obtained from the SPEDIDAM (Company of Collection and Distribution of the Duties of the Artist-Interpreters of the Music and of the Dance) which has the role of delivering the authorizations necessary for negotiating and of receiving in the name of the artist-interpreters remunerations corresponding to all the uses of their recordings.

The Collective Bargaining and Administration System in the United States of America

Audiovisual Industry

The performers' quest for the betterment of their status in the United States of America began much before the advent of the kinetoscope that revolutionized the world.[111] It was confined to the performers' and workers in theatres. They had problems that ranged from working conditions to reining in the agents and the production companies. However these past organizational moves made performers' prepared organizationally to meet the contingencies posed by the film

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[109] See, <http://216.239.39.104/translate_c?hl=en&u=http://www.spedidam.fr/4_utilisateurs/42_musique.htm&prev=/search%3Fq%3DSPEDIDAM%26hl%3Den%26lr%3D%26ie%3DUTF-8 > as on 1st February 2005.

[110] Thus, for example, the musician, the singer, the actor, the dancer, whether they are professional or not, is artist-interprets.

[111] Thomas Alva Edison invented the machine on the year 1896 but much prior to that organized movements among the theatre actors had commenced. <http://www.sag.org/history/chronos_pages/pre_guild.html> as on 1st February 2005.

medium.[112] These unions received the blessings of the American Federation of Labor through a charter.[113] The producers also began to form themselves into an alliance during this period.[114] The adaptation of these unions to the new media like motion picture industry took place naturally. Other union's connected to the stage were also formed during this period .In the year 1919, Equity was granted recognition and soon it became the representative voice of motion picture principal performers'. Equity was also instrumental in proposing the first model contract for the freelance actors however it was advanced by the Academy of Motion Picture, Arts and Sciences and it was called as academy contract.[115]

The period was marked by reports of abuses at the work place with the extension of working hours with the advent of talkies.[116] The studio system posed considerable hardships on the performers' regarding unsteady working conditions with no scheduled working hours, no turn around and no meal breaks.[117] The contracts were for as long as seven years during which time the actor was not allowed to break the contract. The actor at the end of the seven-year contract would have to renew the contract and would not have much say in that choice considering the weak bargaining position. The studio could even interfere into the actors' personal life and even dominate the political preference of the actor. It was impossible to rebel against the system, as it would pose grave risk for the career. The actors were not able to choose their roles under the studio system. The dominating influence of the studio system even stood as a obstruction to growth of a trade union of the actors which until 1937 the studio and other producer interests refused to acknowledge as representing the actors interests.

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[112] It was in the year 1864 that William Davidge formed the Actors' Protective Union, formed due to the "long-existing necessity for an equitable status" for actors, along with the wish to establish a standard minimum salary for players, <http://www.sag.org/history/chronos_pages/pre_guild.html> as on 1st February 2005.

[113] It as a matter of coincidence that the congress also gave the assent to the formation of labor union during the time when infant organizational efforts were begun among the actors. A significant development was the formation of the Actors Equity Association in 1913. In the motion picture industry, the first union to take shape was the Motion Picture Players Union that represented the extras. In the year 1918.

[114] To create a "Theatrical Syndicate".

[115] 1926. Equity scorned at it as it was very similar to the model that it had been persuading the interests to adopt.

[116] In the year 1928.

[117] Ken Orsatti, "The Actors' Road to Empowerment",< http://www.sag.org/history/empowerment.html.> as on 1st January 2005.

Decisions that Changed the Fortunes of Studios and the Artistes

Two actresses revolted against the oppressive contracts that were enforced by the studios closing their options to sign on different roles and under different banners. The actresses were Bette Louis and Dehaviland. Both rebelled against the severe seven-year bond of contract with a Studio. While the former lost the case but she did cast a heartening precedent with the fight, the latter found a decision in her favor.[118] With this the studio term-contract was opened up for negotiations.[119] It was another Supreme Court decision against Paramount Pictures in the year 1948 that once again brought diluted the domineering stature of studio particularly its monopolist inclinations. In an anti trust suit against paramount pictures the Supreme Court rules that the monopoly from shooting studios to film theatres would require to be broken down and did not quiet fulfill the anti trust legislations.[120] This case not only liberated the production scene as independent producers were able to find space but it also gave freedom the stars to experiment with their service terms.[121] Very significantly from the residual payment point of view, of interest from the angle of intellectual property rights, the first agreements based upon a percentage of gross receipts began with this shift.[122] This change was not without disadvantages. While it benefited the stars it did not provide the old studio remuneration or guaranteed employment tenure under the studio system for the vast majority of non-star contract players.

Audiovisual Performers Organizational Evolution

An important legal development took place in 1935, which made it possible for performers and indeed other workers to organize themselves. The National Labor Relations Act of 1935, known popularly as the Wagner Act was the New Deal

[118] The studio was not willing to release her even after her seven-month period.

[119] See for the entire decision, < http://www.sag.org/history/dehaviland.html>. As on 1st February 2005.

[120] The advent of television further weakened the studio system.

[121] Until the end of the 1940's Performers', and in particular actors enjoyed secure, continuous long-term employment contracts with the studios–which is what is meant when the "Studio System" is referred to. However in the 1940's technological change (the advent of television) and antitrust legislation forced the studios to relinquish control over both production and distribution, and the system was forced to become much more flexible, with studios contracting with independent production companies to make films. As a result, producers came to contract with the actors on a picture by picture basis, and the role of the unions and of agents in negotiating individual contracts became much more important

[122] It was Jimmy Stewart who negotiated to work for a percentage of the gross receipts for the film Winchestor'73 made in the year 1950.

legislation designed to protect workers' rights to unionization.[123] It was after a bitter struggle and a strike call that Screen Actors Guild was finally extended recognition in the year 1937.[124] The first collectively bargained contract was signed between SAG and thirteen producers during the same period.[125] The period was also marked by great economic and political turmoil with the great depression and the war looming over the horizon.[126] This brought about considerable down sizing and salary cuts for the performers' and others in the industry that further fuelled the need for an organizational intervention. The guild membership was to be open for all as against the previous 'by invitation only' membership of the Academy of Motion Pictures and Arts.[127] The Guild soon proposed a code of fair practices to the industry. It organized strikes and boycotts (even Oscars) in order to drive home its point that existing circumstances were of no help to the performer. The guild became representational of the interests of actors in the Industry as the earlier representatives granted its jurisdiction to Screen Actors Guild.[128] Soon the television realm too came under their dictates.[129]

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[123] It created the National Labor Relations Board (NLRB), which still functions to enforce the National Labor Relations Act.

[124] In the mid-1930s, with the growth of Hollywood, the Screen Actors' Guild was formed by some of the biggest stars in the business, including James Cagney and Boris Karloff and in 1937, after a threatened strike, the Guild forced the Studios to recognize the union as a bargaining agent, and soon afterwards the first-ever SAG contract was signed.

[125] President Montgomery declares Guild recognition "the victory of an ideal."- Thirteen producers sign first SAG Contract, pay minimum $25 per day; $35 for stunts, $5.50 for extras, and portions of the 1935 contract of the Academy of Motion Picture Arts and Sciences become part of the new SAG contract.

[126] Six actors Berton Churchill, Grant Mitchell, Ralph Morgan (all three members of Actors' Equity Council), Charles Miller (Actors' Equity's West Coast representative, Kenneth Thomson and his wife Alden Gay meet in the Thomsons' Hollywood hills home to discuss formation of self-governing organization of film actors in the year 1933. See http://www.sag.org/history/chronos_pages/30s.html as on 1st February 2005.

[127] Most significant among these was the Labor-Management Relations Act of 1947 amending the National Labor Relations Act. This legislation, named for its instigators as the Taft-Hartley amendments, restricted the ability of the unions to confine jobs to their own members.

[128] The Actors Equity Union.

[129] Equity, AFTRA and SAG decided to share the television jurisdiction in the year 1940. SAG notched up several firsts in the history of collective bargaining on behalf of Performers' in films. It was able to win rights for actors through its first commercials contract in 1953, residual payments for television reruns in 1952 and, in 1960, after a strike, residuals for films shown on television. With the implementation of the Pension and Health Plan, won in the 1960 negotiation, and residual gains. Understanding the needs of the low budget independent filmmakers SAG prepared a contract with special provisions in its contract in relation to theactors. The Screen Actors' Guild has extended its jurisdiction to the digital sphere also with the contracts being drafted and terms being negotiated with respect to Internet usages of the motion pictures.

Some of the organizations such as the American Federation of Musicians (AFM) have been in the forefront of the welfare oriented initiatives.[130] Much prior to the technological advent the organization had prepared and enforced the first wage scales to be observed by troupes of different kinds.[131] They were also in the forefront for copyright reforms particularly for the recognition of performance rights. The new technological developments had pushed the entire lot of performers into other professions. The development destroyed the performing arts at various levels and thousands who were dependent on their talent for sustenance lost their jobs as it affected their revenue from live entertainment.[132] Forced into unemployment they sought refuge in part and full time employment in other fields. The recording musicians worked on a one-time payment alone.[133] Therefore recordings displaced their revenue from live performances.[134] The AFM responded and by the year 1928 one can see minimum wage scale agreements being entered into on behalf of performers in vita phone, movie tone and phonogram records.

The unions attempted to approach the issue from different standpoints. They attempted to pursue a royalty based approach rather than the property based approach that found a set back in the *Whiteman* decision.[135] Their efforts bore fruit in the recording and transcription fund that was established for the welfare of

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[130] <http://www.afm.org/public/about/history.php> as on 1st February 2005. The organizational efforts of the musicians had begun much before the advent of the affixed media. In the 1800 one can notice the formation of mutual aid societies to help the musician with financial assistance and unemployment and death benefits. The AFM was formed I n the year 1896 with Owen Millar as the president. Around 3000 members were represented by this organization at the time of its inception.

[131] *Ibid.* In the year 1904.

[132] *Ibid.* Thomas Alva Edison's talking machine changed the fortunes of live performers. This was further dented by the radio broadcasting which had caught on in a big way by the 1920's.

[133] <http://www.afm.org/public/about/history.php> as on 1st February 2005. Besides broadcasting, the use of recorded music in films also displaced the performers, as their services were no longer required in theatres during the screening of silent films. In fact with the release of the first talkie the 'Jazz Singer', the performers in the theatres lost around 22000 jobs.

[134] Attempts to help live performers' was foiled due to the intercine conflict between the unions concerned and the hostility between them is a continuing incident.

[135] 114 F.2d86 (2dCir.1940), cert. denied, 311 U.S.712 (1940). Benjamin Kaplan and Ralf S. Brown, *Cases on Copyright, Unfair Competition and Other Topics Bearing on the Protection of Literary, Musical and the Artistic Works*, Foundation Press Inc. Brooklyn (1960), p.554.

the performing artists.[136] This idea came under criticism and it also exposed the drawbacks in the strategy.[137] The recording companies and the recording artists were to contribute to the trust fund. The reason being that the focus was not to help those who were unfairly exploited in the execution of their contracts but was to provide employment to the unemployed. This caused differences of opinion among the artists and was resented by the recording artists. This eventually led to a rift in the organization.[138] Though unity was restored upon the AFM reversing and making amends for their former policy and providing impetus to the issues of recording artists like royalty payments.

Another highlight of the unionized attempts was the unbreakable unity of the artists' fraternity in the United States despite the fact that instruments of protest like strikes were banned by way of legislation.[139] It is noteworthy that despite this the artists wrested royalty based collective bargaining agreement that has borne the test of time and yielded dividends.[140]

Another important facet of the activities of the union was the sustained pressure they bringing on the government to create a performance and property rights for professional musicians for recorded music. The legislation in 1971 that made the piracy of music a criminal offence was one of the results of things pressure. However it did not elicit the performance right for the musicians or for the sound recorders. Another feature of the organizational work was that there was consistent adaptation to the exploitation by means of new technology and the

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[136] James Caesar Petrillo's demands were interesting- it required employment of standby performers when records were used, quotas were to stipulate the amount of recorded music that could be used, restrictions on the use of canned music for various purposes and prohibition on the licensing old films (including sound tracks for performance on television etc.) were some of them. The union did every thing to inhibit the use of recorded music for any thing other than the personal enjoyment in the private homes and an agreement was reached in the year 1943. The artists in fact set upon a vigorous labor action and there was a ban on virtually all recording by union musicians during the period 1942-1944.

[137] The *Taft- Hartley Act* of 1947 announced a complete ban on the use of trust funds used by the union.

[138] Lead by *Cecil Read,* the Musicians Guild of America came into being with a substantial sway over the recording musicians who were the major contributors to the former union. It detrimentally weakened the representative character of AFM.

[139] The *Lea Act* was passed to ban strikes on the 16th of April 1946 and was repealed only in the year 1980.

[140] The first collective bargaining agreement was signed with the motion picture industry in the year 1944. Soon there was increasing representation of musicians in the motion picture industry. Considerable emphasis was given to the welfare measures that included disability fund and the constitution of employees pension welfare fund.

business model that was followed in its implementation in the collective bargaining agreements.[141] Important legislations for the performers such as the Digital Audio Recording Act [142] and the Audio Home Recording Act[143] that provided them with royalties from the sale of digital audiotapes and recorders were passed by the diligent follow-up by these organizations.

It is interesting to see some of the instruments that had been forged in order to attend to the problems of the artists such as the Trust Fund and the royalty agreements had attracted much controversy in America even among the artists fraternity. It is pertinent to note that the recording artists had to contribute their royalty payments to the trust fund and this evoked a lot of resentment amongst them. It revealed the fact that charitable machinations never really gave a lasting solution, as it would always have the effect of the earners feeling the pinch while contributing for the cause of the unemployed. The experience in United States with trust funds shows that any dependence on the contributions of those gainfully employed in order to help the underprivileged among the artists would not satisfactorily produce results in the long run.

Collective Bargaining Agreements and Standard Rates for Performers' in Audiovisuals

There is a whole range of very lengthy and detailed collective agreements covering audiovisual production in the US, with varying structures and compensation systems.[144] The principal players who negotiate to arrive at different contracts for different categories and medium being the Screen Actors Guild[145], the American Federation of Television and Radio Artists (AFTRA)[146],

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[141] For instance as early as 1962 the collective bargaining agreement had been entered into specifically taking into account the needs of the pay-TV. <http://www.afm.org/public/about/history.php> as on 1st February 2005. The same adaptability can be seen in the special rates devised for low budget audio and media recording in 1997. It was not merely the technology but also the business model that influenced the rate pattern.

[142] 1987.

[143] 1992.

[144] Some specific and simplified examples are quoted in this paper for the purposes of illustration–this does not however represent a comprehensive analysis of every agreement.

[145] (SAG) represents 98,000 performers' in all categories working in film, television, commercials (jointly with AFTRA), industrial/educational films, as well as interactive (*f.n. contd. Next page*) media, low-budget productions and audiovisual productions made for the Internet. SAG is currently in discussions with AFTRA with regard to uniting and consolidating the two unions.

The American Federation Of Musicians (AFM[147]) from the performers' side[148] and the Alliance of Motion Picture and Television Producers (AMPTP)[149], the American Association of Advertising Agencies[150] 25 (AAAA) and the Association of National Advertisers [151] (ANA) from the producers. In addition to these a pivotal role is played by talent agents in the US in negotiating performers' individual contracts. Traditionally the unions have worked very closely with this group. Collective agreements in the US are silent on any questions relating to statutory rights or their transfer *per se*. These aspects are left to the performer's individual contract. The agreements do, however, address in considerable detail the performers" conditions of work, and the range of minimum compensation mechanisms for primary and secondary exploitation of the performer's audiovisual performance.

The Collective Bargaining System: A Fine Balance Between Individual Freedom to Contract and Collective Minimum Safeguards

Today the audiovisual industry in the US remains heavily unionized, meaning that the majority of production takes place under union collective agreements, and the vast majority of professional performers' are members of one or more of the

[146] AFTRA represents actors, other professional performers' and presenters in four major areas: 1) news and broadcasting; 2) entertainment programming 3) the recording business and 4) commercials and non-broadcast, industrial, educational media. AFTRA's 70,000 members include actors, announcers, news presenters, singers (including royalty artists and background singers), dancers, sportscasters, disc jockeys, talk show hosts and others

[147] The AFM 29 represents 100,000 musicians in the US and also Canada, including those whose performances are used in film, television and other audiovisual productions, and those who perform live music in every genre and every kind of venue. The AFM has audiovisual and audio agreements in sound recordings, television (public, network, cable etc), motion pictures, interactive media, videocassette etc.

[148] Other Performers' Unions including Theatre performers', as well as stage managers, are represented by Actors Equity Association (AEA). Live music and variety performers' find their representation in the American Guild of Musical Artists (AGMA), and the American Guild of Variety Artists (AGVA). All these unions, under the umbrella of the Associated Actors and Artistes of America (sometimes referred to as the Four A's), are all affiliated with the trade unions' central organization in the US, the AFL-CIO.

[149] Since 1982, the Alliance of Motion Picture & Television Producers (AMPTP) has been the primary trade association with respect to labor issues in the motion picture and television industry[149]. Producers who sign a contract or letter of agreement with the union in their jurisdiction are called signatories.

[150] For more information <*http://www.aaaa.org/*> as on 1st February 2005. .

[151] For more information< *http://www.aaaa.org/* >for more information *http://www.ana.net (*as on 1st February 2005*)* representing over 300 companies which have over 8000 brands.

performers' unions or guilds.[152] Each union negotiates its own basic agreement with the producers' association. This agreement, which covers all workers under its jurisdiction, will typically cover such issues as minimum rates of pay, periods of work, retirement and health benefits, grievance procedures etc. Re-negotiations of the (often very extensive contracts) take place periodically and the agreements are subject to constant and in some cases joint monitoring by the unions and the producers with respect to their implementation. The key element of the system depends on the framework set by the collective agreements for individual bargaining. Union collective bargaining agreements are not contracts between individual performers' and producers. They provide minimums terms for the actual bargaining over performers' individual contracts. The basic agreements allow individuals who have more marketing power than others–the stars–to negotiate additional compensation above the minimum through personal services contracts.[153]

Union Control over the Profession

The American system whereby performers' are compensated via collective bargaining agreements depends on two factors: the first of these is the ability of the unions to control the number of performers' working under their contracts entering the profession, and secondly that of the discipline exercised by the performers' themselves. Following the 1947 Taft-Hartley Act it became more difficult for the unions to restrict hiring to union members. The law dictates that a producer who is signatory to the union's collective bargaining agreement may hire a non-member under a union contract for thirty days.[154] After that time the performer is required to tender the requisite initiation fee and dues to the appropriate union in order to accept any additional union work. In practice

[152] Any performer (with the exception of instrumental musicians) who work on motion picture or television film that is shot on film will work under the Screen Actors Basic Agreement. Television material that is shot on videotape or digital falls under the jurisdiction of both SAG and AFTRA and in certain cases is produced under a separate AFTRA agreement. The performers' covered by the agreement are performers' (actors), singers and dancers (both solo and in groups) stunt performers' and background actors (extras) in specific zones around New York and Los Angeles.

[153] Ms. Katherine M. Sand,*op.cit.*,p.25.
[154] Ms. Katherine M. Sand,*op.cit.*,p.26.

producers can hire non-union members without any significant difficulty, though naturally this is heavily discouraged by the unions.[155]

Rule One

Once a performer becomes a member of the Screen Actors Guild, he/she is bound by the rules of the union. In terms of obligations, 'Rule One' is the most important of these, which states as follows: '*No SAG member shall work as an actor or make an agreement to work as an actor for any producer who has not executed a basic minimum agreement with the Guild which is in full force and effect*'. This means in effect that SAG members will not accept any non-union work–indeed there is a system of fines and other measures for those who contravene it. This is a key element in ensuring the signing of collective bargaining agreements by producers.

Foreign Performers

Foreign Performers' are entitled to work in the film industry in the United States. They are also amenable to receive the benefit from US Union Agreements. However they have to overcome the hurdles of technicalities and formalities in order to avail the facility. The US Immigration and Naturalization Service (INS) sets the visa requirements for foreign performers' who want to work in the United States.[156] However once granted permission to work in the US, foreign performers' are treated exactly in the same way as national performers' in terms of union requirements and benefits.

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[155] There are a number of routes into union membership although these differ from union to union. A performer may join the Screen Actors Guild in one of three ways: either by obtaining work as a principal for a SAG signatory producer, or by virtue of membership in an affiliated union or by being hired for at least three days' work as an extra under a union contract. A performer may join SAG's sister union AFTRA on payment of an initiation fee.

[156] The INS allows performers' who are not US citizens or permanent residents to audition based on any visa, but they must then obtain a very specific visa to actually work on a film, television, or electronic media project, whether the producer is a union signatory or not, in the United States. Production companies, and sometimes talent agents and managers, will often apply for these visas on behalf of the performer concerned. Due to the INS criteria and cost of transportation, living expenses, and legal fees, these visas are typically granted only to major-role principal players.

The Jurisdiction of US Union Agreements

Most of the performers' collective agreements in the US are currently restricted in scope geographically (one exception being the AFM's sound recording agreement). This means that the terms of the agreements apply to performers' contracts made in the US and to situations in which a producer based in the US hires a performer who may then be filmed on location in another part of the world. This is an area of concern to the performers' unions in the light of the increasing amount of production that takes place in foreign countries by US companies operating from subsidiaries established in those countries. In such a situation the terms of the collective agreement do not legally have to be applied to the performer concerned and can potentially undermine observance of the collective agreement. This issue is likely to remain an important point in collective bargaining for the future. In the mean time the unions are engaged in a major effort to enforce the terms of their collective agreements by requiring discipline on the part of their members in not accepting contracts other than those based on such agreements.

Global Rule One

One of the most significant and recently adopted principles of the United States collective organizational philosophy with respect to performers' rights is what is called the Global Rule One-this was introduced in the year 2002.[157] The essence of this call is that no performer member should venture to work with a producer who has not signed a minimum basic agreement with the union guild. This has assumed importance particularly in case of productions that have been shifting offshore in order to escape from the rigors of the SAG contracts. The members are bound to this pledge of working with a producer who is a signatory to a sag union agreement. The reasons that are mooted include the loss of all benefits which a SAG agreement otherwise extends to the members. The pension and health benefits emanate from the percentage of contributions made by the

[157] The rule was introduced in the year 2002.

producers to the Screen Actors' Guild.[158] The rule can be waived in select instances where in the SAG considers it proper do so. The application of this rule is with regard to English offshore productions involving members of SAG with non-signatory producers. Punitive sanctions from a SAG trial board are invoked upon deviance from this rule.

Moral Rights

Provisions have been incorporated that seek to secure the right of paternity and the integrity of the performer. The issue of screen credits and depiction for instance in the nude and the rights of the artist with reference with to these situations have been laid down. These are basic minimum provisions and the individual performer can negotiate individually for better results. Typical credit provisions include provisions such as (Extract from AFTRA network code for television programming), ' All persons classified as performers' who speak more than five lines...shall receive cast credit, individual and unit respectively... although there are situations in which the unions accept that despite best efforts, credits may not always be possible'. Similarly extract from SAG codified basic agreement says, 'Producer agrees that a cast of characters on at least one card will be placed at the end of each theatrical feature motion picture, naming the performer and the role portrayed. All credits on this card shall be in the same size and style of type, with the arrangement, number and selection of performers' listed to be at the sole discretion of the Producer. All such credits shall be in a readily readable color, size and speed...'

Residual Uses

The most important feature of the US system of performers' compensation and control over secondary use of performances is represented by residuals, which are also referred to as 'reuse fees' or 'supplemental contributions'. These payments may be calculated as a percentage of either the minimum initial payment or the revenue of the producers or distributors for a new market.

[158] These could be affected if performer members begin to engage non-union signatory producers.

Payments are ongoing, as long as the audiovisual production continues to be sold to secondary markets.[159]

It can be argued that the requirement for the producers to pay for secondary uses imposed by the collective bargaining agreements, creates a situation whereby the performers' have control over their "rights" in a way that is analogous to that of other countries where performers' may negotiate compensation on the basis of the transfer of their statutorily-created exclusive rights[160]. As secondary markets have grown and new markets continue to evolve, the importance of residual payments to actors' total compensation has become increasingly significant. For the majority of performers' in audiovisual productions the system operates via the collective bargaining agreements, which oblige producers to send performers' individual cheques directly to the union or in certain cases to remit funds directly to the performer.[161] Under the SAG contract the lump sum is divided between the performers' concerned using a points system based on the number of days worked on the particular production. A key feature of the residuals system is that it aims not to disadvantage lower paid actors in relation to their "star" counterparts–a cap is built into the system so that in effect the highest paid performers" secondary use payments help in part to subsidize those whose initial compensation and bargaining power is less.

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[159] For example, the Residuals Distribution Formula (Screen Actors' Guild Basic Agreement) shows the following formula demonstrating how residuals are distributed among performers' under one collective bargaining agreement.

Time units

Each performer is credited with units for the time worked on a production as follows:
Each day = 1/5 unit
Each week = 1 unit
Maximum = 5 units per performer.

Salary units

The salary of each performer is converted to units as follows:
Day performer each multiple of daily scale compensation = 1/5 unit
All other Performers' each multiple of weekly scale compensation = 1 unit
Maximum = 10 units per performer.

Computation

The aggregate of each performers" time and salary units is applied against total cast units and each performer is paid in the percentage their units represent.

[160] Residual payments date back to the 1950's when the American Federation of Musicians became the first union to negotiate secondary use payments for theatrical films exhibited on television. After a decade of acrimonious negotiation, the payment of residuals became accepted practice throughout the industry in the 1960's although further industrial strife took place in the early 1970's when the new markets of home video, cable and pay-per-view television came into being.

[161] Ms. Katherine M. Sand, *op.cit.*, p. 31.

The unions' involvement in the administration of residual payments has given them extensive responsibilities and experience not dissimilar to that of collective administration organizations established by rights-holders both in the US and in other parts of the world. They manage a large amount of data, they disburse very large amounts of money to the precise individuals who have worked on each project, and, as importantly, they monitor and audit the sums received from producers on many thousands of productions each year. It is also worth noting that the unions do not make any deductions from the lump sum received for the process of administration–all the money goes to the performers'. As the entertainment industry has become more complex with ownership of productions passing from company to company, the unions have had to negotiate complex security arrangements to ensure that ongoing residuals obligations continue to be met (including onerous fines imposed on producers for late payments), and to track the accuracy of the sums received from the producers by auditing and other procedures. It is essential to note that in addition to payments for uses; the US performers' unions have negotiated very significant payments by producers for pension and health insurance schemes that are jointly administered by the unions and producers. This huge 'social' element of the collective bargaining system is clearly of immense importance to the individual performer.

Assumption and Security Agreements

It is important for the unions to be able to protect performers" payments in an ongoing way, even if the original producer of the audiovisual work transfers or sells the exhibition or distribution rights in that production to another entity. Union agreements in the US deal with the very frequent eventuality of changes in ownership of audiovisual productions, by requiring distributors to be bound by what are known as "assumption agreements" acknowledging the ongoing requirement to meet the performers' compensation payments on the terms dictated by the original collective bargaining agreement. These sophisticated agreements include a range of obligations that must be transferred to the new owner, including the union's right to be furnished with statements of gross receipts, the possibility of audits etc. In addition, the unions have negotiated the possibility to demand that the original producer obtains a security interest in the

production on behalf of the unions. This security interest is needed in order to protect future ongoing payments in case of default. The unions can choose to vary some of these requirements to take account of distributors or other entities with which the union has a history of dealing with respect to residual payments.

New Forms of Exploitation

A most conspicuous feature of the collective contracts in the United States has been that the way new forms of exploitation are dealt with will differ between collective Bargaining agreements. If there is no agreement as to whether a new use falls within an existing definition within the agreement, the issue will figure in the next round of bargaining between the parties.[162]

An Analysis of the Agreements

From the agreements, it can be discerned that an increasing scale of remunerative minimum of the performers' in the various categories for the next three years has been laid down till a fresh agreement is drawn up.[163] The performers' have been very finely categorized into performers' stunt performers', stunt coordinators, airplane pilots, singers, and singers in television, dancers. Further variations can be discerned with respect to the effort that is required including enhancements in case of appearances, hazardous nature of the work and also rehearsals. Very minute care is taken to see that even minor inconveniences from parking lot conveniences, audition test arrangements; rehearsals to the most starkly important residual payments are taken note of and addressed by the agreement. The payments are divided into daily payments and weekly payments criteria. A minimum agreed amount need to be paid to the performer and others involved in the agreement.[164] There is an increment to this

[162] Ms Katherine Sand, *op.cit.*, pp.32-33.

[163] The Duration of Collective Bargaining Agreements-A collective bargaining agreement applies to all productions made while that version of the agreement is in effect. Therefore, if the agreement is later changed, it will not apply retroactively to earlier productions, unless the parties so agree and specify to that effect in any revised agreement.

[164] *2001 Contract Summary, Theatrical Motion Pictures And Television*, Screen Actors Guild (In House Publication 2001), p.1, Minimum Rates for different categories, see (*f.n. continued next page)*

every year till the agreement is reviewed and revamped. While there are common provisions for the theatrical and television performers' there are variations with respect to their conditions and emoluments in certain other respects. For instance on the television a performer executing a major role is to be paid on a different scale different from the others on the basis of the number of hours of the program on the prime time television. This could cushion the performer against the malady of shooting the entire performances in a single day without respect to the popularity of the program. Therefore an hour of episode appearance by an actor is taken to be equivalent to eight days of employment and half an hour is taken to be five days of employment. A "major role" performer has been defined as one who, as a part of his or her contractual arrangement for that employment, negotiates credit at the front of the show or negotiates credit on a separate card, or its equivalent in a crawl, at the back of the show or who negotiates credit in any of the following forms: "Guest Star;" "Special Guest Star; "Starring;" or "Special Appearance By." Therefore a major role performer is notified ion the basis of the categorization made to him and even guest stars would be amenable to receive the privileges of a major role performer. It is important to notice that the gradation of emoluments are fixed not only according to the hours or days of work put in but also on the manner in which the work is to be finally exploited. It can also be noticed that a categorization is made between those performing solo and in-group. This is noticeable with regard to the singers and their entitlement to emoluments varies according to the situation whether it is a group or a solo performance.

Interviews- Norms to Engage the Performer

The performer is safeguarded from arbitrary denial after having been made to spend precious time with a producer and the resultant loss of pay for the day and denial of an alternate employment opportunity. The minimum terms guarantee payment of money if the performer is retained for more than one hour at the time of being called. The same rules apply with respect to performers' called for

<http://www.sag.org/sagWebApp/application?origin=multipage_template.jsp&event=bea.portal.framework.internal.refresh&pageid=Hidden&cp=home&templateType=multipage&portletTitle=Principal+Contracts&contentType=Contract+Summary&contentUrl=/Content/Public/Contract_Summary.htm&idx=1 >as on December 1st, 2004.

varying durations of engagement[165]. The contractual security of the performer is secured to a great extent by the mandatory requirement of sign in sheets at the time of interview and audition. Thus not only in the actual engagement for the role but with regard to preparatory stages it self extreme care has been taken in order to immunize the performer from unfair loss pf earnings and contractual certainty. This would intimate the union as to who has finally made it to the casting process and other essentials as to how far the assessment and time has been expended on the effort as all these have different consequences as regards obligations under the general agreement [166].

A firm engagement can be said to have been made if there has been a written notice of acceptance, a contract signed by the producer, script is given to the performer with intent to hire him, when the performer is fitted, other than while going through the wardrobe tests, when the performer is actually called or reports all these conditions need not be fulfilled but it appears that fulfillment of some of these would be sufficient indication of the fact of a binding engagement[167].

However this is subject to exceptional circumstances where in either party can cancel prior to noon on the day before the work if the call for work has been verbal alone and none of the aforementioned criteria have been fulfilled. If the start date has not been provided, the performer can terminate the agreement in order to accept a bonafide employment from a third party. However the producer has to be given a minimum period for an alternative start date.[168] It is compulsory for a booking slip to be provided which would indicate the role, guarantee and the salary to be provided to the performer.[169] The booking slip has to be accompanied by the script prior to the start of the work even if it is an engagement on just the previous day of the work. The booking slip is dispensable if the script or the contract has been previously provided. This points out to the care taken to see that a contractually fool proof status is enjoyed by both the performer as well as the producer. It reveals the (the obvious and the

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[165] *Contract Summary,* Screen Actors Guild (2001), p.5.
[166] *Ibid.*
[167] *Ibid.* The performer (Day, 3-Day TV, Weekly) has a firm engagement, which binds the studio in the following cases: 1. Written notice of acceptance, 2. Contract signed by the Producer, 3. Script is given to the performer, with intent to hire performer, 4. When performer is fitted, other than wardrobe tests, 5. When performer is actually called and agrees to report.
[168] *Ibid.*
[169] *Ibid.*

remote eventualities) umpteen eventualities that have been taken into consideration while drawing up a standard agreement to secure the performer against unfair practices in the audiovisual industry in the United States.

Meticulous Documentation Required

Importantly, care is taken to monitor and document the engagement pattern as the emoluments for the performer is dependent on the data with regard to date, time and pattern of the work rendered. The agreement makes it mandatory for a card to be maintained by the producer. It can be either a production time report or a performers' time card that requires to be signed by the performer everyday. Care has been taken in order to discourage practices such as eliciting the signatures in the blank.[170] The producer has to honor the individually negotiated billing as described and which has been agreed upon in the performers' individual contract. The attribution of credit for the performances occurs upon the fulfillment of certain specific circumstances.[171] With respect to television one card in the end credits is stipulated. However if the credit has not been negotiated then it is at the producers' discretion. With regard to theatrical films it depends upon the total number of cast. All performers' are entitled to screen credit if the cast is less than fifty. But if the cast is more all of them need not find themselves but only at the end of the film. Even stunt performers' need to be identified but it need not indicate their respective roles. Any default in this regard invokes liquidated damages. In the event of dispute the recourse am provided for through arbitration[172]. The performers' efforts and remuneration at looping, retakes and added scenes are considered separate from the remuneration for the photographed work. [173]

The Script in Advance

The need to be provided with a script in advance is a mandatory requirement. The script has to be made available 24 hours in advance of a scheduled reading

[170] *Id.*, p.8.
[171] *Id.*, p.7.
[172] If there is a dispute as to the facts, the matter may be submitted for arbitration. All other performers' should contact the Guild. Note: Any such claim must be filed within one year after the first theatrical release or within one year of the first broadcast of a television film.
[173] *Id.*,p.12.

or immediately after scheduling an interview. This gives no opportunity to give the cast a surprise either at the time of the shooting or after the same.[174]

Contracts

A performer is secured from being taken by surprise by the terms of any contract. This is realized by the provision that the performer may not be made to sign any contract on the set of the production. However if the performer chooses to do so then he must be provided with an extra copy of the same. Any default in this respect is met with fines and union intervention upon notice.[175]
Prompt payment- the agreement mandates that payments to the performer must be paid within five days after the services are rendered. Any default from the period prescribed would be met with damages at rupees 10 dollars for each working day to a maximum of 20 working days. This would increase if it were sustained default despite notice from the union.[176] A responsibility is bestowed on the performer to be responsive to defaults at the earliest and a durational period has been set down within which a claim would have to be made. Importantly residual claims have to be filed within a year.[177]

The Residual Scheme and Pattern of Distribution

Both television pictures as well as motion picture performers' are eligible to residuals upon the fulfillment of certain criteria. When motion pictures are telecast on the television then the producer will have to pay to Screen Actors Guild 3.6% of the gross receipts from the distribution of theatrical motion pictures to free television or pay television and this shall include welfare and pension contributions. When the theatrical motion pictures are released in videocassette format then the producer will pay the performers' 4.5 % of the first million dollars and 5.4% in excess of one million dollars. With respect to telecast over pay television, In return for performer's initial compensation, Producer is entitled to 10

[174] *Id.*,p.4.
[175] *Id.*,p.6.

[176] *Id.*, p.12.
[177] *Ibid.* Claims must be filed not later than six (6) months i) after the occurrence of the facts upon which the claim is based or ii) after the employee, Guild or Producer has had a reasonable opportunity to become aware of the occurrence. Residual claims must be filed within one year.

exhibitions or one year's use, whichever first occurs on each Pay TV system. Thereafter, Producer will pay to SAG 6% of the total worldwide gross.[178] This is calculated in accordance with a formula. The same formula applies to the television residuals also based on the daily scale computed along with a ratio of the same.[179] When television pictures are rerun the performers' beget additional compensation, as the initial remuneration already paid to the performer constitutes payment in full for one run in the United States and Canada alone. A repeat in any city puts a television motion picture into the category as a subsequent run.[180] The subsequent rums are paid under the categorization of network prime time, network non prime time (excluding late night), fox telecast for prime time, syndicated telecasts and foreign telecasts.[181] There is also additional compensation for the foreign telecasts. The compensation is based on a percentage of the minimum earned by the performer and additionally a percentage of the gross earned by the producer over a certain limit. This is based on the duration of the program and the slot in which it is telecast.

Similarly when the television pictures are converted for theatrical release also the producers are to pay the performers' for this right additionally if theatrical

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[178] *Id.*,p 15.

[179] Distribution of the monies received will be as follows:
1) a. Time Units
Each performer will be credited with units for time worked.
Each day = 1/5 unit
Each week = 1 unit
Maximum: 5 units per performer
b. Salary Units
The salary of each performer will be converted to units as follows:
(1) Day Performer: Each multiple of daily scale equals 1/5 unit.
(2) All other Performers': Each multiple of weekly scale equals 1 unit.
Note: When a fraction of a multiple is more than 1/2 of daily or weekly scale, the performer will be credited with another day or weekly unit.
Maximum: 10 units per performer.
c. Computation
The aggregate of each performer's time and salary units will be applied against the total cast units, and
will be paid in the percentage their units represent.
2) TV Series (Applies to Section 31 in connection with revenue received on or after July 1, 2001):
Series performer: . . . . . Three (3) Units
Freelance weekly performer: . . . . . Two (2) Units
All others: . . . . . One (1) Unit

[180] *Id.*,p.13.

[181] *Id.*,p. 14.

exhibition[182] takes place in either the United States, its territories and Canada, on the one hand, or in a foreign country, on the other hand, the rates shall be i) 100% with respect to the Day Performer's total applicable minimum and ii) with respect to all other performers', the free-lance Performer's total applicable minimum. Theatrical exhibition in both areas requires that performers' be paid 200% of total applicable minimum (100% for each area). The initial payment for exhibition in any one area shall be 150% of applicable minimum (the extra 50% constitutes a non-refundable prepayment against use in the other area). The "total applicable minimum" is the total minimum salary for the period of the performer's employment in the television motion picture. There is a 50% of applicable minimum payment for a limited release of long-form programs to theatrical in specified foreign zones. It is significant to note that the formula is a minimum formula only and the performer may bargain for his individual rate. The Payment has to be distributed 90 days after first theatrical exhibition.

When what has been produced for the television (for free television) is released (on or after July 2001) to basic cable medium, the producers would have to pay to the union for rate able distribution to the performers', a percentage of the distributors gross receipts. The percentages would be inclusive of pension and health contributions. This would be besides the receipts collected from the residuals percolating from the free television broadcasts.[183]

Secured Against Reuse

The producer cannot reuse the photography or the soundtrack of the performer in another picture or medium without separately bargaining with the performer prior to the reuse. A provision that secures the position of the performer from agreeing to a predetermined sum with respect to reuse payments has been incorporated in the agreement. [184] Such consent cannot be elicited from the performer at all. The reuse would be decided on the basis of the minimum agreed upon contractually per clip or footage filmed in a single day. The reuse payment is required to be

[182] *Ibid.*

[183] *Id.*,p.16.

[184] *Id.*,p.12.

paid within sixty days of exhibition otherwise late payment would result in double day performer minimum. Any default of the stunt without such a bargain would result in payment of three times the amount originally paid for the number of days work covered by the material used.

Assured and Insured

The performers' cannot be held liable or responsible to any resultant damages to property or for bodily injury done while in the course of employment. A mandatory insurance coverage would have to be provided for personal injury and for damage to property. Even stunt coordinators should be held non liable by being covered by the producers general liability insurance policy.[185]

Unfair Employment Practices

The problem or rather the tactic of using the multiple work responsibilities or rotational delegation and exploitation of personnel is sought to be checked by making it clear that the production staff cannot double up as performers' without the consent of the guild. However there are certain specific exceptions and those that cannot be avoided. It invites penalty in the form of specified liquidated damages if violated.[186]

Hazardous Activity

The producer is required to elicit the consent of the performer if the performance that he is asked to performer is hazardous or a stunt activity. Several precautions need to be taken and specialists need to be resorted in order to execute the stunt and the union has to be kept informed in case of any untoward engagements of non-stunt performers'.[187]

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[185] *Id.*,p.13. Performers' and stunt performers' shall be held harmless, legally, from any claim for dam ages for injury or property damage arising out of acts in the course of employment. Producers must provide coverage for personal injury ($1 million/$2 million) and property damage ($250,000.00). Stunt coordinators shall be held harmless by being covered under the Producer's General Liability Insurance policy.

[186] *Ibid.* Liquidated damages for violation: $500 day performers', $600 3-day, $800 weekly.

[187] *Ibid.*

Policy of Non- Discrimination

The producers are expected to comply with a policy of non-discrimination on the basis of sex, race, color, creed, national origin, age, marital status, disability or sexual orientation in accordance federal and the state laws. The contract stipulates that the all performers' must be given casting access and all effort must be made to include minorities, people with disabilities, women and performers' aged above 40. Break downs need to be furnished to sag where the role demands specific disability. Specificities cannot be asked for unless the role requires the same genuinely.[188] The same policy would be continued with respect to doubles for stunt work with the same creed and sex being maintained for the roles.[189]

Minors

While minors are not discriminated on the basis of remuneration paid to them nevertheless rules and provisions stipulating their welfare and security have been provided in the agreement. This is particularly reflected on the hours of work that is permissible to make the minors work at the sets.

Background Actors

The background actors are treated differently from the day performers' in the SAG theatrical television contracts.[190] The agreement is conspicuous by the absence of entitlement to residuals in the contract with respect to background performers'. This is at variance with right to residuals created contractually by means of bargains for the main performers' and the stunt performers'.

Jurisdiction Specific

The contract signed on behalf the SAG and the producers' organizations sternly stipulate that the members of SAG union should not work as background actors

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[188] *Ibid.* The Producer cannot ask a performer's marital status, sexual orientation, age, creed, disability, national origin nor ancestry, unless it can be considered a "bona fide" requirement for the role

[189] *Ibid.*

[190] *Background Actors 2001 Theatrical Films and Television Digest*, Screen Actors Guild publication. <http://www.sag.org/sagWebApp/application?origin=multipage_template.jsp&event=bea.portal.framework.internal.refresh&pageid=Hidden&cp=home&templateType=multipage&portletTitle=Principal+Contracts&contentType=Contract+Summary&contentUrl=/Content/Public/background_actors_contract.htm&idx=2 >as on December first 2004.

on those projects (producers) that have not signed up with the union in the specified respective zones.[191]

Minimum Guarantees and Contracting Out

It is sternly laid down that the members should not work for less than that stipulated in the agreement. Even if the jobs are available beyond those that are specifically mentioned in the agreement and agreed upon between the SAG and the signatory members, the background performers' should not take them up.

Distinctions Between Back Ground Performers'

The contract differentiates a background actor on the basis of the specifications required for the role and rates are fixed accordingly.[192]

Working Conditions

It is noteworthy that extreme care is taken in the case of back ground actors with respect to their working conditions in the collective bargaining agreements. Provisions have been incorporated regarding their duration of work which is arranged according to the hour's put in the course of a day, the mode of payment when overtime is rendered and the method of calculating wages in these circumstances. Besides the basic daily wage rates agreed upon by the union, the background actors are entitled to receive additional wages in case of execution of the hazardous work[193], wet and smoke work, for body and skull makeup, rehearsals, for the interviews[194], wardrobe allowance, personal props[195]. The regular workday is eight (8) consecutive hours (excluding meal periods).[196].

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[191] *Ibid.*

[192] *Id.*,p.1. They are classified as a general background performer, a special ability background actor, a stand-in background actor, photographic background actor, a double and omnies performer.

[193] *Ibid.* Prior intimation has to be provided by the producer regarding the nature of the work to be performed

[194] *Id.*,p.3.

[195] *Id.*,p.4.

[196] *Id.*,p.3. The 9th, 10th, 11th and 12th hours are payable at time-and-a-half in tenths of an hour (6 minute units). Work beyond the 12th hour is payable at double-time in tenths of an hour (6 minute units). Daily wage rate is fixed for 16 hours of work that includes the breaks and the rest.

Not Entitled to Residuals

Very conspicuously, the background worker is not entitled to residuals that the principal performers' or day performers' are entitled to. The collective bargaining agreement is silent on the issue of their eligibility to residual payments as also right of attribution. Though an elevation or utilization of a background performer to the status of a day performer can raise a claim to the emoluments of a day performer.

Membership

A non-SAG participation in a SAG territory can only last for 30 days after which is compulsory for the nonmember to apply for membership to the union. A non-sag member can be engaged in a sag territory only for a period of thirty days. Beyond that period, the producer will have to pay a penalty to the Screen Actors Union. The performer has to seek the membership of the SAG if he as to continue in the sag territory and avail of opportunities[197].

The Moral Right Clause

One reflection of the concern for the moral right to dignity of the background performer is in the provisions relating to nudity. If a scene requires nudity to be exhibited by the background actor then they must be so notified on advance about the same. During the course of the shooting the set must be closed and there should not be any still photography at the site. A violation of this rule enables the actor not to work and to claim the wages of the particular day. A double as a nude is paid at the principle pay rate. However there appears to be no right to credits or in the credits for the performer[198].

Any duration beyond the sixteen hours would betaken as one days pay for each hour beyond sixteen hours

[197] The performers' in this non-member category are called, as must pays.

[198] *Id.*,p.6

Background Actors must be notified in advance of required nudity. Set must be closed and no still Photography permitted without Background Actor's prior written consent. If not notified, the Background Actor may refuse to work and shall receive full day's pay. Employment as a nude body double is paid at the principal day rate.

A Distinction for the Minor

It is specifically spelt out that the minors would not be paid the same rate as the principal background performer in the film or television. Non-payment or late payment by the producer to the performer is met with a late fee imposition. The payments at the most must be paid within a week.[199] Most significantly it is mandatory that the payments are made by cheque alone. [200]

Working Conditions

Documentation

A most critical component is the documentation that is essential in engaging the background performers'. The performers' are made to ensure that proper contracts and vouchers are maintained by recording all the details of their engagement in the work.[201] Care is taken to ensure proper performance of the contract by disallowing taking up of multiple assignments at the same time by the background performer. Any deviation requires the prior sanction of the screen actors' guild. The agreement is a balance of the rights and obligations of the performer. Some of the significant safeguards include the fact that the Background Actor is entitled to a full day's pay for cancellation of an initial work call except if due to illness in principal cast, fire, flood, or other similar catastrophe or national emergency.[202] Elaborate provisions are stipulated in the collective agreement regarding meals, meal allowance, and rest periods during work and overtime payments and wardrobe requirements. Another safeguard against exploitation is his right to ask for wages equivalent to a main performer if he is asked to perform a role that demands such an effort. Thus after recruiting him and paying him the background performers' wages a work of a main

[199] *Id.*,p.6

[200] *Id.*,p.6.

[201] *Id.*, p.10. Advise to members to keep the contract and voucher and the copies of the same.

[202] In the event of such cancellation, the Background Actor will be entitled to a half-check. If the Background Actor is notified of such cancellation before 6:00 p.m. of the workday previous to the work date, the Background Actor will not be entitled to the half-check.

performer cannot be extracted slyly from him. Even with respect to the hiring of background performers', it is specifically underlined that equitable norms and social purposes need to be observed in the endeavor.[203]

The Commercial Performers' Collective Agreement in the United States of America

The Screen Actors' Guild forges a separate agreement for the principal and the other performers' in the commercials.[204] The agreement is significant in that on a closer scrutiny the agreement has taken into consideration and defined circumstances that have emerged with the challenges posed by the modern technology. It also points out the slightly different manner in which entities such as the extras, stunt workers and the background performers' are treated under the commercials agreement in contrast to the ones earlier cited. It includes provisions on working conditions and safeguards encompassing all sections of the performers' including women, persons with disabilities and minors. The stunt performers' too are similarly secured both with regard to working conditions and with respect to fees and other benefits. The dancers and the extra performers' are also covered. [205]

The Minor in Commercials[206]

It is noteworthy that minors are treated equally with other principal, extra or other performers' with regard to the remuneration. No special rates have been devised

[203] *Id.*, p.7.For instance it is specifically expressed that no Background Actor shall be hired due to personal favoritism, Rotation of work shall be established to such reasonable degree as may be possible and practical, Producer will not hire a.Background Actor who is currently on the payroll of the Producer or any of its hiring, casting or payroll agencies, except upon written waiver by the Guild, no fee, gift or other remuneration shall be demanded or accepted by any person having authority to hire, employ or direct services of Background Actors, non-discrimination: producer will make every effort to cast Background Actors belonging to all groups in all types of roles, having regard for requirements of suitability for the role so the American scene may be realistically portrayed and that the producers agree not to discriminate on basis of geographic residence.

[204] <http://www.sag.org/Content/Public/comm_digest2003.pdf >as on first December 2004. These inferences are based on a study of the SAG Commercials Digest, 2003, which is to last for 3 years up to October 29th, 2006. After which it would be reviewed and renewed either with new provisions incorporated or reflecting the changes in the rates and fees to be disbursed.

[205] *Id.*,p.24-25. For the working conditions for dancers.

[206] *Id.*,pp. 17-20. For employment of Minors (Schedule A.I.AA).

to be paid to the minors. The same rates apply regarding the session fees and the eligibility to residuals or the use fees.

Formalities Before Contracting

A standard employment contract is stipulated by the agreement to be used for the engagement of scale performers'. This is required to be executed and submitted to the performer within a reasonable time before production. It is stated that a copy needs to be given to the performer at that time[207]. The performer is vested with the right to counsel the union or his representative before signing the agreement.[208] There are details about the different modes of exploitation that the performance would be subject to and the corresponding remuneration to be availed by them.[209] Some of the practices are noteworthy. Options are to be written on the back of the contract if there are to be rights for the producers in relation to foreign and theatrical /industrial exhibition and on the front of the contract for Internet, dealer and simulcast rights. Very importantly the agreement says that the principal performer may withhold these rights by specifying the same on the contract. However this can be dispensed with if the engagement has been conditioned upon the producer having those rights.[210] This means that unless there is a contract to the contrary specifying conditions in the contract by the performer or saving or retention by the performer, there are no further rights to the performer other than those specified in the agreement.

Under the system envisaged by the terms of the agreement it is incumbent upon the producer to inform the principal performer at the time of the audition and at the time of hiring of the performer about the initial use that is intended (the use and scope) of the commercial. In case the commercial is to be used as a test or test market commercial, the producer must advise the principal performer at the time of audition as well as at the time of hire.[211]

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[207] *Id.*, p.1. See section 9 of the agreement between sag and the producers and the terms of the contract agreed upon for the years 2003 to 2006.
See <http://www.sag.org/Content/Public/comm_digest2003.pdf> as on 1st December 3004.

[208] *Id.*, p.2.

[209] *Ibid.*

[210] *Ibid.* See, Engagement of Principal Performers' -Section 9(a) & (b).

[211] *Ibid.* Intended Use Notice -Section 10.

The Exclusivity Clause for You

A check has been placed on the principle of restraint of trade on the performer. Any restraint or exclusivity can be placed on the performer only with respect to accepting employment in commercials advertising any competitive product or service. It is further provided that (in order to protect the performer from unfair bargains) that the performer may agree not to perform in non-competitive commercials upon the payment of due compensation that has been ratably fixed in the agreement.[212] A breach of exclusivity is viewed with grave seriousness and the performer who breaches would be liable for substantial damages.

Categorization in Commercials

Performers' are categorized into principal performers' and extra performers'. They in turn have been categorized into minors, women and persons with disabilities, group performers', dancers, and stunt performers'. For the sake of special provisions applicable to each one of them.

Period of Use of the Commercial

It is important to note that there is a maximum period of use of a commercial, which may be used not more than 21 months after the date of commencement of the first fixed cycle. Where new commercials are created by integration, the maximum period of use is limited to the same period as the original unless the principle performers' consent is obtained for a full new maximum period of use. The performer should notify the producer if he does not show interest in renewal. Such renewal would be disallowed if there has been any default in the payment to be made.[213]

Rates of Remuneration

The performers' both on camera as well off camera performers' are to be paid fees for the sessions that they work for the producer according to minimum rates.

[212] *Id.*, p.3. Exclusivity of contract - Section 16.
[213] *Id., p.22.*

A single session for the principal performer is reckoned to be 8 hours. The rates vary between the principal performers' (be they solos or duos), group singers and dancers (3-5), group singers, dancers, speakers 6-8 and the same equation of 9 or more. The rate per head comes down if there are more in a group. It is noteworthy that the arrangement safeguards against fraudulent practices and if a person who has not actually rendered any service to creation of a music track (singers) name was included in the credits supplied then it would be inviting action for fraud and damages.

Residuals from Commercials

Foreign Use

For the use of the commercial on a foreign soil, the performers' contract has to contain a provision sanctioning such use for a period of one year upon the payment of additional compensation in the manner set down or arrived at in the commercials agreement. The segmentation of the additional rates based on the basic session fees is according to the country or zone in America in which the exploitation is intended.[214] Similarly commercials that are translated into another language invoke the terms of the contract to provide 50% of the sessions fees to the performer. The same applies with respect to the producers need to have exclusivity of the performers' services[215]. With respect to use beyond the United States, Mexico and Canada a specific set of rates have been provided. The foreign use can be extended beyond the normal 21-month maximum period of use by paying additional 50% of the foreign use fees. This is subject to conditions[216]. For theatrical and industrial exhibitions a separate tariff table of residuals have been prescribed. For 30-day use, performer is to be paid not less than 100% of his/her applicable session fee. An additional 60% of the applicable session fee is payable for any additional use which occurs beyond the 30th day within the maximum period of use this also takes into account advertisements in

[214] *Id.*, p.34.

[215] Exclusivity.

[216] *Ibid.*

the format of videocassettes, laser disc, DVD, CD's or such format which the applicable rate would be 320% of the session fees.[217]

Internet Use

The commercials produced not exclusively for the Internet can be used on the Internet. However the remunerative modalities would have to be subscribed by the users. The commercial can be used for the internet during the normal period for broadcast use for a period of one year at the rate of 300% of the session's fees. The same rate shall apply to the extended period as well.

Productions Produced for the Internet Alone

However, with respect to the initial use of the commercial made for the Internet itself, there is a striking difference. The same terms of the collective bargaining agreement do not apply to the productions for Internet use. There is an immense freedom of contract, with regard to the terms and conditions, which becomes displaced only when the production for initial Internet use is subsequently made over for use on the broadcast circuit. However the terms of the working conditions of the performer with regard to the commercial contracts in the ordinary course would be applicable to the initial use for the Internet as well. The allowances and damages would be subject to negotiation between the parties. The producers' commitment towards the pension and health plans remains the same.[218]

Cross Over Uses of Programs Originally Meant for the Internet

Safeguards are provided against usage of programs produced for Internet to any other application. The producer may not use an Internet commercial on broadcast television or in any other medium unless the producer bargains for the right at no less than the rates provided in the collective bargaining agreement applicable to

[217] *Ibid.*

[218] *Id.*, p.31.

such use. In the event of broadcast use, producer must pay each performer for Internet use, not less than the difference, if any, between the amount previously paid for Internet use and the amount which would have been payable for use of a broadcast commercial on the Internet. It is important to notice the varying criteria that have been adopted to fairly work the system. It is noteworthy that both the compulsions of the performer and that of the industry have been taken into consideration. An interesting discrimination between diverse means of exploitation –length of use and remuneration from use -has been attempted with respect to the exploitation of the commercials produced under the SAG agreement. A classification based on the kind of television stations and the kind of programs that go into making such an evaluation[219].

Cable Transmissions

Cable transmissions also give rise to residual rights as set down in the agreement[220] Cable commercial rates are provided for both the cable transmission of broadcast commercials and for commercials produced for cable transmission only. These rates are not applicable to use of commercials on Pay TV systems that do not presently carry commercials. A cable use cycle is 13 consecutive weeks commencing with the first cable transmission on any originating cable network or system. For instance cable T.V. commercial if it is to be used for broadcast TV would require the consent of the performers'. Very importantly it must be a prior written agreement that must be given.[221]

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[219] *Id.*, p.25. For instance a commercial is deemed to be wild spot if it is broadcast by no interconnected single stations and (a) is used independent of any Program or (b) is used on local participating programs. All other uses of a commercial are considered program use. Compensation for wild spots is for unlimited use within a cycle of 13 consecutive weeks, based on the cumulative total of unit weights for the TV markets in which the commercial is used. Each television market is rated according to the value placed on it.

[220] *Id.*, pp.29-30.

[221] The compensation to each principal performer for each 13-week cycle of cable use (whether a broadcast commercial or a commercial produced for cable transmission only) is computed by multiplying the applicable unit price by the aggregate unit weight of all cable systems and networks on which the commercial is transmitted. In no event will the compensation be less than the session fee nor more than the price for 2,000 units.

Fair Use Provisions –Waiver of Residuals

Waivers are granted of re-use fees for messages produced and used under the auspices and / or on behalf of various federal, state and local government agencies, non-profit public service organizations, charities and museums which are aired on time granted by the stations or networks. This exception of waiver does not extend to the session fees due to the performer.[222] However a safeguard is expressly provided that the producer would have to obtain the consent of the union before seeking the consent of the principal performer.

Extra Performers' in Commercials

However in contradistinction with the rights of principal performers' and extras in theatrical and television, the extra performers' in the commercials are provided variegated residual rights in the use of the commercial. It is specifically provided that no extra performer may be asked to sign up for exclusivity.[223] Unless the extra performer is notified at the time of hire that he/she is to be paid on the basis of a 13-week cycle of use, he/she must be paid at not less than the unlimited use rate applicable to the extra performer's classification.[224] Any use beyond the initial 13-week cycle of use will require notification and additional payment to the extra performer.[225]

Commercials for Internet Use

With respect to commercials made for initial use on the Internet, the Producer may bargain freely with the extra performer with respect to compensation.[226] The provisions of working Conditions are applicable, except that allowances and liquidated damages are subject to direct bargaining with the performer or his/her agent. In the event of broadcast use of an Internet commercial, Producer shall also pay each extra performer not less than the difference, if any; between the applicable minimums provided in the commercials Contract and the rate bargained and initially paid to the extra performer. Extra performers' hired to work

[222] *Id.*, p.33.
[223] *Id.*, p.40.
[224] *Id.*, p.42.
[225] *Ibid.*
[226] *Ibid.*

in commercials produced for cable transmission only shall receive the payments that cover use of the commercial for one-year only.[227] Producer may negotiate with extra performers' for the right to use such commercials on cable beyond one year, on terms that are no less favorable.[228]

Restrictions on Use of Commercials; Additional Services

The rights granted to Producer are limited to the right to use, distribute, reproduce and/or exhibit the commercial over television.[229] Producer has the right to use the name and likeness of performer and his/her performance in the commercial in trade publications and reels publicizing the business of the producer provided such reels are not rented, sold or utilized as give-aways.

Use Inconsistent with Purpose

Very significantly the contract also takes into account the additional use to which the performers' efforts would be utilized, while at the same time making way for business expediency. It is provided that no part of the photography or sound track made for a commercial may be used other than in commercials as provided in this Section without separately bargaining and reaching an agreement regarding such use.[230] In case of violations, the principal performer is entitled to damages as provided by the contract or may elect to arbitrate his/her claim or bring an individual legal action to enjoin the use and recover damages as fixed by the court in that action. Any services, including translation, not covered in the contract are subject to bargaining between producer and principal performer.

Holding Fees and Sessions Fees

Quiet significantly the remuneration is based on session fees or holding fees and use fees depending upon the period of exploitation and mode of exploitation. A minimum limit has been spelt out as tariff with respect to both in the

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[227] *Id.*, p.43.
[228] *Ibid.*
[229] *Id.*,p.20.
[230] *Id.*, pp.20-21.

agreement.[231] If the producer fails to pay the holding fee on or before the date on which it is due, all further right of producer to use the commercial terminates and the performer is automatically released from all contractual obligations. If, during the maximum period of use of a commercial, producer wishes to reinstate a commercial after termination of the right to use it, producer may do so with the written consent of the performer and payment of not less than two holding fees, one of which may not be credited against use.

Maximum Period of Use

The maximum period during which a commercial may be used is not more than 21 months after the date of the commencement of the first fixed cycle.[232] Where new commercials are created by integration, the maximum period of use is limited to the same period as the original commercial unless the principal performer's consent is obtained for a full new maximum period of use. If no default in payment exists, the commercial may be automatically renewed for subsequent maximum periods of use unless the performer notifies producer not more than 120 days and not less than 60 days prior to the end of the then-current maximum period of use that he/she does not grant the producer such rights. This points out to the detailed use based bargains, the fee being dependent on the duration of use.

Impact and Advantages of the Collective Bargaining Initiatives

A study of the legislations and the collective bargaining agreements in the respective countries (this includes most prolific film producing countries of the world and this has imparted a cultural status to the medium of cinema) shows that the state of performers' status in these countries is tremendously advanced in agreements and execution particularly with reference to the audio visual industry. It can be stated confidently that the performers' status is as secure in audio visual as in the most conventionally and universally recognized performers' rights in the sound recordings. The state of affairs points out to the prevalence of

[231] *Id.*, p.21.
[232] *Id.*, p.22.

a mature collective bargaining process either aided by state laws and administrative machinery or in spite of it. It points to the systemic and meticulous manner in which periodic exercises in negotiating fresh drafts are held by the performers' representatives and the producer interests in the film industry. It also indicates the benefits of organizing into stable trade unions recognized under the labor legislations of the respective countries.

The collective bargaining agreement drawn up reveals the significance attributed to fair practices in the production of films and other audiovisuals and the care taken balance the interests of both sides to secure and safeguard either of them from unfair exploitation. It can be perceived that the minimum guarantees and limits are firmly laid down leaving no circumstance to arise that has not been articulated or taken into account. In which mere discretion of free bargaining between individuals might operate.

The immense value that has been attributed to the performers' contribution is explicit in the incorporation of provisions that invokes compensation and damages for any unfair exploitation against the terms of the contract. Even the latest technological means of communication has been or intended uses on these media like the internet have been taken into consideration to decide the means of arriving at mutually acceptable mode of exploitation. Besides original use on these new media, care has also been taken for the situations wherein the old affixations would be reused on these new media disseminators. All imaginable prospects of exploitation has been thought of and care taken to meet these eventualities.

In the context of the administration of the rights, it is significant to find a subtle categorization of the performer in the audiovisual. While with respect to minimum conditions of work a broad uniformity can be found in the treatment between them but for certain circumstantial and professional differences but with respect to remuneration for shifts put in as well as for the uses there is definite difference in emoluments. It is important to note that rights accrue to the performer in a work based on literary or artistic works as well as those not so derived. In other words such a distinction has not been insisted upon.

It is of note that fair use provisions have not been explicitly spelt out but there has been incorporated in the contract where in the producer can use the performances without the permission or need to grant use fees to the performer.

This shows that even collectively bargained agreements without the minimum being laid down via any copyright legisla6tion takes care of the public and state interest to have the programs made available in certain circumstances.

There are either institutional redressal mechanisms or those instituted but the parties to the collective bargaining agreement. Therefore the provision of easy access to preliminary resolution of the dispute is set in place. The terms and conditions laid down in the contract points out to the confidence nursed by the performers' s in administering the rights secured by them. It also shows the trust that bas been bestowed or the trust that has been inspired by the collective administration societies established for the purpose.

The stern resolve of the unions and the administering agencies is evident in the fact that membership of the union is a sine qua non for acting in the producers films and for securing protection through the terms of the collective contracts. The anxiety to plug circumventions has led to formulation of rules to offshore production engaged by the producers of member performers'. The unions discourage such tendencies and this shows the significance attributed to tactics opened by globalization and the need to respond to it.

It points out that while in countries with legal recognition to performers' in audio as well as audio visuals there is the intervention by the Copyright Tribunal in the fixation of fair rates of remuneration for the use and different exploitation to which the performance is subject to, in countries with collective bargaining alone as the means it has to be arrived at through negotiations. In either case there is scrutiny as well as flexibility. However the rates of apportionment spelled out in legislations; like the French code makes the minimum guarantee a wee bit inflexible, though at the outset it appears to aid the performer in securing a minimum guarantee. It would have better to have the percentage laid down by the tribunal from rime to time.

It shows that that either the endowment of these rights either through the means of law or means of collective contracts has not deleteriously affected the entertainment industry in those countries and on the contrary has inspired confidence from the performers' and the aspiring performers' in those countries. This is testified by the increase in memberships and in the earnings dispersed. Further the cohesive characteristic displayed by the organizations, particularly in the United States, where despite the Screen Actors Guild being the sole

representative of the performers', there has been no rival organization nor litigation questioning its compulsory member stipulation after the thirty-day period. Both the Global Rule One and the compulsory membership stipulation have not yet been seen to disturb the principles of restraint of trade. In order to safeguard the rights of its performers' and the integrity of the purpose of the organization it keeps vigil to see that the performers' don't contract out of the rights that they have realized by either signing up nonmembers or contracting out.

A most significant characteristic has been the social responsibility that has been displayed by these agreements that are not merely instruments laying out the rates and limits of residual payments but cover a wider ambit of welfare. The policy of non-discrimination adopted by Screen Actors Guild, the policy of non-discrimination of children, disabled and the women performers' bear abundant testimony to this. The meticulous manner in which the working hours, rest and wages based on hours put in etc. have been formulated clearly points out the holistic treatment given to performers' rights.

The remunerative pattern and conditions of engagement points to the divergent manner in which performers' are categorized and benefits accorded while there is a tremendous equanimity in several aspects of labor rights enjoyed. Particularly significant is the categorization of the performers' on the basis of being principal performers', walk-ons, stunt performers' or extras upon the fulfillment of some eligible criteria. Extra performers' in most instances are not eligible to residuals (though with respect to commercials a leeway has been provided). Another significant aspect is that in certain instances it can be noticed that even background performers' have been found eligible for residuals or their remuneration has been found impinging upon the length of actual exploitation beyond the minimum Guaranteed. Thus both voice over artists as well singers in audio visuals have been benefited from the repeats (though this is not uniform in all jurisdictions).

The distinction or the stratification between the performers' on this scale appears uniform in France, United States as well as in Britain where in collective bargaining as well as statutory rights have played important roles. Even though variations can be found with respect to the manner of treatment accorded to the stunt performers' who are provided with residual rights in the United States, in

France they might not be the position in order to qualify for the protection under the Intellectual Property Code, though under the labor code they enjoy the same security. In other words the lesson to be learnt from the protection afforded in these countries and the differences maintained is that despite variations there is no section among the performers' who have to survive without some kind of minimum protective cover or the other.

CHAPTER 6

PROTECTION OF THE PERFORMER THROUGH INTERNATIONAL INSTRUMENTS

Objective of the chapter: The chapter seeks to trace the evolution of international efforts to secure and promote the interests of the performer. It attempts to analyze the existing international instruments endeavoring to protect the performer and its advantages and disadvantages. It reveals the dynamics underlying the issues and the conflict of interests involved in attempting an international harmonisation. The inferences from the study should contribute to formulating a more credible protection for the performer without unfairly sacrificing the interests of other interests involved in the issue.

The Need for Protection of Performers Under International Instruments

The pivotal reasons for international initiatives for performers rights to gain momentum were not much different from that which impelled similar endeavors in international copyright. It was an accepted fact that the realm of movable property and the norms for its international treatment are different from that of the international norms for copyright or intellectual property. In other words with respect to copyright, the center of the work for all the legal consequences is the country where the protection is claimed. In this regard the circumstances could not be much different between copyright protected entities and entities like the performer.[1] To cope with the Gresham law that bad money drives away good money a state has to provide some semblance of protection to the foreign work as only then a reciprocal protection can be expected[2]. No country would want to part away more than it receives[3].

It was inevitable that the performers' rights movement had to have international wings as the problems of the performer in different nationalities began to have a

[1] S.M. Stewart, *The International Law of Copyright and Neighboring Rights*, Butterworths, London (2nd edn. - 1989), p.34. The idea that copyright exists from the act of creation and not from any formal administrative act leads naturally to the idea that once the right exists it should be valid anywhere.

[2] *Ibid.*

[3] *Id.*, p.35. However the attempts at streamlining private international law has been laggard in other countries particularly in the U.K. and other common law countries.

common rationale especially with the fixed and live broadcasts crossing the national frontiers and making it an international commodity[4]. Internationalization of the problem would further the interests of the countries as those with a low level of protection would have to raise their level of protection with those of the performers enjoying higher protection. The impact of technology began to indicate a common pattern of unemployment the world over as live performers became unemployed.[5] This led to what has been termed as technological unemployment[6].

The concerns pointed were similar to those bothering the broadcasters as generally the television broadcasts were made on the basis of contracts in which the authors, composers, performers and other participants authorized the transmission and delimited the area where it was intended to be transmitted to. The problem was with respect to the area being limited to the area proportional to the amount of remuneration. The performers found themselves to be at a disadvantage in such an international situation in contrast to the authors and the others who were represented by the societies who could assert their rights against third parties and relaying organizations situated in countries where copyright was protected. They were aggrieved that they have lost an opportunity at either performing live in these countries where the program is relayed and can claim compensation for the loss of income[7]. In case rights existed then the originating organization would have to either compensate or would have to abandon the transmission altogether[8].

The supra national organizations like the ILO (International Labor Organization) also took up cudgels on behalf of performers among many other sectors that it began to represent among workers. Thus the times were favorable for an international representation to performers concerns as the international mood was for a consolidated attempt at international solutions to international problems.

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[4] Edward Thomson, "International Protection of Performers' Rights: Some Current Problems" (1978) *International Labor Review* pp.303- 304.

[5] *Ibid.* The technological change had its impact on the working conditions as the cinema, the radio –broadcasting and the gramophone records became popular across the European and American continents.

[6] *Id.*, p.308. According to the author the television is a medium that insatiably devours its raw material –the creative efforts of the writers, composers, producers and performers.

[7] *Id.*, 309.

[8] *Id.*, 310.

The pressure from the traditional entities to extend the protection to the new media in the international conclaves for international treaty protection provided the incentive for the performers in these new media affixations to demand similar treatment. This not only brought for ward the question of protection with regard to the new media in itself but also the new intellectual creators within it. There were wide-ranging differences with regard to the treatment of these entities with respect to moral and economic rights as well as philosophical differences and variations in contractual practices. In this regard it would be pertinent to the distinctions between the *Droit d' Auteur* and the common law based copyright stream.[9] Thus the underlying imperative was the realization that some kind of protection was essential but the question was how wide.[10]

The Digital Revolution and the International Norms

The advent of digital communications further compounded the problem, as the traditional regulatory concepts could not fix itself onto the realities of the digital environment[11]. The digital tools and its vastly different capabilities revolutionized the marketplace of ideas.[12] Digitization postulated not only breaking of national frontiers even more effectively than broadcasting but also process of exploitation through a single medium as distinct from the trade in physical commodities or analogue distribution of the past. It facilitated convergence of markets; contents and businesses as well disinter mediation.[13] With the level of legal development in terms of digital regulation very uneven in different countries, the authors are at

[9] The degrees of difference with the main concept were intended to be projected with the use of distinctive terminology. As early as 1941 using the term connected rights- *Dirritti Connessi,* German law -related rights and the French law *Droit Voisins*-neighboring rights.

[10] The contractual practices too differed from one country to another particularly polarized between the American and the European systems.

[11] Alan Williams, Duncan Calow, Nicholas Higham, *Digital Media Contracts, Rights and Licensing*, Sweet and Maxwell, London (2nd edn.- 1998),p.8.

[12] These raise challenges in the form of internet, interactive CD, information super highways, info *bahns* - the question is whether the current form of legal protection would be able to cope with the digital demands.

[13] *Id.*, p.9. The change has already impacted publishing and entertainments like video grams, music retailing, broadcasting and even distribution of films. Even though only in a limited way, with the arrival of the broadband technology, the possibilities are immense. Even though the present downloaded versions are inferior in quality- the future of cinema may be well online.

great danger of unauthorized exploitation[14]. Greater access needed to be directly proportional to the security for the content.

The issues of jurisdiction are even more complicated with the international element almost certain to arise with the content provider, the service provider and the user being situated in different countries and jurisdictions. This compounds the challenge in identifying the *lex loci* of the issue to be resolved. The need for a harmonization of the laws in diverse jurisdictions and also realize the use of the concept of national treatment is felt indispensable in the digital environment. But even with the adoption of the concept of national treatment variations between different countries can be quiet unsettling as the concept promises to provide only the same treatment as is provided by the protecting country to its own nationals. There was also the need to lay down more precise indicators to solve questions of private international law.

The same challenges that the traditionally protected copyright subject matter face are confronted by the performers as well[15]. It can be considered more acute as the prevalence of preliminary protection to the performers interests are still in a process of acceptance and implementation in different countries of the world. The performer had not yet attained protection even in a world determined by the analogue medium. As for the rights granted by means of either collective contracts or individual contracts, many of these never spoke about the digital media exploitation[16]. The need for proper acquisition of rights from the performer of the live performance or the recorded performance is essential in the digital media and the digital media producer would have to observe the need to acquire these rights[17]. The rights holders would be reluctant to provide content for online and digital services if they are in doubt about the extent to which the rights apply

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[14] There would no more be middlemen. In other words the traditional industry and market models would no longer sustain. With respect to intellectual commodities, the very product could be carried online to the user.

[15] *Id.*, p.323.The need for a level playing field has been identified as a reason for the European community initiates in this area. See the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications of Regulation Towards an Information Society Approach (E.C.COM (97) 62303.12.97).

[16] *Id.,p.*176. Though, it was in certain specific collective agreements specified that new forms of exploitation would require fresh agreements. Of late provisions are made specifically taking into account the Internet medium of exploitation and the performers have to be compensated. However where no such collective strength exists the performer would be left to the exploitation of the market forces in the absence of the law.

[17] *Id.,p.*177.

and can be enforced[18]. In the absence of legal certainty, it might cause grave economic prejudice to rights holders. The need for certainty applies in full measure to the service providers and users as well. This might reduce the availability of the subject matter for exploitation and warp the development of online services[19]. All these postulated the need for introduction and harmonization of rights and law in different countries of the world.

The aforementioned reasons point out to the growing concern that have given rise to demands for the international regulation of performers interests. The movements in this regard have been both from the formal international organizations as well as non-state international performers organizations. It was felt that the efforts at stoking international consciousness would naturally lead to much awareness, as the countries concerned would be influenced by the international initiative[20].

The elevation of the performers issues to the international status, it was believed would provide momentum nationally and the performers concerns the world over was common enough to have similar aspirations[21]. Since their inception in the 1950's the international organizations representing the performers have played a pivotal role in upholding the welfare of the performer through well-crafted activities, programs and plans[22]. The programs include the amelioration of the working conditions, provision of salaries that match the technical and artistic qualities, securing minimum security and social protection, development of norms in contractual deals while maintaining the sanctity of the performers volition with regard to the exploitation of his performances[23]. Studies have been initiated, projects undertaken and training programs held in order to gauge the true picture of the performers status in society in coordination with other bodies integral to the

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[18] *Id.,p.*333.

[19] This would have a detrimental impact on the employment generation prospects of the digital segment.

[20] The unions and the collective administration societies were forging alliances with similar bodies across national territories.

[21] See <http://www.fia-actors.com/eng/aboumain.htm> for actors and <http://www.fim-musicians.com/Datas/EN/Statuts/index.html> for musician's representation and activities as on February 3rd, 2003.

[22] For instance International Federation of Actors (FIA) has affiliates in over 70 countries. With a well-coordinated organizational strength of over 65 national organizations spread out across the world there has been a rapid growth in the activities of the performers and notable achievements as a result of these efforts.

[23] See, <http://www.fia-actors.com/eng/aboumain.htm> as on February 3rd , 2003.

performers vocation[24]. The activities have involved all regions of the world as the branches of performers representative networks are spread out all over the globe.[25]

The work has concentrated around establishing international standards, norms and model collective agreements and coordination of performers initiative spread across a wide array of countries[26]. The organizations have also associated with international organizations or supra national organizations in framing critical international Conventions and negotiating the formulation of legislative norms at both the regional and the national level[27]. The representative character of the international performers organizations has covered both musicians as well as the actors in the widest sense of the term.[28]

Evolution of Performers Rights in International Instruments Upto the Rome Convention

The Berne Convention and the Performer

Germane to the topic of performers' rights and its evolution through the international legislation would be the protection granted to the media that has spurned the audio and audio-visual performers claim for rights[29]. Before the performers rights discourse had begun to be pronounced, there had been speculation that there existed enough spaces between the existing international instruments for the due recognition of new media and for the performances

[24] <http://www.fim-musicians.com/Datas/EN/ProgrammesActions/index.html> on the programs undertaken by the International Federation of Musicians- as on February 3rd, 2003.
[25] <http://www.fim-musicians.com/Datas/EN/Information/index.html>. As on February 3rd, 2003.
[26] The effort has been to solve the problems posed by the new technologies, cultural funding and policy, social and professional protection of performers, IPR, taxation, social security and health of the performer, aiding the formulation of collective agreements and negotiating with collecting societies including the cost effective and easy manipulation and creation of new performances in a digital age. Striving to work for the equality of the women performer as also the freedom of the artist intimidated owing to political hostility, war or persecution.

[27] See Edward Thompson, *op.cit.*, p. 303. The representation of these organizations at al major international conclaves is evidence of their contribution to the cause of the performer. In fact the first international initiative by the international labor organization was undertaken upon the request by the international federation of musicians in the year 1926.
[28] The latter term covering within its ambit performers within the realm of theatre, operas, dance, variety and circus artists.
[29] Stewart,*op.cit.*,p.104.

therein and the performers in it. The Berne instrument with its untrammeled definitional width could be interpreted to include the performer within its ambit. While protection under the Convention is provided to authors and their works neither of these terms have been defined. This entitled several entities of creative labor that can be brought under the ambit of the Convention. However, there was conscious change over from this careless open-ended posture that could hold within its width both the films as well as phonograms. The abolition of this generous leeway in 1908 created a lot of practical difficulties. In fact even the concept of the neighboring rights need not have been attempted at all if the conscious amendment had not been carried out.

The Paris Additional Act Of 1896 took care of the requirement of according recognition to the photographs, there does not appear to have been any mention nor call for performers recognition to recognize their authorial talents. This could be said to have sown the seeds towards further developments, it would be pertinent to point out that it was only with the recognition of this visual medium and cinema that a similar standard was desired to be established for the performer particularly as certain other creative contributors had been required to be distinctly recognized under art 14 and 14 b of the Berne Convention[30].

There had been great uncertainty whether the protection should be accorded at the same level as those granted to other entities under the Berne Convention. Some of the problematic areas included difficulties that are experienced with oral works and of proof with respect to unfixed performances. The large number of performers was also a cause of consternation. The major doubt was whether what the performer does is fit only for a derivative status[31]. The genesis of the proposition in favor of record producers, performers and the broadcasters could be found in the Berne revision conference at Rome in 1928. The Italian government raised the issue in the context of equitable remuneration to be provided to the performers[32]. Though the proposition was not accepted the

[30] The real impact of technology on the performers rights appears to have taken time to realize and at the highest international level it seems to have taken a meaningful turn within 20 years from the time recognition was accorded to the cinematography as a medium amenable to protection under the copyright norms.

[31] Sam Ricketson, *The Berne Convention for the protection of Literary and Artistic Works: 1886 –1986*, Centre for Commercial Studies, Queen Mary College, Kluwer, London (1st edn. - 1989), p.311.

[32] The committee called upon the states to consider measures to protect the performers.

conclave expressed a *voue* that the government consider the advisability of adopting measures intended to protect the rights of performing artists[33]. These matters were discussed at the Rome conference where the Italian delegation proposed that the performers should be protected against unauthorized broadcasts and recordings of the performances (1928 at Rome conference). There were also supplementary proposals to include performances under article 2 of the Convention. However there was no consensus in this regard. No general acceptance to the view that performances could be included among productions in the literary, scientific and dramatic works. But no general agreement could be reached with respect to this. [34].

This was followed in 1948 at the Brussels Conference where in the Belgian government urged the adoption of a new Article obligating the contracting states to provide protection to performing artists. But leaving the means and the modalities to national treatment. But the author- publisher interests vehemently opposed this and it had to be dropped.[35] It was U.K at the Berne revision conference of 1928 at Rome and 1948 at Brussels that sought protection for sound recordings. The representatives of producers and broadcasters pressed for international action. In fact the French Government in 1948 used the phrase phonographic works[36]. Finally the performers had to be satisfied with a *voue* recommending the respective states to study the means to assure without prejudice the rights of the author the protectionist instruments for the mechanical reproduction of musical works.[37] There were a lot of hostile resolutions from author's organizations. A compromise proposal was mooted at the Brussels conference, which left it to each member to identify the conditions to be fulfilled in order to accord protection. A more specific British amendment provided that unauthorized recordings of performances of dramatic and musical works should

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[33] *Studies on Copyright*, Arthur Fischer Memorial Edition, Fred B. Rothman and Co., The Bobbs-Merrill Company, Inc, New York (1963), p.44.

[34] Sam Ricketson, *op.cit.*,p.311. The French delegation took the extreme view that the performers were not authors and that performances were not works. The matter was left after a request to the member countries to find what measures could be taken towards the same.

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[36] Sterling, *World Copyright Law*, Sweet and Maxwell, London (1998), p.502.

[37] *Studies on Copyright*, Arthur Fischer Memorial Edition, Fred B. Rothman and Co., The Bobbs – Merrill Company, Inc., New York, (1963), p.45.

be prevented[38]. The Convention after observing the division of opinion came to the conclusion that by now the protection of performers belonged outside the Convention. This suggested the path towards an alternate course and the necessity of a separate treatment of the performer outside the ambit of the Berne Convention[39]. Thus it can be discerned that there was immense opposition from the authors' coterie to apportion new rights and the states too seemed to share their sympathies and was inclined towards the protection of mechanical instruments. There appears to have been no inclination to recognize another creator within the constellation of copyrights. But the performers could take heart that despite this; the *voue* carried the sentiment that interpretations of the performer have an artistic character and that study on performing artists in the context of neighboring rights need to be pursued.

A sympathetic out look towards the plight of the performer began to emanate from other international forums. The International Literary And Artistic Association (ALAI) at its congress in Weimar in 1903, looked sympathetically at the plight of the performers. They assessed the plight of solo performers and found that while new technological Inventions provided a wide dispersion to the performance of the artist, it has upset the pattern of his professional life by unemployment. As a response the organizations that represented them turned to the International Labor Office[40].

The development of the League of Nations in the aftermath of the First World War and the establishment of the international labor office provided a further gusto to these efforts. The International Labor Organization was working on this since 1920's[41]. The work of ILO from the 1926 to the conclusion of the Rome treaty in 1961 is of prime importance in the matter of safeguarding opportunities for employment and preserving the standard of living of a distinguished category of workers, the ILO could not ignore the serious economic problems that had arisen and that called for international action [42]. As early as the year 1940, the question of rights for performers in relation to broadcasting and recording was mooted but the interruption of the war slowed down this resolve. The earnestness

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[38] Sam Ricketson, *op.cit.*,p.311.
[39] *Ibid.*
[40] Claude Masouye, *Guide to The Rome Convention (1961)*, WIPO, Geneva (1981), p.7.
[41] *Ibid.*
[42] *Id.*,p.8 .

of the body could be gauged by the constitution of a separate committee on employees and intellectual workers that concentrated on performers' protection[43]. During the 1930s, it was realized that the interests and activities of the phonogram producers and those of the performers are in so many ways interlinked that any international solution to the problem of phonogram and the performer would have to represent a compromise of interests.[44] The Brussels conference ruled out protection under the copyright act. It stressed that any effort in this direction should not affect authors' rights and that the protection if any should be based on the artistic quality of performances and the emphasis came to be on rights neighboring on copyrights.[45] The international non-government organizations, those representing performers and authors strove in the search for solutions. They in fact signed an agreement with the international phonographic industry in 1934.[46] A meeting of experts in Samadan, Switzerland in1939, by the Secretariat of the Berne union and International Institutes for the Unification of Private Law was fruitful.[47]

Run up to the Rome Convention

The ILO through its committee on employees and intellectual workers attempted to coordinate with Berne union.[48] The drafts emanating from Rome (1951), Geneva (1956) and Monaco (1957) and Hague (1960) contained profound

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[43] *Ibid.*

[44] Sterling,*op.cit.*,p.503. Since then in the formation of an international consensus all the major international nongovernmental organizations were involved including the International Federation Of Musicians, The International Federation of the Phonographic Industry Representing the Producers, The European Broadcasting Industry, and The International Federation of Actors and The International Federation of Variety Artists.

[45] Sterling, *op.cit.*,p.503. At forming an international consensus the International Federation of Musicians representing performers, The International Federation of Phonographic Industry, representing the producers, the European Broadcasting Industry representing the broadcasting industry, the International Federation of Actors and the International Federation of Variety Artists were all involved in the process towards evolving an international consensus.

[46] Claude Masouye,*op.cit.*,p.8*. The reports of their meetings are full of resolutions and recommendations on the matter. Some bargains were struck, for instance in 1934 at Stresa, The International Confederation of Authors and Composers Societies (CISAC) that signed an agreement with the International Federation of the Phonographic Industry. The war interrupted the efforts

[47] Kevin Garnett, Jonathan Rayner James, Gillian Davies (Eds.), *Copinger and Skone James on Copyright,* Sweet and Maxwell, *London* (14th edn. - 1999), p.1180. Two draft treaties were produced one on performers and producers of phonograms and the other on broadcasting organizations

[48] Claude Masouye, *op.cit.*,p.8. 1949 –1961.

differences[49]. Finally at Hague in 1960 a single draft emerged upon which the first of the international Conventions held in Rome in 1961 was based.

The drafts of two international Conventions both stemming from the Rome draft of 1951 were completely at variance with the structure and content and there are difficulties to reconcile them. The implementation of either of them would have been premature[50]. While the ILO Draft was inspired by social concepts and lead to a recognition of a collective right of a trade union character dealing particularly with relations between employers and employees. It also intended to regulate relationships that are truly international in character but also situations that might be termed national.

The second draft on the other hand seeks to protect rights conceived as rights of a strictly individual nature. This was limited to aural performances and audio products only and not those that are visual and oral. (Motion pictures and television broadcasts were thus excluded). The structure of the latter draft was inspired by recognized concepts, which form the basis of international copyright Conventions concerned with international situations excluding only the law of the country of origin that includes a minimum protection and national treatment. Nothing was stated in either draft about these other rights neighboring to copyright but the title of the Berne UNESCO draft on the protection of certain rights called neighboring on copyrights implied a creative content as to the contribution of the creative artist. A strong connection was laid between the rights of the authors and rights of the creative performing artists. The protection was limited to performances of literary and artistic works. The states that are parties to the Universal Copyright Convention (UCC) and the Berne become eligible to enjoy the membership of this treaty. The draft also contained a provision with respect to the fair use provisions with general principles relating to private use, reporting of current events and ephemeral broadcasting. Particularly striking was the proposal of the Italian delegation not to grant protection to the

[49] Claude Masouye, *op.cit.*, p.9. The Universal Copyright Convention with its secretariat at the UNESCO at Geneva from 1952 and the ILO in 1956 convened a meeting of interested parties that produced an explanatory report.

[50] Valerio De Sanctis, "Copyright in Relation to Rights of the Performing Artist", 5 BULL.CR. SOC. 64-70(Oct 1957 –August 1958).,p.68. The two drafts are the Geneva draft of July 1956 drawn by the Italian Labor Organization and the Berne UNESCO draft of March 1957 under scrutiny by the respective countries.

performers any more than that granted to the authors by the state. But the majority did not accept this.

One of the criticisms of the drafts were that without knowing before hand what copyright legislation would be provided in a given country that is a party to the Convention, the existence of a general assimilation clause and the minimal nature of the rights granted was to permit the states to legislate liberally in favor of one of the other groups in question and as a consequence profoundly disturb the equilibrium of interests. The two drafts in other words reflected distinctive approaches with one leaning on individual rights and the other on labor rights[51].

It is noteworthy that the concept of reasonable compensation to be paid to the performer was prevalent even at the stage of the infant discussions on performers right on the international realm. The Rome draft (1951) contained the requirement of reasonable remuneration to be paid in the event of the records being used for the purpose of broadcasting and communication to the public and prompted a large number of countries to suggest that the artists be given a share of the proceeds[52]. There were many differences between the Geneva and the Monaco drafts. The former centered on the principle of national treatment. Minimum rights were not given undue emphasis particularly the notion of remuneration related to secondary utilizations of the records. This was to be left entirely to the discretion of the national legislations. The Geneva draft was much more detailed that was the result of compromises between the groups representing the three interests. The Geneva draft incorporated the provisions relating to secondary utilization of the commercial records and the need for the reasonable remuneration to be paid to the producers for the use of records for broadcasting and communication to the public, subject to the qualification that they should (that is the producers) should allow the performing artists, by means of direct arrangement between performers and producers, a share in the proceeds.

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[51] *Id.*, p.70. This Article observed and suggests that it would be a combination of both these approaches that would best serve the interests of the performer.

[52] See Eugen Ulmer, "The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations", 10 BULL.CR.SOC. 90(1963)., p.91. Mr. Lenoble, Inspector General of the French broadcasting organizations proposed that while the right to a remuneration should be granted to the producers, they in turn should be obliged to allow the performers a share in the proceeds.

The differences between the Geneva And the Monaco drafts were reconciled and that produced a new draft called the Hague draft (1960)[53]. While it incorporated notions on the national treatment from the Geneva draft, other rights were incorporated from the Monaco draft. Most importantly provision was made for the incorporation of the right to reasonable remuneration. However this was left to the discretion of the concerned nation states whether the right to remuneration belonged to the performers, the producers or to both jointly. The contracting countries were to have a right to declare in their instruments of accession that they abstained, wholly or partially from granting the right to remuneration provided under the Convention in the event of commercial records being used for communication to the public[54]. The concept of reasonable remuneration in the Hague draft found a lot of opposition in the months ahead of the Rome Convention[55].

The concern of the authors had been that in case an international agreement on neighboring rights should materialize, it should have a guarantee based on the principle of primacy of copyright to the effect that the authors' interests would not be adversely affected. The authors associations were satisfied that the drafts did not grant a right of authorization to the performers and producers of phonograms. This eliminated the scope of the obstruction posed to the authors right to royalties whenever records were broadcast by means of the exercise of the right of authorization by the performing artists.

The authors also saw a danger in the principle of right to remuneration and felt that the additional burden on the consumers would lead to a reduction in the royalties that they enjoy. Though this was confined to uses or communication to the public other than broadcasting[56]. The authors adopted a hard line stand (CISAC), that the international instrument was unnecessary as the general legal principles were sufficient to this end through the possibility of contractual arrangements. Similarly, the ALAI also felt that the international resolve was

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[53] *Id.*,p.92

[54] *Id.*,p.93

[55] The resistance came from the authors associations and from the Confederation Internationale Des Societiesa D'autears Et Compositeurs (CISAC) And The Association Litteraire Et Artistique Internationale (ALAI) and from the European Broadcasting Union that opposed the right to compensation provided with respect to secondary uses.

[56] At a meeting of authors held in 1956 at the invitation of the director of the Berne bureau, these were laid down in the so-called *principes interauteurs. Id.*, p.95.

uncalled for, useless and premature. This was supported by certain countries like France that had reservations about neighboring rights and felt that safeguarding the interests of performers and others could also be achieved through contractual arrangements and not through any special Convention. The difference in the rights of the entities in the same instrument was also pointed out by the organizational think tanks. Prime broadcasters union like the European Broadcasters Union who were against any secondary use fees being paid supported them. It was an irony that the authors' opposition to the neighboring rights resulted in opposition to performers' interests whose nature of the work had close affinity to the authors' status[57]. The difference between performers, producers and the broadcasters was not being stressed by the interests' involved.[58]

There was considerable opposition to the idea of doing away with the initiative to grant even secondary use rights to the entities concerned as envisaged in the Hague draft. The performers, however, found the backing of several countries that included countries like U.K and Germany but also Australia, India and Israel, the Latin American states and the countries of the eastern block. These countries felt that the reservation clause took care of those countries that still nursed doubts regarding the implementation of the envisaged remuneration system. The prevalence of a remunerative system either by way of statute or through the means of contract in several European countries and in a modulated manner in the United States of America gave considerable impetus to the idea.

The Rome Convention [59]

The Identification of the Performer under the Rome Convention

The Rome Convention has attempted a definition of the performer though no attempt has been made at all to define performance. It was generally felt that the new right owners were those whose involvement were derivative from that of the author in that by their contribution (performance, recording, broadcast) they

[57] *Id.*, p.98.
[58] *Id.*, p.99.
[59] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26th, 1961.

converted the original work into a new form[60]. The performer in the Rome Convention is defined as meaning actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.[61] The definition of the performer has been inseparably connected to the literary and artistic works and the performance of these works.[62] For example the conductor of an orchestra or chorus comes within the concept of performers because he is performing a musical work. The difficulty appears to have been to draw a categorization without recourse to the dependence to the literary and artistic works. With the difficulties to draw a subjective criteria, in order to qualify as a performance the only way to accredit a performance as being amenable to protection was perhaps to connect it with the literary and artistic works that enjoyed or is enjoying copyright credentials[63]. There was never any lack of proposals at the Rome conference[64] for extending the protection to variety stage and circus artistes, acrobats, equestrian performers and lion tamers etc.[65]. A waiver of the criteria of literary and artistic works was disfavored as otherwise the concept as to who was a performer would lose all clarity[66].

There is a reprieve for this closed approach in that a wider approach has not been restricted. That is the nation states desirous of extending protection to performances other than those of the literary and artistic realm have not been prevented from doing so. Rather they have been provided under Article 9 to do otherwise[67]. From this expression of intent two aspects stand out, one, that the Rome Convention was never against extension of the subject matter and two, the respective nation states have been provided the freedom to provide for the same.

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[60] Richard Arnold, *Performers' Rights*, Sweet and Maxwell, London (2nd edn.-1997),p.17.It may be pointed out that the nearest right owners under the Berne Convention were translators and arrangers.

[61] Article 3(a) of the Rome Convention. See *The Rome Convention*, WIPO, Geneva (1996),p.3.

[62] Eugene Ulmer. *op.cit.*, p.176. The concepts of literary and artistic works have to be explained in the same manner, as they are understood in the revised Berne Convention and the universal copyright Convention. It thus includes dramatic, musical and dramatic musical works.

[63] Gillian Davies,"' The Rome Convention, A Brief Summary of its Development and Prospects" [1979] 6 EIPR 154.

[64] See Stewart, *op.cit.*, p.236, it was indicated at the conference that certain countries wished to include sportsmen such as footballers, ice skaters or golfers (though no country had done this so far) the extension was intended to cover variety artists like clowns, acrobats and jugglers.

[65] Eugene Ulmer,*op.cit.*,p.176.

[66] *Id.*,p.177.

[67] Article 9 of the Rome Convention says that any contracting state may, by its domestic laws and regulations, extend the protection provided for in the Convention to artists who do not perform literary or artistic works.

Thirdly, no subjective criterion has been drawn by the Convention as well as no vertical stratification has been suggested and no objections to the same uttered. Several countries have either prior to the Rome Convention and after it brought a lot of performing entities under the ambit of the protection that might look ridiculous to the conservative for whom a performer had a traditional mooring in literary and artistic works.[68] The Rome Convention had however identified the weakness of these absolute criteria of classification. This was sought to be made-up, bridged, balanced by the provision of Article 9 of the Rome Convention, The ostensible reason for this would be that that there ought not to be any confusion inherent in Article 3 with regard to the ambit of performers protection. The grant of exceptions does not appear to qualify the preliminary grant of protection to performers of literary and artistic works. Thus there is no right to exceptions emanating from the main rule. The states it appears have to provide for separate legislation in order to extend the protection to others[69]. On weighing the consequences it may be seen that while the provision permits the states to extend by legislation it does not permit legislate to negate art3. Thus the bare minimum of protection granted primarily in Art 3 must be kept intact. A vital question arises as to why the link with literary and artistic rights has been maintained. It can be surmised that it has been stated to be ostensibly for identifiably, So that literary and artistic works are not overwhelmed by performers preeminence as otherwise courts and executives would have to interpret according to circumstances, which would prove to be cumbersome in the long run.

National Treatment in the Rome Convention

The objective of the Rome Convention was to lay down a set of minimum rights to be observed across geographical frontiers and also see to it that nationals and foreigners are not discriminated in the application of the national law if any that is adopted with respect to the performers, the phonogram producers and the

[68] Claude Masouye, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO, Geneva (1981), p.42.

[69] Article 9 of the Convention shows the mixed sentiment of the Rome Convention to this and says that the contracting state may by its domestic laws and regulation extend the protection provided for in this Convention to artists who do not perform literary and artistic works.

broadcasters. The Rome Convention was based on the idea of national treatment and the grant of minimum rights[70]. According to it, by national treatment is meant the protection granted by the domestic law of a contracting country to performers who are its nationals with respect to performances taking place, first fixed in, or broadcast from its territory; to producers of phonograms who are its nationals with respect to phonograms first fixed or published on its territory; and to broadcasting organizations who have their headquarters in its territory with respect to broadcasts transmitted from, transmitters situated on its territory. The protection granted may be based on different criteria in different countries order to grant protection to their nationals. The provisions regarding minimum rights as contained in Articles, 7,10,12,13,14, supplement the principle of national treatment[71]. Article 2(2) of the Rome Convention makes specific reference to this supplemental provision as also to the exceptions. This was ostensibly incorporated for the reason that the protection afforded by the Convention may in certain cases be greater or less than domestic protection. The Rome Convention contains features where in the minimum rights are directly applicable to the national laws (where it is so possible) and provisions that are not so applicable. The latter circumstance is particularly striking with respect to the provisions regarding performers rights granted under Article 7 of the Rome Convention. Even with respect to countries that admit of a direct assimilation of rights granted under the Convention into the national law, Article 7 pertaining to performers rights would only provide a panel of options as it does not mandate a clear cut stipulation as to the rights to be bestowed on the performer and only grants a possibility of prevention[72].

Rome and the Point of Attachment in Order to Invoke National Treatment

The point of attachment that was finally endorsed in the Rome Convention was that of the country where the performance takes place should be a contracting

[70] Article 2(1)(a)(b)(c) and (2).
[71] See Eugen Ulmer, "The Rome Convention for the Protection of Performers, Producers of Phonograms And Broadcasting Organizations", 10 BULL.CR.SOC.169 (1963).
[72] *Id.*,p.170.

state[73]. If the performance was incorporated in a phonogram, which is protected under Article 5, and if the performance not being fixed on phonogram, is carried by a broadcast, which is protected under Article 6. Thus the performers are protected even if their performance does not take place in another contracting country. If the conditions for the protection of phonograms and the broadcasts have been fulfilled. The question that was bothering the participants at the conference was whether the circumstances of attachment[74] that was being taken into account was regarding international situations or domestic situations were being taken into consideration.[75] With respect to broadcasting organizations the criterion for points of attachment are the headquarters of the broadcasting organization is in a contracting state and two, the broadcast was made from a transmitter situated in a contracting state[76]. Seen in this perspective it can be surmised that national treatment of the performer is assured on the fulfillment of criteria that covers a variety of circumstances and the dangers of being exposed without legal cover is few and far between. The criticism was with regard to the lack of clarity with regard to the chemistry between provisions of the national laws and those of the minimum guarantees provided under the Convention. The question would be if the provisions of law in the state where in protection is sought for is lesser than that proposed by the Convention then should the minimum guarantee apply to the foreigner. Similarly if the parent state does not provide the same protection as given by the state in which protection is sought for then will that disqualify the foreigner from a higher protective treatment.

Thus under the aegis of the Rome Convention a person who is not a national of a contracting state or who is from a contracting state that does not provide an equal character of protection to the performer as is imparted in the state were the demand of protection is made by the performing artist can avail of the protection granted to him by the latter to their own nationals. Further, the applicant can also

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[73] Article 4(a)(b)(c) deals with performers, Article 5 91)(a)(b)(c), 5(2) and 5(3) deal with phonograms and article 6(1)(a)(b) and 6(2) deal with broadcasting organizations.

[74] *Id.*, p.172.There was this proposition from the German delegation to stipulate that the performance of the nationals must be taken into consideration as a criterion and that the there was need for mutuality in that respect as well.

[75]Claude Masouye,*op.cit.*,p.29. The criterion for the qualifying phonogram lists nationality of the producer, the place of fixation of the sound, and that of first publication of the phonogram.

[76] *Id.*,p.32.

invoke the minimum guarantee in the Convention as national treatment in the Rome Convention encompasses the minimum guarantees laid down in the Convention ratified by the contracting state.

Article 7 of the Rome Convention [77]

The most significant or cardinal feature of the Convention or achievement of the Rome connection is enshrined in art 7 of the Convention. The most noteworthy characteristic has been the endowment of the right of possibility of prevention. This status is in contrast to the more unambiguous and precise conferment of rights to the producer of phonograms and the broadcasters who are also beneficiaries of the same Convention. The reason and the fallout of the word on is that it leaves complete freedom of discretion on the countries to decide on the course of action to beget the preventive result[78].

There were differences and opposition from countries that had not bestowed any rights in to the performer till now to those who had some semblance of protection on the subject of the legal nature of the right to be bestowed. The, major questions debated with respect to the rights to be granted to the performers revolved around. The legal nature of the protection, the definition of the general scope of the protection, the special question of rights of the performers in connection with the further use in broadcasting of performances whose broadcast was authorized by them, the transferability of rights and the exercise of rights in case of group performances.

There were delegations that mooted a personal property right in favor of the performer sanctioned by a civil cause of action. There were other jurisdictions

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[77] Article 7 of the Rome Convention -minimum protection for performers – Art. 7 Paragraph 1: particular rights 1. The protection provided for performers by this Convention shall include the possibility of preventing: a) the broadcasting and communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or public communication is itself already a broadcast performance or is made from a fixation;(b) the fixation, without their consent, of their unfixed performance ;(c) the reproduction, without their consent, of a fixation of their performance (I) if the original fixation itself was made without their consent ;(ii) if the reproduction is made for purposes different from those for which the performers gave their consent ;(iii) if the original fixation was made in accordance with the provisions of article 15,and the reproduction is made for purposes different from those referred in those provisions.

[78] It affords an array of legal methods from law of employment, unfair competition, criminal law to the most advanced of the intellectual property rights protection or positive authorization property rights. See Claude Masouye,*op.cit.*,pp.34-35.

who were vehemently opposed to this and were happy at the administration by means of criminal law[79]. Interestingly, the droite d' auteur countries heeded the authors organizations and preferred a regime falling short of the positive attribution of rights[80]. Finally in keeping with line proposed by the draft at Hague the possibility of prevention with necessary exceptions was broached and accepted.

One of the major areas of conflict was in the kind of right to be granted. Majority of the countries were against the grant of property rights as these are assignable and this could facilitate tall claims by the assignee and deprive the users of the use of performances. Both the authors and the producers of phonograms raised these fears. The broadcasters feared that the grant of an exclusive right would embolden the performers to create difficulties with respect to both original broadcasts as well as rebroadcasts. The activity of the performance has been likened to a wage earning activity, which made it to be at loggerheads with the exclusive right.

The delegations were divided over the following questions-

Live performances - The Rome Convention mainly spreads around the regulation of the exploitation of live performances and its various means of exploitation. The Rome Convention mainly gives confidence to the performer of live performances that live performances can only be exploited subject to their consent. However owing to the different ways in which the word has been used in different countries. The Convention has desisted from the application of the word[81]. This could raise difficulties in the countries that intend to apply the terms of the Convention, as the extent of rights would be uncertain[82].

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[79] The Czechoslovakian delegation was for a civil right of personal property while the British delegation was for retaining its present criminal law framework to tackle violations of performers rights. The authors rights countries like France and Germany were circumspect because of the equanimity with which incorporeal entities like companies which produced audio visual products and the performer who was a personal entity.

[80] Eugene Ulmer,*op.cit.*,p.220.even the term performers rights as being applied to the status granted under the Rome Convention has been considered to be a misnomer rather it is proposed that it refers to merely the legal position of the performers.

[81] Claude Masouye, *op.cit.*, p.36.For instance in France the word used in France means – directe. Secondly most of the broadcast performances are also recorded rather than live. However this interpretation could confound any settled interpretation particularly with respect to repeats.

[82] The Hague draft was specific on the question of the performance being qualified by the word "live". However this ran into difficulties at Rome. The Present draft was upon the proposition by Dr. Bogsch of the United States that qualification can be conveyed through the exceptions than through the use of the prefix live. Eugene Ulmer, *op.cit.*, p. 221.

By the term possibility of prevention it does not mean that the states concerned cannot grant any of the proprietary rights or that the states cannot grant a status of a copy right entity to the performer. But rather the states have been granted a wide discretion to select the manner and method to protect the interests of the performers. It ought to be pointed out that there is no discretionary power or option on the states whether to provide any protection or not at all. That there shall be protection granted to the performer is mandated by the use of the word "shall" in article 7 (1) of the Rome Convention*[83]. The article further lists out the activities whose possibility of prevention is to be explored by the states concerned. There is no further guideline as to what the method ought to be. Thus it can either be a petty fine and even a warning. The possibility of prevention includes the broadcast and communication to the public of the performance without the consent of the performer. Most of the commentators have not noticed the conjunctive use of and between broadcast and the communication to the public. This can only ostensibly mean communication that follows a broadcast and not communication to the public otherwise. But the common understanding has been that the communication to the public as used in the Convention caters to situations within the nation and not across national frontiers either by loudspeakers or by wire. The word communication to the public has not been defined but this sentiment of constraint is carried in the general report. However the word broadcasting has been defined in the Convention as meaning the transmission by wireless means for public reception of sounds or of images and sounds.[84] Some commentators have attempted to understand the true meaning of the term communication to the public as provided for in the Rome Convention. It has been thought to include the transmission of performances by other technical means other than radio electric waves. However the technological possibilities available at that time appears to have pointed out a situation of terrestrial dispersion of short distances particularly within the geographical proximity of the original performance. The idea of a deferred broadcast or a broadcast that had been relayed over the borders and then disseminated

[83] *Ibid.*
[84] Article 3 (f) to the Rome Convention

through wires after it has been received by any apparatus had been remote in the minds of the policy makers[85].

The extent of the word performance that can be restrained or possibly prevented is qualified through the exceptions to the minimum right. The performer cannot prevent the broadcast and the communication to the public of the performance if the performance has already been broadcast or is made from a fixation. This could mean that a repeat performance by the artist of a live performance that has already been broadcast can be broadcast by any one yet again without the consent of the performer. It could mean that the broadcast of either a live performance or an affixed performance can be rebroadcast if it has been already broadcast from an affixed performance but what it does not mention is that only the person who has broadcast it first might be allowed to rebroadcast the same without any further consent.

The inclusion of communication to the public together with broadcasting found opposition from certain delegations. It was not found to be important in the context of an international instrument being prepared. However the majority of countries were of the opinion that the contingency should be taken into consideration. This was also considered to point out to future legislation towards the domestic acceptability of the concept.

Right of Consent for Fixation

Besides the protection against the conveyance of their performance (live) by means of broadcast and communication to the public, the performers consent is required in order to affix their performance (live). This is a minimum guarantee advanced by the Rome Convention. It is to be noted that what has been granted is not a positive right of authorization but rather protection against affixation without the consent of the performer. The limitation is evident as a fixation made from an already existing fixation is exempt from the terms of violation or would not amount to violation. Films as well as phonograms are in need of observing these clauses but broadcast from a fixation does not invite a further consent from

[85] The British delegation opposed the inclusion of communication to the public on the ground of it having no relevance in international relations. Eugene Ulmer, *op.cit.*, p. 221.

the performer provided there was consent for the initial fixation. Rome Convention encompasses the basic concerns of the performer in both audio as well as the audiovisual media.

Affixations and Reproductions

One of most heavily contested issues at the Convention was with respect to the right to stop reproduction without authorization from the performer. The Hague draft extended protection with respect to reproduction only in certain circumstances. The opinion was divided over the issue with the United States and German diplomats calling for a protection against reproduction of their affixed performances. The broadcasters vehemently opposed the proposition, as the broadcasters were for technical reasons dependent upon the need for reproducing the records. They felt it to be too burdensome to elicit the consent of the producers as well as the performers in this regard[86]. The detractors felt that the consent of the producer alone would suffice and that any remuneration for the performer could be settled through the means of contract between the producer and the performer. The producer could proceed against the third parties in the interest of performers as well.

However Rome Convention takes care of the reproduction without the consent of the performer in three instances-when the original fixation has been made without the consent of the performer, when the reproduction has been rendered for purposes different from those for which the performers gave their consent. And if the original fixation was under art 15 and the reproduction of the fixation was different from those referred to in art 15. (Whether against third party unauthorized fixations under the perms of the Convention.) . The second possibility of exercise of the rights is significant in that the reproduction from an affixation for purposes different from those for which consent was provide gives a significant empowerment to the performer from unauthorized reproductions. (The meaning of the word reproduction as to whether it is a direct reproduction or an indirect reproduction would need to be explored). Though the Convention does

[86] For instance Dr. Straschov (Monaco) and Professor Bodenhausen of Netherlands were all against the filing of necessary consent. Eugene Ulmer, *op.cit.*, p.222.

not provide illustrations for the same it applies to derived exploitation in the nature of commercial records being produced by the broadcasting organization from tapes given to it for broadcast or the use of records for use in soundtracks without their consent. This could also provide a reprieve to unsolicited use of soundtrack performances as commercial records without their consent[87].

The question of rebroadcast and reproduction for broadcasting purposes- both these very important usages of the affixed performance has been left to the domestic legislation of the respective countries. The Convention provides a wide rope to these countries. This means that once the performer has consented to the broadcast he may with hold any further protection of his performance. Countries had mooted the proposition extend the protection to rebroadcasts on an *exjure Conventionis* basis but this proved unsuccessful[88]. There was also a plea not to have any special rules regarding the relationship between the broadcaster and the performer since it was for the broadcasting organization to secure by contract the rights from the performer[89]. However this proposition too did not meet with any success. The proposal to safeguard contractual agreements and desist from any compulsory licensing in the domestic legislation met with success. A positive feature of the provisions incorporated has been the fact that domestic legislation cannot restrict the right of the performer to negotiate contractually[90] his rights with the broadcaster though the he might not be vested with any statutory rights with the mandate of the Convention.

There is no provision with respect to assignment or transfer of rights nor does the Convention make any mention against the same. Therefore it is left to the domestic legislations to provide for it. The absence of the same need not beguile one to conclude that it was not a contested issue rather on the other hand it was the most fiercely debated issue as it was connected to the civil tights and authorization rights application. (Though it does not seem the case that transferability arises only in case the positive right of authorization is granted). A lot of propositions were voiced to bring out a balanced bestowal of the right of

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[87] *Id.*, p.223.

[88] *Ibid.* The German proposal on the basis of that performers be granted protection from rebroadcast

[89] The American proposal. Eugene Ulmer, *op.cit.*, p.223.

[90] This includes collective agreements too. This was clarified in the general report upon persuasion from the Belgian and Dutch delegations. Eugene Ulmer, *op.cit.*, p.223.

transferability. One of the worst fears that were voiced was one regarding the transfer to performing right society or the trade union unconditionally that might result great obstruction to normal exploitation of the product. The suggestions to pacify this fear (on the lines of the Geneva draft of the performer retaining the right to negotiate did not succeed)[91]. But this was opposed on the ground that this would amount to restriction of the freedom of contract and that it need not find expression in the international realm[92]. The grant of rights may turn the onus of proof on the producers and broadcasters as against customary practices in which the presumption is traditionally in their favor. The manner of administering group performances has been left to the domestic legislations of the respective countries in the Rome Convention[93]. The only addition has been the introduction of the plausibility of compulsory licensing to the countries to be exercised with respect to group performances[94].

Equitable Remuneration – Article 12 of the Rome Convention

The right to equitable remuneration had been considered as a safe substitute to the grant of a complete positive right to authorize the use of the performances. The use of the equitable remuneration for the traditional entities had already been seen to be present either by way of statute or through collective bargaining processes. The extension of this concept to the Rome Convention and the processes including the draft preparation over a ten year period culminating in the Hague draft was a strong pointer to the need to accommodate the rights along with the need to have less cumbersome administration of rights[95]. The

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[91] The Austrian delegation referred to the Geneva draft and mooted that notwithstanding any assignment, performers may exercise their rights to the extent necessary for the fulfillment of contracts in which they undertake to perform for the purposes of a recording or a broadcast. The ministerial draft of the new German copyright law was also supportive of this. Eugene Ulmer,*op.cit.*,p.224.

[92] The United States delegation. Eugene Ulmer, *op.cit.*, p.224.

[93] This follows the desire on the same lines in the Hague draft. Eugene Ulmer, *op.cit.*, p.224.

[94] This was upon an American proposition. As the word condition carried according to the revised Berne Convention the meaning of imposition of conditions in the form of compulsory licensing for the exercise of rights.

[95] Article 12 (secondary uses of Phonograms) says that if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

provision triggered a lot of opposition from the authors' associations and the European Broadcasting Union. They were opposed to an obligation to pay or share remuneration and were not satisfied despite the possibilities of reservations and limitations in the Rome Convention. They were of the opinion that it would be much better to leave the issue to the choice of the domestic legislations and enable the countries who initiate such a legislation to deny national treatment where there is no reciprocity. However majority of the delegations were in favor of the article. The dissenting notes are also considerable. However the delegations which where favorably inclined to authors' associations and broadcasting organizations were instructed by their government's guided by social considerations to vote in favor of article 12 or in the alternative to abstain from voting.[96] It is noteworthy that India was among those countries that voted for the motion. It is also significant that most phonogram producing and performer centric countries were in favor of the concept of the single equitable remuneration being applied.[97]

It's noteworthy that under article 12 of the Rome Convention only the use of phonograms for commercial purposes is to give rise to an obligation to the remuneration. In other words only those commercial phonograms are taken into reckoning not intended for free trade but those of broadcasting organizations are outside the scope of article 12. Under the terms of the Convention there is no obligation to pay remuneration for the use of these in broadcasting[98]. Secondly, the obligation to the remuneration has provided for in Rome is confined to the direct use of records for broadcasting or communication to the public. If for example the broadcast of a record by broadcasting organization is rebroadcast by another of broadcasting organization or communicated to the public in a

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[96] Eugene Ulmer,*op.cit.*, p.226. It is noteworthy that the delegations at 20 countries-Argentina Australia, Austria, Brazil, Cambodian, Chile, Congo, Cuba, Czechoslovakia, cuddle federal republic of Germany, Great Britain, Iceland, India, Ireland, Israel, Italy, Mauritius, Mexico, Peru and Poland voted in favor of acceptance of article 12. The delegations of eight countries France Japan, Luxembourg, Monaco, Netherlands, South Africa, Tunisia and the Yugoslavia voted against. Nine delegations Belgium Denmark, Finland and Norway, Portugal, Spain, Sweden, Switzerland and the United States abstained from voting.

[97] However interestingly, the necessary two-thirds majority had been achieved. It was met with a vigorous applause.

[98] It is important to note that, during this relevant period, certain legislations in countries such as in Germany have gone for the further and even those records the sharp that are not meant for commercial usage are also subject to take the trouble remuneration. Further there is no exception regarding employees of broadcasting organizations who are performers. Their remuneration is to be governed by the terms of their employment contract

restaurant or other public place, no obligation to pay remuneration arises in the second broadcasting organization of or restaurants. Here the protection under the Convention for the benefit of performers lags behind the protection enjoyed by authors in other provisions of the world Convention[99]. Thirdly, the remuneration payable to the performers and to the producers of phonograms was to be a single equitable remuneration. A two-fold burden was decided against in view of the burden on the organizers and the authors. However doubts and criticisms have been raised whether the single equitable remuneration that has been mandated would be a maximum limit or a minimum guarantee[100]. In other words the question that emerges is whether the countries do enjoy the freedom to have a scheme that envisages something more than a single remuneration. Fourthly it is important to note that it is not a specific entity who has been entitled to the remuneration rather it is either the performer or the producer or both. This is left to the national legislations to choose from. Though the legal bases from which different countries proceeded differed, it was felt that it was not time to forge an international finality on the issue[101]. Particularly since a balance had been arrived at through various means in different countries among the conflicting interests. However it was felt that fairness demands that payments for secondary users should not pass in a one-way flow from one contracting country to another.

Agreement that in respect of the obligation to pay remuneration, national treatment maybe withheld in the absence of reciprocity. In this connection, it was advisable to choose a uniform criterion, irrespective of whether the rights of performers, of producers of follow grams, or of both, is involved. The criteria chosen was the nationality of the produce phonograms which is in keeping with the fact that the rationale of the use the most important criteria in connection with the protection of producers of phonograms. The following further reservations

[99] Though this was considered to be a disadvantage, it was agreed to move ahead with caution.

[100] Eugene Ulmer,*op.cit.*,p.228. The Berne consensus in this regard may not have the same influence considering the compromise in this regard that was evolved and arrived at in Rome neighboring rights.

[101] *Id.*,p.229. The Belgian delegation wanted the right to remuneration to be granted to the producers, but that obligation to allow the performers share in the remuneration has to be imposed upon them. The performers interests opposed this. For there were countries such as Germany who were envisaging legislation where in the remuneration was to go to the performers who in turn were to distribute a share to the producers. In Britain for instance despite the absence of a statutory obligation through collective contracts the performers were entitled to a share in the proceeds from the phonograph industry.

also admissible a. In the case of phonograms the producer of which is not a national of another contracting country, any contacting country may exclude the application of art12. Thus with respect to national treatment and art 12 benefits a different yardstick based on reciprocity and the point of attachment pegged on that of the nationality of the producer was intended[102]. Though this pertains only to international situations nevertheless this showed the lack of sternness in making the equitable remuneration provision a part of the national legal system in a uniform manner. However there was an endorsement in principle to the concept from all nation states particularly the major entertainment producers that included India.

Right of the Performer in the Audiovisual and the Rome Convention and the Conflict of Interests

A Convention that protects performers and broadcasting organizations should have logically extended to the field of motion pictures as well. Particularly considering the fact that the motion picture industry engages the most number of performers and broadcasting of audiovisuals had become a huge commercial prospect by the middle of the century. However this logic seemed to run into bottlenecks and opposition came from the diverse interests particularly from the film industry[103]. The issue was whether the film industry owing to the special circumstances prevalent in it required any special treatment. The Hague draft encompassed the film industry to bring the performers and broadcasting organizations within its ambit. The protection to performers was commonly confused with the protection accorded to authors of films. Another significant proposition that was advanced was that there ought to be a distinction between the cinematograph films and other audiovisuals. However no heed was given to this proposed demarcation at the Rome Convention.

There was vehement opposition to the grant of neighboring rights to the performers on the ground that it might create new problems for the film industry. Rather than make do with any compromise of interests the film industry preferred

[102]Eugene Ulmer, *op.cit.*, p.230.

[103] Article 19 (performers' rights in films)- says that notwithstanding any thing in this Convention, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, Article 7 will have no further application.

a complete immunity from any legislative grant of rights. The eligibility of the film industry to the grant of rights to the performers had its first imprint in the Monaco draft. The draft provided that no provision was to be interpreted as applicable to the reproduction, or any other use, of motion pictures or other visual and audio visual fixations. This would have included the broadcasting organizations that would have enjoyed protection only for their live television broadcasts and not for their televised broadcasts from fixations. However the Hague draft excluded broadcasting organizations from the ambit of exclusion from the application of the draft. In the case of performers the Convention was not to apply to the reproduction of performances fixed on films where the purpose of the reproduction is different from the purpose understood by the performers when they consented to the original fixation. The exclusion was not total and that enhanced the protective status of the performer in comparison to the total exclusion that is reflected in Art 19 of the Rome Convention[104].

The Rome provision for exclusion has raised some sharp criticisms that cannot be termed unfounded. For one, the exclusion seems to take away the right on the performer to disallow any derived exploitation from the film or the soundtrack of the film that he might not have explicitly consented to. Thus both the audio performers and those who appear for instance the actors do not have any right to fall back upon in case the exploitation was one that was distinct from that for which they gave consent[105]. The distinction between the treatments meted out to the performers in films and those in audio fixations has been ostensibly because of the distinction between the commercial distribution of records and those of films. In particular the question of secondary uses only arises from records in comparison to films[106].

The grant of rights to the broadcasting organizations in the absence of similar rights to the performers has raised a storm of criticism. The broadcasters enjoy rights both with respect to radio as well as film exploitation. They are protected from rebroadcast, fixation of broadcast or reproduction of such a fixation regardless of whether a broadcast is a live broadcast or based on an audio,

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[104] Eugene Ulmer, *op.cit.*, p.242. Eugene Ulmer it appears the provision was influenced by the film industry interests in the United States and comes nearer to the provision advanced by the American delegation.

[105] *Id.,p.* 243. The German delegation did give a proposition to include the reproduction with respect to films within the Convention but this was not successful.

[106] *Ibid.* This criterion is outdated today.

visual or an audiovisual fixation. This protection extends to the communication to the public too from films televised as well as recordings exclusively for television[107].

Reservations and Exceptions

The Rome Convention provides for reservations and exceptions in the application of the Convention provisions by the member states[108]. This had found expression in the preceding Hague draft of the Convention too. There was conflict of interests with respect to these specific enumerations and there were suggestions for addition of further circumstances into the exception lists[109]. While Art 15(1) lays out a few instances of exceptions that include educational purposes, Art 15(2) provides that countries may limit the exercise of rights to those exceptions that is mandated for the copyright entities under the copyright laws. It has been stringently implied by means of article 15(2) of the Rome Convention that the exceptions to the entities covered by the neighboring rights should not be more liberal than the exceptions that the copyright entities have to comply with[110].

Anathema to compulsory licenses- it is specifically provided in Section 15(2) that the compulsory licenses must be resorted to only in case of compatibility with the terms of the Convention. There is no endorsement of the compulsory or statutory licenses but they have been held to apply to certain circumstance that does not conflict with the exercise of rights. An indiscriminate application of the compulsory license for instance to the performers would negate the very basic enjoyment of their preventive rights by way of grant of consent. Therefore it appears that compulsory and statutory licensing in contradiction to the minimum exercise of

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[107] *Id.*,p.243. An exclusion from the purview of the protected entities has been the film producer. Films are commonly protected under the aegis of the Berne Convention. So any attribution of a neighboring rights status to the film producer will naturally lead to the danger of the continued protection to the film under a film copyright. However this only exposes the lopsided logic of the distinction between the producer of phonograms and the producer of films.

[108] Article 16 of the Convention deals with reservations.

[109] Eugene Ulmer, *op.cit.*, pp. 239-240.Interesting propositions can be seen to have come from the Scandinavian and the German ministerial drafts. This included exception to quotations being used and performances that were not rendered for a business motive such as during the testing of equipment.

[110] Claude Masouye, *op.cit.*,pp.58 to 59. The general report on the Rome Convention has advised them to follow the rights and exceptions granted to traditional entities under the copyright fold.

rights is disallowed by the Rome Convention[111]. However given the degree of allowance to impose, it does not present a profound difference with the leeway provided in the case of traditional entities under the copyright legislations. The statutory licensing as envisaged under the Art 12 for secondary uses does not affect the preliminary grant of consent[112]. While the Rome Convention does limit the area with respect to possibilities of compulsory licensing, it has been pointed with regard to the leeway to be provided to the neighboring rights in being accorded a lesser quantum of exceptions than the copyright entities.

Reservations

The Rome Convention has been criticized as being too lenient in the observance of most critical provisions pertaining to performers and producers of phonograms. The provision for reservations overwhelms the effectiveness of the treaty.

Inferences from the Rome Convention, 1961

It has not stood the test of time and has become out dated under current technological developments and circumvention possibilities. The Rome Convention does not fulfill the desires of the performers by begetting them positive civil proprietary rights or authorization rights. It provides them only a possibility of prevention measures that the states are bound to undertake. It does not speak about enforcement machinery that the states must put in place in order to supervise the implementation of measures. The durational period is too meager compared to that enjoyed by the authors in literary and artistic works. The moral rights for the performer is not granted -not even an optional choice is provided to the states in this regard. The Rome Convention does not grant rights to performers in audiovisual fixations and is confined to aural and live performances. It leaves a lot of discretion to the states with regard to rebroadcasts and communications to the public of fixations. The Rome Convention provides a presumptive favor towards the affixer of the performance. The performers definition remains anchored to literary and artistic works. It has

[111]Claude Masouye, *op.cit.*,p.59.
[112] *Ibid.*

left out the definitions of key terms thereby creating confusion. The Rome Convention has not mandated the use of a viable mechanism of single equitable remuneration that would have adequately taken care of the transactional intricacies. The Rome Convention has not explored nor exhorted the need for state supervised collecting societies.

But on the other hand, to sum up the Rome Convention has been a major gain for the following reasons. It introduced Conventional minima with a choice of obligations for the nation states to choose from. It is a landmark and a pioneering attempt of regulation with respect to performers rights. It allowed a lot of latitude to the nation states as an incentive. Even though technology would have grown beyond the dress tailored by the Rome Convention reference to it would be eternal and inevitable truism[113]. It provided a reason for the nations to try for improvements. It created a permanent forum and office in the form of intergovernmental committee to follow up the administration of the treaty and suggest changes. The fact that by 1978,84 states had legislated to protect the producers of phonograms, 66 to protect broadcasting organizations and 35 to protect performers show that the intent of the Rome Convention has to a large extent been realized.[114]

The Phonograms Convention and the Performer

The concern for the performer was firmly in place even in the formulation of the phonograms Convention, 1971 that was ostensibly for the protection of the producer of the phonogram for exclusively aural fixations. This is evident from the sentiments reflected in the preamble to the Convention. The intent was to protect the interests of the producers, authors and the performers from the arms of the pirates and bootleggers taking into account the unauthorized duplication of phonograms and the damage caused to the interests of authors, producers and performers in phonograms[115]. It was intended that the protection to producers would inadvertently help the performers as well and the need to secure the work

[113] Masouye,*op.cit.*,p.12.

[114] S.M. Stewart, *The International Law of Copyright and Neighboring Rights*, Butterworths, London (2nd edn.-1989), p.224.

[115] Claude Masouye, *op.cit.*, p.94.

tendered by the UNESCO and The WIPO and not to impair the gains of the Rome Convention. It expressly seeks to safeguard the protection otherwise secured to authors, performers and to producers or to broadcasting organizations under any domestic law or international agreement[116]. The benefits secured by the Rome and the phonograms Convention needs to be cumulatively shared. Thus the phonograms Convention only fills areas like distribution and the importation of copies that were left unspecified by the Rome Convention. It is to be noted that the Convention does not say any thing about the locus of the performer in raising a dispute in these circumstances against illegal duplication and distribution or importation. Secondly the membership of the Convention does not Mandate that the state should have been a member of either the Berne or the Rome Convention in order to be eligible to be a member of the Convention.[117]

The TRIPS and the Performer

The protection to performers under TRIPS is enshrined in Article 14 of the agreement. [118] The possibility of prevention is specifically provided with respect to fixation of their performance on a phonogram. Acts such as fixation of unfixed performances and the reproduction of such fixations, broadcasting by wireless means and the communication to the public of their live performance without the authorization of the performer, require to be prevented by the contracting states[119]. It is noteworthy that while the need for authorization to affix is provided only with respect to the performer in a phonogram as regards the need for authorization for broadcasting and communication to the public, the right is available for both the Phonogram as well as the audiovisual performer.

In contrast to the provisions of copyright where in the TRIPS has incorporated the provisions of the Berne Convention, with respect to the rights of the performers & producers of phonograms or broadcasters, the Rome Convention does not find

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[116] Article 7 of the Phonograms Convention. *Id.*, p.107.
[117] Article 9 of the Convention.
[118] See Professor Michael Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement,* Sweet And Maxwell, London (1st edn.-1996), p.11.
[119]See Article 14(1). *Agreement Between the World Intellectual Property Organization and the World Trade Organization (1995) Agreement on Trade Related Aspects of Intellectual Property Rights*, WIPO (1997), p.21.

ditto incorporation into the TRIPS agreement [120]. The TRIPS agreement limits itself to reproducing in a simplified form, the substantive rights recognized by the Rome Convention. The rigor of the Rome Convention with respect to the ambit of the rights is absent in the TRIPS and a narrower string of rights is asserted. Art 14(1) only refers to right of affixation on a phonogram where as the Rome Convention is with regard to fixations on any material support[121]. The Rome Convention does not provide for the retroactive application of its provisions but the TRIPS agreement establishes such retroactivity when applied *mutatis mutandis* Article 18 of the Berne Convention. In other words it can be noticed that TRIPS uses existing Conventions as starting points and do not reduce the obligation to these Conventions. National treatment is provided only for those rights recognized under the TRIPS agreement. Even though there is a strong shadow of the Rome Convention, it is the rights explicitly provided by the TRIPS that are consequential. The TRIPS do not endorse all the rights desired under Rome Convention. The reason for the non-application of the right to single equitable remuneration was owing to the opposition from North American broadcasters who did not want to pay[122]. Provisions of the Rome Convention that were not found acceptable by all the members do not find itself in the TRIPS. The right of rental is narrower than the right in the corresponding European directive[123]. The condition of the normal exploitation of the performance being impaired by the rental right has been placed. There is no right to lend mentioned in the TRIPS. The TRIPS also speaks of non-natural entities as authors and uses the term rights holder.[124] The TRIPS therefore is narrower and conspicuously silent as distinct from the Rome Convention. For instance TRIPS does not speak about the audiovisual performer or exclude them expressly from the purview of rights. The silence leaves it to the nation states to decide. This is a major change from the stance of the Rome Convention. The TRIPS through its silence have spoken much more for the shape of things in the future. The TRIPS has also extended the duration of the rights of the performer from the Rome twenty years to fifty years.

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[120] Carlos M Correa, Abdulquawi A. Yusuf (Ed.), *Intellectual Property and International Trade: The TRIPS Agreement*, Kluwer Law International, London (1ST edn.) p.155.
[121] *Id.*,p.157.
[122] *Id.*, p.149.
[123] *Id.*,p.154.
[124] *Id.*,p.155.

The TRIPS does not carry any definitional clauses and therefore inadvertently it would be the definitional clauses of the Rome Convention that would have to be resorted to. Another highlight of TRIPS is that it placed the performers for the first time in the company of copyright entities. That is in the same section. By including within the same agreement and the same section and also by using the term 'related rights' to characterize the performers rights, it has caused a perceptional change in the status of performers rights the world over.[125]

From the audiovisual perspective there was a tremendous imbalance and discrimination among the countries as regards the protectionism to domestic industries[126]. From restrictive market access to foreigners to controls on marketing the audiovisual sector was straddled with mechanisms for preempting open competition. This was complemented by a conservative mindset, as it was also a cultural goods sector; any consensus was hard to evolve[127].

Though a major hint at strategic overall change was made in the TRIPS Convention in 1994,by integrating trade with intellectual property, it was not a holistic re-appraisal of the Rome Convention taking into account the effects of profound change in the technological front and the consequent impact on the performers. Similar to the Rome endeavor, the producers of phonograms have been provided with positive authorization rights. While the broadcasters have been provided with right to prohibit the aforementioned acts[128]. The extent of exceptions, conditions, limitations and reservations also follow the trajectory of the Rome Convention[129].

Gains from the TRIPS

Though the TRIPS might have emulated the Rome Convention without much change nevertheless there is a significant gain. Owing to its synchronization with

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[125] See also Amy .S. Dwyer, *TRIPS*, in Terence P. Stewart (Ed.), *The GATT Uruguay Round, a Negotiating History (1986-1994): the End Game (part –I),* Kluwer Law International, London (1999), p.465.

[126] The American film industry faced a lot of protectionist blocks from countries such as France. See Frank W Swacker, Kenneth R. Redden, Larry B. Wenger, *World Trade Without Borders, The World Trade Organization (WTO) and Dispute Resolution*, Michie Butterworth Law Publishers (1ST edn.-1995), p.338.

[127] Christopher Arup, *The New World Trade Organization Agreements, Globalising Law Through Services and Intellectual Property*, Cambridge University Press, United Kingdom (1st edn.-2000), p.261.

[128] Daniel Gervais, *The TRIPS Agreement-Drafting History and Analysis,* Sweet And Maxwell, *London (*1st edn.-1998*)*,pp.91-93.

[129] Article 14-6 of the TRIPS.

more onerous trade issues and the inextricable pattern in which both had been woven together there has been an inevitable obligation on the part of the contracting states of the TRIPS to undertake measures to protect the rights of performers in sound recordings. This is a major gain as the Rome Convention as well as the phonograms Convention found few takers.

The WPPT

The Need for the New Attempt

One of the major landmarks in the protection for performances and performers rights was the WIPO Performances and Phonograms Treaty (WPPT) adopted by the Diplomatic Conference held on Dec. 20, 1996[130]. The reason for its significance is obvious particularly considering that much water had flowed on the technological front since the first such international endeavor in 1961 that is the Rome Convention[131]. It was the answer to the need for solutions to the issues raised by economic, social, cultural and technological developments.[132] Based on these impelling concerns the treaty was the result of a work carried out over a number of years by WIPO committee of experts.[133] Long and detailed negotiations took place in the development of the draft instruments.[134] The result were two treaties- The World Copyright Treaty (WCT) and the WPPT. While the former was a reiteration of the literary and artistic rights in the new world order of digital communications, the latter was an initiation and expansion of certain concepts that were grounded rather nervously only a bare 34 years before but in a digitally wired world.[135]

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[130] The treaty was adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, on December 20,1996.

[131] Jorge Reinbothe and Silke Von Lewinski, "The WIPO Treaties 1996:Ready to Come into Force" [2002] EIPR 199., p.200. The need was also felt to go beyond the minimum standards laid down by TRIPS.

[132] The preamble to the treaty encapsulates this sentiment. *WIPO Performances and Phonograms Treaty* (WPPT)(1996), WIPO, Geneva (1997), p.9.

[133] Sterling, *World Copyright Law*, Sweet & Maxwell, London (1998), p.557.

[134] In the year 1996, the Chairman of the Committees, Jikka Liedes of Finland was charged with producing the drafts to be considered at a Diplomatic Conference. The diplomatic conference was held from December 20, 1996, all member states, a large number of non- govt. organizations – a special delegation of European Communities, 7 inter-governmental organizations made it their single biggest diplomatic conference held to date.

[135] Rein Bothe, Martin Prat, Von Lewinsk," The New WIPO Treaties: A First Resume" [1997] 4 EIPR. 171. The digital agenda was added to the discussions only in the year 1995.

The Intent Sought to be Accomplished

The intent of the WPPT has been to achieve the task of developing new protective mechanisms and maintain the protection already granted. While adapting to new social, economic, and technological demands of the age together with the need to provide a balance between private intellectual property rights and the larger public interest. The intent has been to recognize the need to adapt to the new developments in communication and convergence, in other words the digital revolution.[136] In contrast to the intent as enshrined in the WPPT, the Rome Convention does not carry a profound guidance in its preamble. It merely expresses its objective to protect the entities spelt out. The intent of the WPPT is broader. Thus if Rome provisions were to meet with situations beyond the pale of the times when it was drafted, it would not be able to craft a solution out of the four corners of the instrument.

The TRIPS preamble on the other hand is at variance with the WPPT and the Rome Convention, as it does not explicitly refer to any subject matter that it has to treat. Neither performers nor any allied entities have been referred to in the preamble. The underlying rationale of TRIPS has been to have an accommodation between trade and IPR related issues where in intellectual property rights protection would be sufferable to the extent that it does not turn out to be an obstruction to trade. While it does say that intellectual property rights are private rights the TRIPS does not speak about public interest or balance between private rights and public rights.[137] While the preamble in TRIPS is not as vocal as is the preamble of the WPPT, the only hint of public interest as a concern is in Article 8. Thus it could be said that the WPPT in contrast to its predecessors has been more pronounced and projects the underlying intent of balance and accommodation much more than the heavily trade inclined attitude of the TRIPS Convention.

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[136] *WIPO Performances and Phonograms Treaty* (WPPT)(1996), WIPO, Geneva (1997), p.9.

[137] This too is only directory giving the members the choice to adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio economic and technological development consistent with the provisions of this agreement. This is the nearest that TRIPS comes to with regard to the vital balance that intellectual property rights is supposed to hold with public interest.

The Dichotomy with Regard to the Subject Matter- Audio & Audiovisual

There were two standpoints the first being that the rights of performers should only be discussed as far as the fixation of the performances in the phonograms were concerned and that the new instrument would not extend to the audio visual fixations[138]and that despite objection, it would not be possible to discuss the rights of the performers separately from that that of the phonogram producers. It was felt inappropriate not to discuss the question of phonogram producers without concomitantly discussing the question of performers rights.

It is significant to note that even though the majority took the view that nothing precluded the conference from discussing the audio- visual rights nevertheless there was reluctance and finally the idea was aborted for the time being to be taken up separately.[139] A number of delegations did put forward arguments for and against the inclusion but upon the Director General's assurance that the International Bureau would prepare a document on audiovisual fixations in due time.[140] It was also decided that for the preparation of a separate document there would have to be a comparative study of the national laws, contractual practices and administration of rights of which it was collecting information. The reasons appear innocently to be of administrative convenience alone rather than other complexities together with a poise of unpreparedness from the WIPO-the coordinating body[141]. Interestingly, the polarization does appear quiet evident at that stage also because the European communities en bloc did not conceal their enthusiasm for such an instrument nor do they display any indecision in this regard.[142] With respect to the performers and the phonogram producers though

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[138] See the, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2,International Bureau WIPO (1994), p.4.

[139] "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2,International Bureau WIPO (1994), p.4.

[140] *Ibid.* INR/CE/I/3 Paras. 63-65. The Chairman noted this in the summary of discussions.

[141] In the face of European enthusiasm there was evident staunch opposition from the United States. Rein Bothe, Martin Prat, Von Lewinski," The New WIPO Treaties: A First Resume" [1997] 4 EIPR. 171.,p.175.

[142] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2, Annex III, International Bureau WIPO (1994), p.10. The rather elaborate letter written from the European commission to the international bureau seeking urgent action on this front would amply prove their resolve in this regard particularly when other participants were ambivalent. The letter (*F.N.contd.next page*)

they were brought under the same canopy in the instrument, it has to be borne in mind that there was insistence that both should be dealt with distinctly.[143]

The Definitional Challenge

The identification of the performer remains the most important issue, as the subject matter that ought to benefit from the protection should not suffer from ambiguity and uncertainty. In the absence of clear-cut definitions, this would make way for a lot of uncertainty and could be used unfavorably against the genuine performer.[144]

The WPPT and the Definition of Performer

The WPPT made two changes to the definition that holds tremendous ramifications. According to the definition 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. The word 'interpret' is an addition to the string of features appended to the words preceding the performance of literary and artistic works. This widens the ambit of those who come within the range of performers while at the same time narrowing the possibilities of qualitative distinctions among those who partake in a performance. The inception of the word interpret could also bring in off-view contributors into reckoning. Folklore has been included without providing any clue of what amounts to a folklore (not even a definition has been attempted). Nevertheless it is a major step away from the conservative fixation to accord protection only to performances rooted in literary and artistic works. Variety and circus artists have been dropped from consideration. It is a wonder why they did not find expression despite the inclusion of the more inscrutable folklore. It only

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from . J.F.Mogg advisor to the European commission carrying clear intention to push forward the need to streamline the realm of international audiovisual norms reflected the regional progress made in this regard. Thus it can never be said that there was no preparedness in this regard that it should have been jettisoned to a later date on the grounds as yet quiet unconvincing though technical.

[143] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2,WIPO (1994), p.5.

[144] *Id.*, p.6.

accentuates the contradictions in logic with regard to the extension of the protection.[145] The stylistic reproduction of sounds as well as the reading aloud was also considered.

Different countries had varied propositions with regard to the definition of the term 'performer'.[146] There were propositions that said that the elaborate enunciation need not be there and that the definition should be comprehensive and thus the words actors singers, musicians should be deleted rather and that the definition should define performers as persons who act sing, play music and should include folklore and circus and variety artists.[147] In fact some of the African countries stressed that performers of folklore ought to be protected, as they should be considered as literary and artistic works from the moment they are documented[148]. However, there was opposition to this move as while the inclusion of folklore was welcome, the notion that such expressions were an afterthought to creative expression in the form of literary and artistic works was opposed.[149] The eligibility of folklore also involved degrees of recognition and the vital question could be as to- firstly, what is folklore and secondly as to who are folklore artists. Though there were suggestions for a sui-generis protection of folklore it was not carried out placing it within the category of performances otherwise protected.[150] Thus both these change while bringing in newer categories is indicated the resolve of the international community to do justice to the genuine performers deserving of attention.[151]

It is significant to note that the International Federation of Actors had not rendered any opinion at this session with regard to the extent of the term

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[145] "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/V/11,International Bureau WIPO (1996), p.4. Proposal by Argentina. Performer means any actor, singer, musician, dancer or other person who plays a part in, sings, recites, declaims, interprets or in any way performs s literary or artistic work or an expression of folklore, including variety artists and circus performers.

[146] A comparative table of proposals and comments received by the International Bureau-discussed in the fifth session Feb. 1 to 9, 1996. INR /CE/V/11,dated Jan 10, 1996.

[147] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms," INR/CE/III/3 Supple, International Bureau WIPO (1994), p 3. The delegation of Egypt.

[148] "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3 Supple, International Bureau WIPO (1994), p.6. Delegation of Ghana -countries in which these are already considered literary and artistic works.

[149] *Id.*,p.15. The Caribbean Broadcasting Union.

[150] The addition with regard to the folklore was based on the recommendations of the WIPO/UNESCO committee of experts on the intellectual property aspects of the protection of expressions of folklore-Geneva, June –July 1982.

[151] Sterling, *World Copyright Law*, Sweet &Maxwell, London (1998), p.581.

performer.[152]There had only been limited opposition to the inclusion of performances of folklore and to the protection of performers under the instrument. Some delegations and observers were of the opinion that the performers should not be linked[153]. Another significant assessment was that the definition of fixation was not linked to works and thus corresponded with the definition of phonogram and producer of phonograms however the definition of the performer did not correspond to that of the fixation. The performer was linked to the artistic and literary works. He urged broadening the definition of the performer to include the use of previously fixed performances for the creation and production of literary and artistic works[154]. An adaptation right for the performer was also mooted. One sole striking voice that stood against the enlargement of the definition as attempted at the Rome Convention was the European Broadcasting Union[155]. The Asia Pacific Broadcasting Union also voiced the same restrictive approach but it was with particular impetus on the audiovisual fixation[156]. There was an interesting submission to confine the definition of the performer to that of the musical performers alone[157].

While an open ended definition would have satisfied several of the performing organizations it was felt that the a provision in a national law that would merely state that the who do not perform literary or artistic works are also performers would create legal uncertainty since on the basis of this users would not know clearly whether a production is a protected performance or not.[158] In this regard

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[152] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3 Supple, International Bureau WIPO (1994), p.13.

[153] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3, International Bureau WIPO (1994), p.11.

[154] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3 Supple, International Bureau WIPO (1994), p 12. Proposals of the Association of European Performers Organizations.

[155]See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3 Supple, International Bureau WIPO (1994), p.11.

[156]See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3 Supple, International Bureau WIPO (1994), p.15. Asia –Pacific Broadcasting proposals. Thus there appears a broad uniformity with regard to the approach to definitions from the broadcasting unions.

[157] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms', INR/CE/V/11, International Bureau WIPO (1996), p.5. Proposal by United States.

[158] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2, International Bureau WIPO (1994), p. 6.

the relationship between Article 3 and Article 9 of the Rome Convention was sought to be explained in that the delegations felt that even in the absence of Art 9 it was obvious that the contracting states had the power to deviate and extend more protection than was envisaged by the Article 3 of the Rome Convention. The plausibility of this interpretation appears debatable, as there were sufficient reasons for a closed-door approach to the definition of performers in the Rome Convention. The link with literary and artistic rights has been maintained ostensibly for identifiability, two, that literary and artistic are not overwhelmed by performers preeminence, and three, certainty as otherwise courts and executives would have to interpret according to circumstances, which would prove to be cumbersome in the long run.

Phonogram

Phonogram has been defined as meaning the fixations of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work[159]. It takes into account the great incursions made by technology. It tends to be more descriptive than the one attempted in the Rome Convention. This has been prompted by the new technologies as also the fear of audio-visuals encroaching on the space. Thus, there is a total specific exclusion of the sounds incorporated in cinematographic works or other audio-visual works. This not only secures the position of phonogram producers but also of the audio- visual producers. The mechanism of phonogram has included within it the representation of sounds not just sounds alone. This is to accommodate the digital technology in which the technological representation of sounds (through numbers). The change over from the analogue era is reflected in this. Besides the fixation of sounds of performance other sounds are also brought within the purview.[160] Thus any sound affixed to the instrument would beget rights protection for the phonogram. It need not fulfill any subjective nor objective criteria of originality or link to literary and artistic works. Thus even though the

[159] Article 2 (b) of the WPPT. Fixation has been defined in Article 2(c) as the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

[160] Performance has not been defined in the treaty.

phonogram may qualify for protection without being derived from a literary or artistic work, the performer need not if it is not based upon the definition of a performer. An incongruity is evidently created therein.

Producer

The WPPT has defined the producer of a phonogram to be the person or the legal entity who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds or the representation of sounds.[161] On a comparison with the Rome Convention it is discernible that the definition has undergone an elaboration. In the Rome Convention the language and the intent was much more narrow and a technical one. The deficiency being that the impetus was on the person who first fixes the performance. However it was always pointed that the person who first fixes the same need not be the one who has either invested or facilitated the enterprise. Though the present change leads logically to the employer or the investor there is a danger of making identification susceptible to different interpretations. On the other hand the first affixer need not necessarily be the producer of the program.

Another noteworthy feature of this definition is that the producer of a phonogram is not linked to the need for his product to be 'work' based as in the case of the definition of a performer. It is pertinent to note that there is no attempt to define performance for if that is done then both the performer and the producer of the phonogram will beget the same protection but the intent appears to keep both the performer and the producer of a phonogram on two strata's with respect to the term performances. The performers dependence on works or performance of folklore to beget protection is narrower than the right provided to the producer of phonograms.

Under the Rome Convention, the meaning of the term 'publication' meant offering of copies to the public in reasonable quantity. Under the WPPT, It is not only a phonogram whose publication that is signified but also any other fixed performance[162]. It is intriguing how after an elaboration of definition of the term

[161] Article 2(d). The Indian delegation supported the assimilation of the definition of a producer of phonograms to the person who takes the initiative and responsibility for making the phonogram
[162] Article 2(e).

phonogram, space has been found to encompass any other form of fixed performance? Doubts arise whether this is sought to rein in audiovisual means of dissemination. But in the context of the WPPT with audiovisuals outside the purview of its beneficial provisions then this appears to be only as a check against use of audiovisuals to circumvent the Provisions.

Another significant change has been in the provision that the rights-holders permission must be there for publication[163]. This is a significant addition to the Rome Convention. This secures the position of the rights holder when the intellectual product that is published illegally ticks of the time machine. The agreed statement clarifies that publication could only be through the means of tangible objects. Thus dispersal through any other means does not come within the term publication.

The definition of broadcasting[164] marks a discernible change from the Rome Convention by taking into account besides the wireless means for public reception of sounds or images and sounds- the representation there of transmission by satellite, transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organization or with its consent.

Moral Rights

The pioneering nature of this treaty has been the fact that it boldly introduced for the first time the concept of moral rights for the performer. This was a colossal change from the hesitancy that was conspicuous in the Rome Convention and the total silence in the TRIPS over this issue. It had been the subject of severe discord during the negotiations in the Rome Convention. The moral right of the performer is found enshrined in Article 5 of the treaty.[165] It provides that independently of a performers economic right, and even after the transfer of rights as regards his live aural performances and performances fixed on phonograms moral rights shall subsist in it. An analysis of Article 5 brings to the fore the following components within it- it pertains to live aural performances or

[163] *Ibid.*
[164] Article 2(f).
[165] *WIPO Performances and Phonograms Treaty* (WPPT) 1996, WIPO, Geneva, (1997), p.13.

performances fixed in phonograms. They exist independently of the economic rights, which means that even after the transfer of the product, the performer will have the right to be identified as the performer of his performances. Besides identification as the performer of his performances, the performer can object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation. These rights are avoided only in circumstances where the manner of the use of the performance demands non- attribution. The above-mentioned rights are to continue till the normal expiry of economic rights even if the beneficiary expires in the meanwhile. Though the moral rights are mandated without any option or choice for the contracting states, the treaty provides a small reprieve to those countries that do not wish to extend the right beyond the death of the party. It is not that they have the complete choice rather it is that they can only take away some of the rights and not all after the death of the beneficiary.[166] The question as to who are the legatees of these rights has to be identified by the legislatures of the respective nation states. Similarly the means of redress has also to be governed by the legislation of the place where protection is claimed.[167] There is no hard and fast rule that moral rights ought not to extend beyond the term of 50 years laid down by the treaty, it can be made to go further and also can be made perpetual. This is left to the discretion of the nations contracting in the treaty.

It is pertinent to note that the there is no speck of any moral rights for the audio-visual artists not even for the live performance nor for broad casts of the same or the fixation of unfixed performances, only live aural performances and fixations in phonograms carry the imprint of moral rights. The debate as to the grant of moral rights to the audio-visual performer was always agitating those concerned since the Rome Convention. One of the arguments advanced against it by the film community was that the grant could lead to the unexpected hurdles in the commercial exploitation of the product. It is interesting to note that even countries like the UK that has already incorporated sufficient economic rights for the performer though not in parity with copyright vehemently opposed the grant of any of the moral rights. After having stood for a complete denial of the same, it

[166] This is expressed in Article 5(2).
[167] Article 5(3).

was a compromise that they came to which paved the way for the aural performers to be granted some moral rights.[168]

In comparison with Berne Article 6 bis, the following differences exist for the performer[169]. The exception from grant of rights with regard to 'manner of performance' is not present in the Berne Convention[170]. While the Berne Convention granted the authors the right to honor, the performers have only a guard against the prejudice to reputation. Further the open-ended clause of 'other derogatory action' is absent in WPPT. These quiet substantiate the fact that there was only a restricted focus for the grant of these rights. It is to be noted that in TRIPS there is no mention of performers moral rights or of the phonogram producers' moral rights. The Phonogram Convention too is silent in this regard.

It was pointed out that the manipulation of recorded performances made possible by digital technology might amount to distortion, mutilation and other modification of performance in such a way that it would prejudice the honor, reputation of the performer and that certain other techniques such as dubbing could also be manipulated.[171] Opinions were divided with regard to the exceptions for the right to paternity as well as the right to integrity. It was pointed out that only the most egregious alterations should matter. The moral rights were to be justified by the observations that the quest for moral rights could be found in the common-law roots as well. The need for moral rights was also a political rights necessity. There was a demand for modifying exclusions from the performers organizations. It was pointed out that parody could be made an exception to the right of integrity since it served the interest of free expression.[172] That could be left to the discretion of the national jurisdictions.[173] It was also

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[168] Sterling, *op.cit.*,p.587. The German delegation, for instance, was vehemently in support of the same and even wanted it to be enjoyed universally. It is not clear whether this preference for universality is merely geographical or caters to all performers is a matter to be explored.

[189] Though several countries did want the same rights as were granted under the Berne umbrella the final draft fell short with arguments for commercial expediency prevailing.

[170] Though modeled on the Berne Provision. See Miholy Ficsor , *The Law of Copyright and the Internet* ,Oxford University Press(1st edn.- 2002),p.616.

[171] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2,International Bureau WIPO (1994), p.13.

[172]See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3,International Bureau WIPO (1994), p 22.

[173] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2,International Bureau WIPO (1994), p.14.

With regard to the term of protection of moral rights the opinions (*F.N.contd.next page*) ranged

voiced that the term of protection should be equal to that of the term for economic rights or they could even be considered perpetual.[174] With regard to moral rights of performers there were several countries that were unconvinced about their necessity and what could be conjured up was a reference model to the Art 6bis of the Berne Convention. It was pointed out that the interests to be protected by the moral rights were personal to the performer and there fore exercise of the rights after the death of the performer should be limited.[175] Inclusion of vague and wide phrases such as like 'as far as practicable' raised questions[176]. However those in favor of commercial flexibility were in favor of the wide words. It was also pointed out that there was a difficulty to administer moral rights in situations that involved more than one performer.

The Economic Rights

The WPPT will be known in the history of performers' rights movement as the harbinger of substantive proprietary rights that they were clamoring for well three quarters of a century. It was a transition from the qualified contractual capability granted to the aural performer and the minimum guarantee of 'possibility of prevention' provided in the Rome Convention.

Unfixed Performances

The right enshrined in Art 6 caters to all performers that include both the aural and audiovisual performer. Art. 6 of the WPPT grants rights to the performer generally not merely confined to the aural performer alone. The right of

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between terms identical with the term of protection of economic rights, lifetime of the performer, a term without limitation or decision on terms to be left to the national jurisdictions in accordance with their own cultural peculiarities. The most crucial question being whether the same yardstick as used for literary and artistic authors should be used.

[174] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3,International Bureau WIPO (1994), p.21. While there were several countries that supported the inclusion of moral rights as a necessity there were interests in particular the authors and the broadcasting corporations who were opposed to the same. Those who supported the same laid stress on the fact that the interest was in no way different from that of the authors, it should be in the same language as Art 6 bis, of the Berne Convention.

[175] *Ibid.*

[176] *Id.*,p.22.

authorization is granted as regards their unfixed performances.[177] They shall have the exclusive right of authorizing the broadcasting and communication to the public of their unfixed performances. This is however subject to an exception that if the performance has been once broadcast they shall no longer have any right of authorization with regard to that performance. This raises interesting questions. The phrasing of Article 6(1) suggests that the exception applies to both broadcasts as well as communication to the public. However there can be doubts in this regard with respect to communication to the public, as it does not find mention in the exception. Only rebroadcast is an exception. The communication to the public being of a very wide ambit, the reuse not being amenable to the authorization right could deprive the performers. It could also mean that where a performance has been communicated to the public then the exception could not be said to arise, as only program that was a prior broadcast is an exception.[178]

While there appears to have been a broad consensus with regard to the economic rights for performers the fact that sufficient attention needs to be focused on the issues and proposals was pointed out by those countries, which had a well oiled contractual system regulating the relations between the performer and the industry. The issues with regard to enforcement of rights also posed problems particularly in the new digital environment.[179]

Rights of Authorization of Fixations in Phonograms

[177] Art 6 of the WPPT says: economic rights of performers in their unfixed performances
Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the fixation of their unfixed performances.

[178] In this regard one would have to recollect the interpretation of Claude Massouye to the Rome Convention that the rebroadcast would encompass the communication to the public as well.

[179] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3,International Bureau WIPO (1994), p.7. There was a proposed legislation with regard to recognizing the public performances in digital communications pending in the U.S.A green paper on intellectual property aspects of the national information infrastructure (NII) and from the Middle East 1981 Arab Convention on the copyright. Many of the countries were in the process of seeking to streamline this new area by enacting new legislation by extending the traditional notions of rights either begotten through legislation or through the process of collective or individual bargaining to new area to the digital domain and distribution in that environment.

The WPPT provides the performer four other rights but these are confined to performers in phonograms. The right to reproduction (Article 7)- covers both the direct and indirect reproduction of performances fixed on a phonogram.[180] It is a right that has to be mandatorily provided to the performer as the word 'shall' has been used by the drafters.[181] The right to authorize reproduction extends to reproduction in any manner or form. Thus the technological constraint is removed and the digital or any future technological possibility is taken care of. The right to authorize also covers the right to prohibit the reproduction implicitly.

In comparison, the Rome Convention made fixed performances and reproductions there on totally within the control of the producer provided there was a contract to the contrary. Thus under the Rome Convention the presumption in favor of the producer would be lost only if the original fixation was without consent, if the reproduction was made for purposes different from those for which they were intended for and if the reproduction is made for reasons other than for reasons for which the performance was fixed under Art. 7. Thus with the WPPT providing them with the right of reproduction the performer can stop the reproduction if it is done even for the purposes for which the initial permission was given for fixation. Thus fixation and reproduction become two mutually exclusive legal entities where in the motive for the fixation would not have any bearing on the enterprise for reproduction. In other words an agreement to affix under certain conditions would not be sufficient to constitute an implied consent or agreement to reproduce the said performance for the said purpose for all times to come. Under the Rome Convention the lack of any contract explicitly appeared to provide an unrestrained right to the affixer to reproduce at will, unless and until limited by implied or express contract.[182] The WPPT provision on reproduction with regard to performers provides them an exclusive right thereby passing on

[180] Article 7-Right of Reproduction says that performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

[181] *WIPO performances and phonograms treaty with the agreed statements of the diplomatic conference that adopted the treaty and the provisions of the Berne Convention (1971) and of the Rome Convention (1961) referred to in the treaty*, WIPO, Geneva (1st edn. - 1997), p.15.

[182] *Rome Convention*, 1961,WIPO, Geneva (1997), p.6.

the presumption of right enjoyment to the performer rather than what was understood under the terms of the Rome Convention.[183]

The meaning of the term 'reproduction' is also further clarified in the agreed statement accompanying the treaty instrument or the provisions of the treaty. The reproduction right fully applies in the digital environment. Even the storage of the protected performance or phonogram in the electronic medium would constitute a reproduction within the meaning of Art 7. However the crucial question whether temporary storage would also amount to reproduction has not been directly answered.[184] The authorization extending to both direct and indirect infringements extends the locus-standi of the performer to cover and check indirect reproduction also. This saves the oft-encountered disadvantage of depending on the producer or the broadcaster for fighting indirect infringements.

It was felt that the words 'in whole or in part' should not provide performers the exclusive right of authorizing the reproduction of insubstantial parts of the phonograms. Rather the rule of substantiality should apply.[185] The application of the criterion of substantiality and similarity in determining whether a phonogram is a copy of the other under national law and jurisprudence and was of the opinion that the words 'whole or in part' should be deleted.[186] Some delegations accepted the phrase 'in part' but found difficulty in the inclusion of temporary and transitory storage in electronic format, which would in its view amount to the recognition of a right to use which was alien to copyright and neighboring rights. It was mooted that such a broad definition inevitably necessitates the inclusion of limitations on the right of reproduction along the lines of the European union directive on

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[183] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3,International Bureau WIPO (1994), p.13. Reservations were expressed by different parties with regard to the grant of a right of reproduction for performers in authorized fixations of their performances since they went beyond the Rome Convention.

[184] WPPT (1996)- Agreed statement concerning articles 7, 11 and 16: the reproduction right, as set out in articles 7 and 11, and the exceptions permitted there under through article 16,fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram, in digital form in an electronic medium constitutes a reproduction within the meaning of these articles.

[185] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3 Suppl., International Bureau WIPO (1994), p. 3. Delegation of South Africa.

[186] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3 Suppl., International Bureau WIPO (1994), p. 4. Delegation of Australia.

computer programs and that the interests of the owners could be secured by the grant of rights to such acts as permanent reproduction, transmission to the public, and public performance, thus it was suggested that the definition of the reproduction should be left o the national legislation following the example of the Berne Convention.[187] It is proposed that that it should considered as such regardless of the duration of storage. Subject to the criterion of substantiality.[188] Some delegations favored the inclusion of all forms of reproduction.[189] Doubts were expressed regarding extending the right of reproduction to parts of phonograms at least without further qualification.[190] It was proposed that the words 'in part' of the reproduction were significant and that it should be included.[191] However there were delegations that considered the use of the words 'in whole in part' as inappropriate.[192] It was pointed out that the words 'in whole or in part' must be replaced with one of substantiality that varied from case to case pointed it out.[193] It was proposed that the words 'in the whole or in part' should be replaced with 'in the whole or substantial part' to reflect the principle of substantiality.[194] In contrast some delegations favored the retention of the words 'in whole or in part' with respect to the definition of the word reproduction.[195]

The Right to Distribution

Art. 8(1) of the WPPT grants the right of distribution to the performer in phonograms[196]. The exclusive right extends to making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership. However this right is subject to a qualification or exception. The right can be the subject of exhaustion accordingly to be decided by the parties concerned. The exhaustion is to take place only in the aftermath of the first sale or transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer. By copies is meant the fixed

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[187] *Ibid.*
[188] *Id.*,p.5. Delegation of the United Kingdom.
[189] *Ibid.* Delegation of France.
[190] *Ibid.* Delegation of Finland.
[191] *Id.*,p.6. Delegation of Sweden.
[192] *Id.*, p.6. Delegation of Spain.
[193] *Id.*, p.7. Delegation of Belgium.
[194] *Ibid.* Delegation of Ireland.
[195] *Id.*, p.8. Delegation of Iberia –Latin –American Federation of Performers (FILAIE).

copies that can be put into circulation as tangible objects.[197] It would be interesting to see how this idea of original and copies as tangible objects will work in the digital realm where distribution through the wire or wireless means need not be through the means of tangible objects.[198] The Rome Convention is silent as to the right of distribution.

Aligned to the right of distribution was the issue of importation. The concern was whether the right of distribution and the right of importation vested with the performers and the producers result in no access to works that would impede human civilization whether it would have any benefits to the consumer was also an engaging issue to consider.[199] It was pointed out that the grant of a right of importation would upset contractual agreements. A possibility of collective administration might certainly enable the working of those rights so there were suggestions for provisions in that regard as well.

The issues raised were with regard to the exact ambit of the right.[200] The reference was to the rights enjoyed by the authors in this regard and conferred by international Conventions in this regard. This was attempted with regard to the right of distribution and also with regard to the exceptions particularly in the realm of public lending. The first sale in the European union did not exhaust the right of rental. The right of distribution would include the right of public lending, sale and

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[196] Article 8- The right of distribution (1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership. (2) Nothing in the treaty shall affect the freedom of contracting parties to determine the conditions, if any, under which the exhaustion of rights in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

[197] The agreed statement concerning Articles 2(e), 8,9,12 and 13: as used in these Articles, the expressions "copies" and "original and copies " being subject to the right of distribution and the right of rental under the said articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

[198] N.S. Gopalakrishnan, "WIPO Copyright and Performers and Phonogram Treaties- Implications for India", 21 Ac.L.R., 7-8(1997). An agreed statement regarding the nature of copies (tangible fixed) was also included. This was to make it clear that the right of distribution applies only to permanent copies like printed materials, CD'S Etc. and not to materials in the electronic media which are intangible in nature, example material in the memory of the computer.

[199] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3, International Bureau WIPO (1994), p.15.

[200] *Id.*, p.14. This included is whether only tangible copies had to be covered or whether other forms of communication should also be brought within the four corners of distribution rights., how long the right should subsist with the performer or the producer is also crucial and the survival of the same after the first sale of the original or the copy, what should be the limit of the rental right and the right of importation and also whether the exhaustion should be upon national, regional or global basis.

right of rental. Each definition had its own ramifications and the issue was to delimit the extent by the use of the words that would not allow for any further interpretation and leeway than was essential. There was a call to redefine the right of rental to that of transfer of possession. (But this would have come to be similar to the right of lending that would have covered non-commercial activity as well. The idea of regional exhaustion was mooted in this regard. A broad right of importation was also proposed including a right of importation of both pirate and legitimate copies and recordings. But there was an objection to the grant of the right of distribution to pirate copies.

Some of the major factors that were influencing the discussions and the ambit of the protection were the characteristics of the new technological era that had arrived through the digital medium. It had blurred the distinction between the traditional media rights of reproduction and distribution, broadcasting and communication to the public and public performance. The question was whether any area should be exempted, as using wide terminology would have the tendency to over legislate. The digital means of exploitation and the consequent receptive clarity has blurred the distinction between primary use and secondary use. The perfect copies of the original communicated to the public through the diverse means of dissemination has led to similar expectations of compensation with regard to the manner of exploitation. The question was whether it should be mere exclusive rights to remuneration even if exclusive rights could not be provided to all manner of digital communications. There were demands that exclusive rights must be granted at least to the on demand interactive digital delivery of phonograms and performances included therein.[201]

The Right to Rental

Art 9 (1) of the WPPT grants the right to commercial rental of the original and the copies to the performer.[202] It is specifically stated via an agreed statement that

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[201] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2, International Bureau WIPO (1994), p.22.

[202] Art 9 says that the performers shall enjoy the exclusive rights of authorizing the commercial rental to the public of the original and the copies of their performances fixed in the phonograms as determined in the national law of the contracting parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Not withstanding the provisions of paragraph (1), a contracting party that, on April 15, 1994,had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may, maintain that system provided

the terms 'copies' and 'original and copies' refer exclusively to fixed copies that can be put into circulation as tangible objects.[203] The right is to be enjoyed even after distribution by them or pursuant to an authorization by the performer. Art (9)(2) points out that if there is a system of equitable distribution in place then that may suffice to the point that commercial rental is not giving rise to impairment of the exclusive right of reproduction of performers. It is important to note that it is only commercial rental that is covered and not lending. The manner of application of the right for the performer shall be left to the concerned national law. It is noteworthy that this delegation is absent in Art 7 and Art 8. Significantly the right is to subsist even after distribution by the performer or even when it is done under his authorization. A wide power is vested in the contracting state to draw the extent of the right of commercial rental that is as long as the exclusive right of reproduction is not impaired. This is a matter of wide subjectivity based on the practice of the system and the benefit to the performer in the long run. The WPPT has been careful that the commercial rental through equitable remuneration or otherwise does not swallow the right to reproduction.

The Rome Convention was silent on the issue of rentals thereby providing a huge leeway for the states. The TRIPS granted a right confined to the producers. It can be seen that the obligations mandated above are limited to the similar obligations expressed in the TRIPS agreement[204]. Some of the propositions said that the definition of rental should include transfer of possession only and not to a transfer of ownership.[205] It was also proposed to cover all forms of use that are of limited duration for commercial purposes.[206]

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that the commercial rental of phonograms is not giving rise to material impairment of the exclusive right of reproduction of performers.

[203] The agreed statement concerning articles 2(e), 8,9,12 and 13: as used in these Articles, the expressions "copies" and "original and copies " being subject to the right of distribution and the right of rental under the said articles ,refer exclusively to fixed copies that can be put into circulation as tangible objects

[204] N.S.Gopalakrishnan, *op.cit.*,p.11. There was tremendous opposition from India against any extension of the protective ambit.

[205] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3 Suppl., International Bureau WIPO (1994), p. 5. Delegation of the United Kingdom.

[206] *Ibid.* Delegation of France.

The Right of Making Available of Fixed Performances

The performers were granted the right of making available fixed performances[207] in such a way that the members of the public might access them from a place and at a time individually chosen by them.[208] This is compensation for the right of distribution and rental being confined to physical tangible copies or originals. This would bring within the fold the digital mode of delivery of performances.

Right to Remuneration for Broadcasting and Communication to the Public

A common right shared between the performer and the phonogram producer has been the right to remuneration for broadcasting and communication to the public.[209] The performer is entitled to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting and communication to the public. The single equitable remuneration can be claimed from the user either by the performer, producer or by both. The state can set the terms of how the remuneration is to be shared only in the absence of an agreement between the performer and the producer of the phonogram.[210] Thus the concept of single equitable remuneration is to be practiced in the contracting state unless it takes recourse to these formalities. It can turn off this mechanism if it notifies to the Director General either that it will confine the application of single equitable remuneration to certain uses or that it will limit its uses to certain applications or that it will not apply these provisions at all. Phonograms made available by means of wire or wireless to the public who may access them from a place and at a time individually chosen by them shall be considered as having been published for commercial purposes. Thus the presumption is that the publication is for commercial purposes.[211]

A parallel provision can be found in the Rome Convention in Art 12 where in if a phonogram is published for commercial purposes or a reproduction of the same

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[207] *WIPO Performances and Phonograms Treaty* (WPPT) (1996), WIPO, Geneva (1997), p.16, Art.10 of the WPPT says that - performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[208] N.S.Gopalakrishnan, *op.cit.*,p.16.

[209] Article 15 (1)(2)(3)(4) of WPPT.

[210] *WIPO Performances and Phonograms Treaty* (WPPT) (1996), WIPO, Geneva, 1997, p.19. Wipo Performances and Phonograms Treaty (WPPT) (1996), WIPO, Geneva (1997), p. 20.

is used for broadcasting or communication to the public then a single equitable remuneration would have to be paid to the performers or to the producers of the phonograms or to both. In the absence of agreement between these parties domestic law may lay down conditions as to the sharing of the remuneration. The difference between the two treaties with regard to this is palpable. There is no ordination of a right of equitable remuneration under the Rome Convention. Thus, it appears to be an entirely optional provision though much stronger compared to the Rome Convention and the TRIPS sentiments in this regard. The agreed statement is an expression of the inability to come to a consensus regarding the extent of the rights and also the limits of the reservation.[212]

The Debate Between Exclusive Rights and the Right to Remuneration

The impact of digital broadcasting was to change the conspectus with regard to the way the treatment of works either with regard to communication to the public was to be rendered. Previously prior to the impact of the digital revolution with its attendant technical qualifications and enhancing effects it was the common refrain to treat the issue of communication to the public either encompassing the broadcasting medium as being susceptible to control only via the right of equitable remuneration in the absence of any other exclusive grant. But even this was subject to the states discretion particularly after the first fixation and the first broadcast. The issue was whether the traditional broadcasting standards and the novel digital arrivals ought to be treated with the same regulatory attitudes and norms or there is sufficient difference between the two to have separate leg of regulatory framework for the new technological possibility.

A crucial difference in the manner of availability of programs had arisen in the manner of the making available programs in the sense that the recipient could now decide on the time and place of receipt of programs- either a phonogram or

[212]Article 15(4). Agreed statement concerning Article 15:- It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by the performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have left the issue to future resolution.
It is understood that Article 15 does not prevent the granting of the right conferred by this article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain. *Ibid.*

other material.[213] The proposition was that both the performers and the producers should be endowed with a right of communication to the public, applying to the cable, satellite or any other system when such right was equivalent of distribution when the user could choose the works he received.

The on-demand delivery system demanded the recognition of exclusive rights and suggested that the committees focus on the possibility of those systems substituting the sale of copies of phonograms. This could not be considered the same as broadcasting. Without a mandatory collective administration system, electronic copyright management system, identifiers, the economics of the industry the world over would be affected.[214]

The issue from another plane was that whether the grant of exclusive rights would clash with established practices in the country. While on one hand it was argued that a right to equitable remuneration would suffice as laid down in Rome and 14 of TRIPS. If exclusive rights were guaranteed then collective administration would not be a guarantee for appropriate access to fixed performances and phonograms. The major grouse was that if collective administration was resorted to and they were granted the exclusive right they could refuse licenses and impose unreasonable terms.

It was pointed out that digital broadcasting would facilitate purchase of copies. It would result in reduction of programming if payments were to be made. National culture and folklore never brought forth rewards for the producer rather it was only so for the broadcasters particularly in smaller developing countries. The recording industry already made sufficient substantial profits and it did not require any further remunerative potential. The American contractual system did not contain any reference to the payments for broadcasting that is through the NAFTA broached deals. There was no evidence that digital copying would bring about an increase in private copying[215] or impinge on the sale of phonograms.

Studies in the states had revealed little copying of broadcasts. It was opined that a clear distinction had to be made between the traditional broadcasting and on

[213]See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3, International Bureau WIPO (1994), p.17.proposition by Mercosur member states.

[214] *Ibid.*

[215]*Id.*,p.18.

demand delivery. The lumping together of both would make them too broad and difficult. A range of possibilities including the right to equitable remuneration would pose difficulties. There should not be different yardsticks for different media within the general realm of broadcasting and communication to the public. These terms have been used interchangeably but with the endeavor to create a different layer within the communication realm it would be important that each word had its own meanings. And if a different treatment was essential only then need a new word be added to the existing array of jargon.

The differences were based on different factors. Broadcasters used phonograms to increase their audiences. What uses justified exclusive rights and what other uses a simple right to remuneration should cover.[216] For instance the multi channel broadcasting would have to be assimilated into on demand delivery systems. Economically comparable situations needed to be placed on the same footing. It was pointed out that the availability of multi channel and access to copying facility would naturally lead the user away from the purchasing a copy or tangible copy. This would deleteriously effect financial flows and reduce investments.

In other words without the grant of exclusive rights to the providers, it would not be helpful. The present technological possibilities do not find the optional use of the art 12 of the Rome Convention to be a feasible proposition. The authors lobby was quick to latch on to the issue to protect their interests. They objected to the equitable treatment of the authors of performances and phonograms that were derivative works. The hierarchy between the author's rights and the neighboring rights had to be maintained. It was feared that the commercial interests of the owners of rights in derivative productions would directly interfere with the rights of the author and thus derogate from the bedrock principle of the international protection of copyright and neighboring rights protection[217]. The musician lobby countered this that there would never be life for music without the performer.[218] Rights owners were not in the habit of denying access to works rather the instinct was to the contrary-exclusive rights would help them to face new market practices and technical solutions that related to them. It was in order to

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[216] *Ibid.*
[217] *Id.*,p.19.
[218] *Ibid.*

encourage dissemination that there was the need for exclusive rights. Thus there was no need for any exceptions with regard to the execution of these rights. The reasons that warranted an exclusive right for on demand delivery applied equally to all forms of delivery or broadcasting having a similar effect. There is no question of unmanageability particularly with the collective administrative mechanisms in place[219].

The term narrow casting was suggested as a likely replacement to broadcasting right in respect of on demand delivery- a right to equitable remuneration would be ineffective with regard to the multi channel broadcasting. The producers agreed that the performers could enjoy exclusive rights where it was so justified. It was stressed that it was the market practices that would have to be assessed and not any technical differences. The on demand delivery systems were more akin to distribution of copies in fact CD's could be made at a marginal cost at home. In this regard there is no difference between the benefits to be enjoyed by the producer, the performer, authors- a mere right to remuneration alone would not be optimal.[220]

The Duration of Rights Under WPPT

The duration of performers rights under the WPPT for the performer begins from the end of the year when the performance is incorporated in the phonogram or fixed or published whichever is earlier [221]. The producers' rights also begin at the same time. The term of protection is uniform for all the protected categories. That is for a period of fifty years. The TRIPS that preceded the WPPT by two years does not prescribe a minimum term less than fifty years. The duration granted under the Rome of the minimum of 20 years was found to be insufficient particularly owing to the technically superior quality, value and longer commercial

[219] *Id.*,p.20.
[220] *Ibid.*
[221] Art 17 of the WPPT-. (1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram. (2) The term of protection to be granted to producers of phonograms under this treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

life of the phonograms[222]. A 50-year protective term on the lines of the TRIPS seemed appropriate. Several national systems had also begun to provide the 50-year term. There were endorsements from different countries with regard to the 50-year term of protection.[223] There were also calls for an equal treatment of the term of protection as that enjoyed by the copyrighted works[224]. This would include both the term for the performers as well as the producers as well. Another interesting omission from the WPPT in contradiction to the Rome Convention has been the lack of an incorporation of a time limit of protection for unfixed performances. As for the producers the time duration has been fixed either from the end of the year the fixation of the performance was done or from the end of year when publication was rendered. The duration of protection for broadcasters under TRIPS is however significantly only 20 years. That is the only repetition from the Rome sentiment.[225] But this could create a problem in the sense that while the broadcast could lose its protection after 20 years the performers permission would still have to be taken as the period of their protection is still 50 years under TRIPS and WPPT.

In other words, the inference from the durational limits placed would be that there has been an increase of the period for performers' protection. The period has been placed at par with that of the producer. One striking feature is that the performer despite his profound intellectual creative contribution has been placed alongside the producer. There is no further discrimination shown among various performers. There is no mention of the duration for live performances, which in its absence would mean to have been still surviving within the provisions of the Rome Convention with duration of twenty years, as there is no mention of it in TRIPS either[226]. Another critical point is that while the authors or the intellectual creators under the Berne Convention have been granted a protection of a lifetime and a period of 60-70 years, such a rationale has not been found in here. The

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[222] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2, International Bureau WIPO (1994), p.32. Memorandum prepared for the first two sessions.

[223] See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/2 Annex., International Bureau WIPO (1994), p .15. Argentina.

[224] *Id.*,p.9. United States of America.

[225] *WPPT,* WIPO, Geneva (1996), p.22. The TRIPS has provided other rights to the broadcaster-Art14 (3).

[226] The International Bureau provides explanation that the value to the performance is imparted only with the affixation and not before.

WPPT has only laid down the minimum term and the nation states are free to decide the term above the minimum or increase it in accordance with their mandate.

Technological Measures and Obligations Concerning Electronic Rights Management Information

The WPPT introduces two new provisions that are significant particularly in the after math of around 30 years since the Rome Convention in a world confounded with technological breakthroughs in communications. The introduction of the obligations with regard to technological measures in safeguarding the rights marks an important step in adaptation to the altered environment where in both the rights holder and the rights violator are both endowed with the technology to secure and to circumvent. The WPPT under Article 18 mandates that there shall be provided adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights.[227] The need for legal remedies extends to the restriction of acts in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.[228] The Rome Convention does not carry such a mandatory requirement of effective legal remedies. Thus even if there is no actual violation of the rights bestowed nevertheless if there is tampering with the technological apparatus placed to protect the performance then the contracting states are expected to place the legal provisions against this in place. This is a highly useful deterrent.

Article 19 of the WPPT imposes obligations concerning Electronic Rights Management Information (ERMI) on the contracting states. Though no parameters of a well-defined nature are provided in the Article 19 nevertheless

[227] Art.18 - Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

[228] *WIPO Performances and Phonograms Treaty (*WPPT) (1996), WIPO, Geneva (1997), p.22.

the nation states have been asked to provide for effective legal remedies in respect of such acts that would reasonably induce, facilitate or conceal an infringement of any of the rights in this treaty.[229] Thus it is to dissuade those who aid and abet rather than the actually infringe the rights guaranteed. The acts sought to be checked include the altering or removing of any electronic rights management information without authority, to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority. Once again it is those who aid and facilitate the infringement that is the object of deterrence [230]. Thus no body is expected to feign or take advantage of the tampering with the rights management information if there is sufficient ground to believe that these are not genuinely authorized goods. Therefore doing any or all of the aforementioned acts would ordinarily invite punitive measures if it were done with the knowledge that the ERMI has been tampered with. Though this demands formalities to be indirectly imposed nevertheless it is not to be construed that without these EMRI formalities there would not be any protection.[231]

Art. 20 that follow the security clauses against EMRI violation is a statement that the enjoyment and exercise of the rights provided for in this treaty shall not be subject to any formality. This follows the Rome sentiment though it was not made as explicit in the Rome Convention. It also seeks to pursue the norms of protection followed in literary and artistic works. From an assessment of the provision it must be stated that there is no other provision bringing the need for aiding and abetting or indirect infringements within the net other than those in relation to EMRI. It is an issue whether this would mean that there is no international mandate to go after the indirect infringements other than against those who tamper with EMRI. The striking deficiency of the entire scheme of Article 19 is that there appears to be no direction to have an EMRI compulsorily

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[229] Agreed statement says that this includes both the exclusive rights as well as rights of remuneration.

[230] *WIPO Performances and Phonograms Treaty* (WPPT) (1996), WIPO, Geneva, 1997,p.23.

[231] Agreed Statement. *Ibid.*

imposed upon the nation states as only legal remedies have been called forth to be put in place and to subscribe to norms as desired by the WPPT.[232]

Limitations and Exceptions with Regard to Rights Granted in the WPPT

The clause with regard to limitations and exceptions is very widely worded in the treaty.[233] The contracting parties are given the option to provide for the same kind of limitations and exceptions as they provide in their national legislation in connection with the protection of literary and artistic works. It is optional on the part of the contracting nation states to provide any thing less or more for the performers rights as exceptions. It is a mandatory clause that the parties should confine their exceptions or limitations to the certain special cases that does not conflict with the normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or the producer of the phonogram[234].

Thus unlike the Berne and the Rome Conventions the parties do not have a precise criteria to follow. Questions could abound as to what constitutes conflict with the normal exploitation of the performance and what unreasonably prejudices the legitimate interests of the performer and the exercise of his rights.[235] The agreed statement clarifies that the exceptions shall apply to the performances stored in the digital form as well. It in effect brings even the computer storage within the ambit of reproduction there by extending limitations and exceptions to that sphere also. But yet again lack of sufficient clarity mars this provision particularly in a digital era where in the mode of exploitation has changed and is in a state of flux.

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[232] It is noteworthy that both Art 18 and 19 don't find a place in the Rome Convention. The nearest that any thing comes close to the need for formalities in the Rome Convention is Article 11. Though it is not a provision that calls for measures to protect the EMRI, it is only a caution to restrict the need for formalities that might be adopted by the contracting states. It is another way of saying what has been stated in the agreed statement of the WPPT to Article 19 and the subsequent Article 20. There is no other provision corresponding to Article 20 of the WPPT in the Rome Convention.

[233] Article 16(1) of the WPPT.

[234] Article 16(2) of the WPPT.

[235] *WIPO Performances and Phonograms Treaty* (WPPT), (1996), WIPO, Geneva, 1997, p.21.

Reservations & Limitations

Save one Provision none of the contracting parties can exercise any right of reservation other than in those circumstances where in discretion has been explicitly granted to them to do so. The reservation power is granted to only the right under Art 15(3) where in the contracting states have been granted the power to notify if they are not planning to fulfill the mandate of Art 15 that provides for a single equitable remuneration. This is in sharp contrast to Art 16 of the Rome Convention wherein Art 12 (with regard to single equitable remuneration) as Art 15(3) of the WPPT can be reservedly applied as also Art 13(d) with regard to communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.
The right of reservation can be invoked in this regard under Art 16 only when the state notifies the Secretary General that 13-(d) would not be applied and that the other contracting parties shall not be obliged to grant the right in 13-(d) to broadcasting organizations whose head-quarters are in that country. It is noteworthy that this provision of reservation has been taken away in the WPPT. As is the right of reservation with regard to entrance fee to television broadcasts. Further no procedure is formulated with regard to any reservation attempted after the accession to the treaty while under the Rome Convention the notification for reservation could be attempted six months after accession or ratification. The TRIPS agreement does not make any specific contribution with regard to conditions, limitations, exceptions and reservations other than state that it intends to follow the same to the extent provided by the Rome Convention.

Retroactivity

The TRIPS through Art 18 of Berne Convention speaks about application of the provisions from the time the treaty is applied. Those works that were protected continue to be protected under the shadow of the new treaty. It shall be subject to any provisions contained in special existing Conventions or those to be

concluded between the parties. In relation to the Rome Convention, the WPPT carries a softer approach.[236]

The WPPT has also borrowed from Art.14 (6) of the TRIPS provision on the application of Art 18 of the Berne Convention. Thus the treaty would be applicable to works still not in the public domain. No mention is made about not disturbing acquired rights as is mentioned in the Rome Convention. Nevertheless, Art 22(2) provides a further leeway to the contracting states in that Art 5 of the treaty concerning the moral rights may be applied only to performances that have happened after the coming into force of the treaty. This essentially excludes even those performances whose period of moral rights protection survives the impact of the new treaty. Thus existing performances would not be able to enjoy the protection of moral rights.[237] The protection of the economic rights of the existing performances survives the advent of the new treaty. The underlying tenor both of the TRIPS as well as the WPPT provides the contracting states much more discretion to evaluate the application of retro activity and non-retroactivity. While this is substantial with regard to the economic rights it is even more so with regard to the moral rights.

Membership

A significant change can be seen with regard to the eligibility norms to become the member of the treaty.[238] Any member of WIPO is eligible to be a member. Intergovernmental organizations may also become parties to this treaty upon a declaration being made that it is competent in this respect and has its own legislation binding on all its members on matters covered by the treaty. This

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[236] The Rome Convention it was specifically stated in Article 20 that the rights acquired before the date of coming into force of this Convention were not to be prejudiced. Further article 20(2) also stated that testate shall not be bound to apply the provisions to performances or broadcasts that took place or to phonograms that were fixed before the date of coming into force of this Convention for that state. Thus it was a kind of total non-retroactivity that was proposed.

[237] Both the TRIPS as well as the Rome Convention do not grant moral rights to the performer.

[238] Article 26 of the WPPT says that ' (1) Any member State of WIPO May become party to this treaty.

(2) The assembly may decide to admit any intergovernmental organization to become party to this treaty which declares that it is competent in respect of, and has its own legislation binding on all its member states on, matters covered by this treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this treaty. (3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this treaty, may become party to this treaty.

treaty also recognizes the European community. The aforementioned criterion reflects a sea change in the attitude of the treaty makers from that fostered by the Rome Convention. The Rome Convention carried an eternal conservatism and anxiety to safeguard the literary and artistic works in an age recognizing the property rights of the performers.

Under the Rome Convention, the instrument could be open for accession only if any member state of the United Nations is a party to the UCC (Universal Copyright Convention) or a member of The International Union for the Protection of Literary and Artistic Works. Thus this firmly provided authors and artists a secure environment, as they would not be denied protection in preference to performers and producers of phonograms and broadcasters. Thus those nations that did not provide protection to the works of literary and artistic works as mandated in the international instruments would not come within the purview of eligibility to qualify for the membership of the Rome Convention. But the WPPT marks a significant change from the same and does not demand this prior qualification and provides an open opportunity for all WIPO members, intergovernmental organizations and European community members.

INTERNATIONAL INSTRUMENTS AND THE PERFORMER IN THE AUDIOVISUAL

It can be seen that both during the Rome Convention as well as the WPPT the question of protection to the performers in the audio-visuals had been hotly debated. However the preparation of an international instrument could not be agreed upon owing to differences of opinion and the conflict of interest. It ought to be noted that the Berne Convention in Art. 14bis (3) was open to accommodating certain contributors who did not really have a separate copyright such as the principal director etc.[239] It can be recollected that the drafts prior to the Rome Convention contained some definite designs with respect to the accommodation of the performer in the audiovisual. The term 'audiovisual' had not been used and the reference consistently had been to films. The performer in the films was

[239] See the result of the Stockholm revision of the Berne Convention, 1967. Thus while a rigidity could be discerned, the option of accommodation had not been totally foreclosed. Though the performer was not considered as one among the authors of the film.

excluded in the Monaco draft (1957) and no provision was to be interpreted as applying to a reproduction or to any use made of a film.[240] In The Hague draft, the need to protect the performer from clandestine filming either live or off the air and to protect television broadcasts even if it included films was stressed. But it was not with any obligation on the part of the states to affect any rights of filmmakers or any other rights in visual or audio and visual fixations.[241] The draft gave protection to the performers against uses for purposes different from those for which their consent was given. However this was not extended to films. No protection can be said to be afforded to the performers or to the broadcasting organizations against reproduction or other uses of fixations of images or of images and sounds.[242] Some of the reasons voiced were that film producer's feared damage to their interests if performers and broadcasting organizations were to enjoy rights in their films. The film producers themselves had not gained a copyright foothold internationally. Their sight was on Berne rather than in Rome.[243] Another problem encountered was the confusion between films and television. Broadcasting organizations also separately made the their own television programs. There was a synchronization of use between the cinema specific products and the television products as the former was used in the latter as well.[244] The Rome Convention via Article 19 denied total protection to the performer. This was unlike the protection that was extended up to the contractual extent by the Hague draft. There was much anguish at the treatment meted out to the performer in the films as new uses and the possibilities of exploitation had increased manifold times.[245]

The United States of America had firmly stalled any attempt to remain silent about the audio-visual performers rights in any of those instruments and the resultant exclusion in the Rome as well as the WPPT was the result of the stubborn stand.[246] The reason as could be understood from the records suggest

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[240] Claude Masouye, *WIPO Guide to the Rome Convention and to the Phonograms Convention*, WIPO, Geneva (1981), p. 65.
[241] *Id.*,p.66.
[242] *Id.*,p.66.
[243] *Ibid.* Their intent was to steer clear of Rome. They finally managed to beget a foothold in the revision Stockholm in the year 1967.
[244] *Id.*,p.66.
[245] *Id.*,p.67.
[246] Von Lewinski, "The WIPO Diplomatic Conference on Audiovisual Performances" [2001] E.I.P.R. 333.

that the standoff was between the American collective administration bloc that did not want the statutory streamlining of the rights on the one hand and the European and the Latin Americans bloc that wanted fundamental statutory minimum guarantees on the other.[247] Accordingly the negotiations in 1996 offered different alternatives namely the coverage of only musical audio performances, the coverage of all kinds of performances or the principle coverage of all kinds of performances combined with the possibility for contracting parties to declare a reservation with a view to applying the treaty only in respect of audio performances.[248] However the United States was not satisfied with the proposed idea of reservations being left to the respective states concerned. The United States was in favor of limiting the possible treaty to musical performances alone. However it was not amenable to the idea of limiting its own obligations to musical performances alone while allowing the other contracting parties most of which were in favor of a full coverage of all kinds of performances to protect audio visual performances at the international level. Even a proposal of the E.C. and its member states made during the Diplomatic Conference 1996 to allow reservations in respect of certain sectors instead of a comprehensive en bloc reservation as well as further options for a more flexible reservation possibility did not satisfy the United States.[249]

The United States referred explicitly to the possibility of granting protection by collective agreements, under certain conditions that would have allowed them to maintain their domestic system while not being obliged to introduce exclusive rights for the performers. National treatment on the lines of the Berne Convention was to be allowed. Significantly, the U.S also wanted the exclusion of the background performers who do not speak words of scripted dialogue. These were concerns that were raised for the first time in the international parleys and as can be seen in the final WPPT instrument it was all rejected.

The most vehemently opposed component was the set of proposals regarding transferability. This was rejected not only by performers organizations but also several other delegations. Significantly most delegations consistent with the performers point of view preferred not to include audio-visual performers if their

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[247] *Ibid.*
[248] *Ibid.*
[249] Von Lewinski, "The WIPO Diplomatic Conference on Audiovisual Performances" [2001] E.I.P.R. 333.

protection had to be combined with a mandatory presumption of transfer of rights to the producer. The mandatory transfer was perceived to be potentially weakening the position of performers rather than strengthening it and therefore was mainly beneficial to the producers.[250] That was seen as potentially weakening the position of performers rather than strengthening it and instead was beneficial mainly to film producers in particular to the dominating American film industry.

Significantly, prior to the WPPT, the TRIPS had confined to positive speak only on the issue of live performers and phonograms and did not either restrict nor promote nor desire any moves on the audio-visual sector. This could be easily explained away as it was not derogating from the Rome Convention in areas other than the areas on which it has expressly spoken. Thus the restriction on rights in the audiovisual sector would hold. But unlike WPPT where this option of silence was not taken, the TRIPS eased the mental block to explore further moves in this direction ostensibly because of the European block as against American obstruction. The initiative towards the Protocol reveals the conflict involved in realizing a protection for the audiovisual performer.

The WPPT closed with a resolution that the efforts to figure out a consensus with regard to audio- visual performers would continue as a sequel to the efforts to the 1996 efforts for the performers and the phonogram producers. Though the resolution made it a point to distance the WPPT 1996 from any extension to the audiovisual sector, it was with a pint of regret that the same was voiced.[251] This is

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[250] Von lewinski,*op.cit.*,p.334. Such an outcome was regretted particularly by the E.C. and its member states, African countries, Latin American and Caribbean countries. It is interesting to see the package that was proposed by the United States which if accepted would have made themselves accommodative to the protection of audio visual performances. The package contained an interesting mix. The proposed exclusive rights of fixation, reproduction, distribution, and making available were to be granted. What was not to be granted were the proposed moral rights and the exclusive right of modification and the audiovisual performers rental right. The free transferability of all exclusive rights including those of audio performers was to be preferred. The U.S had tried to introduce the same into the TRIPS agreement. In addition a mandatory rebut able presumption of transfer of all rights under the new treaty to the producer of the audiovisual fixation on the mere consent of the performer was to be provided. Still under the heading transferability of rights the United States proposed a choice of law rule under which in the absence of an agreement of the applicable rule, contracts concerning rights granted under the new treaty were to be governed by the law of the contracting party that was most closely connected to the contract. Another proposition was the implementation clause that would allow the respective parties to decide on the means by which the entire scheme was to be implemented.

[251] See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences",(*F.N cont.next page*)

indicative of the fact that there had been a sincere endeavor even at the WPPT to forge an understanding that failed. The contracting states did not want to take a chance even by keeping silent on the issue lest the ambivalence be taken to be susceptible to differing interpretations.

The Protocol[252]

The latest in the array of international instruments that have attempted to streamline the protection of performer in the audiovisual is the Protocol to the WPPT that has been debated at the Diplomatic Conference held in the year 2000. One of the most conspicuous features of the endeavor towards an audiovisual performance treaty has been the fact that there was least disagreement with regard to the need for such an instrument. In fact almost all jurisdictions that mattered with regard to the entertainment industry agreed that performers should be compensated for their work and that a uniformity of treatment must be attempted the world over with respect to their rights. The difference of opinions was only in the means resorted to realize this end. As the WPPT and the WCT had provided a level playing field of protection for some groups of right holders in the new digital environment, it was felt all round that this

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Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO(1st August,2000), p.2,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.
The resolution said,' The delegations participating in the Diplomatic Conference on Certain Copyright and Neighboring Rights questions in Geneva, " Noting that the development of technologies will allow for a rapids growth of audio visual services and that this will increase the opportunities for performing artists to exploit their audiovisual performances that will be transmitted by these services; '" Recognizing the great importance if enduring an adequate level of protection for these performances ,in particular then they are exploited in the new digital environment ,and that sound and audiovisual performances are increasingly related;'" stressing the urgent need to agree on new norms for the adequate legal international protection of audio visual performances ;" regretting that in spite of the efforts of most delegations ,the WPPT does not cover the rights of performers in the audiovisual fixations of their performance;" Call for the convocation of an extraordinary session of the competent WIP[O governing bodies during the first quarter of 1997 to decide on the schedule of the preparatory work on a Protocol to the WPPT ,concerning audio visual performances ,with a view to the adoption of such a Protocol not later than in 1998.

[252] From Dec 7 to 20, 2000, a Diplomatic Conference on the protection of audiovisual performances was convened by WIPO in Geneva. At the end of the conference its president read out a statement according to which a provisional agreement on 19 articles had been reached and however as outstanding issues remained it was decided to reconvene the conference at some later date. Von Lewinski, "The WIPO diplomatic Conference on Audiovisual Performances" [2001] E.I.P.R. 335.

needed to be extended to the performers in the audiovisual as well.[253] The non-governmental organizations that represented the various industry interests also echoed the same attitude[254]. Besides this the non-performer organizations such as the broadcasters and producers associations too did not oppose the grant of the performers rights to the performer in the audiovisual.[255] The proposed Protocol has intended to meet the demands posed by the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances.

Whether a Protocol or a Treaty

While it does proclaim the kindred link with the WPPT, the new instrument seeks to have an independent identity of its own. This is ostensibly to make it clear that there shall be no confusion between the interpretational techniques used and the inferences with respect to the two treaties. The preamble loudly says that the new instrument is in pursuance of the resolution passed at the WPPT. This delicate tight ropewalk could be because of a possibility that the width attributed in interpreting WPPT might be used to dissect the new instrument as well. The maintenance of the umbilical chord could only be for the reason of administrative and procedural simplicity of ratification. Several options as to the exact relationship with WPPT have been proposed and discussed. The indecision could turn on the fact, what would be more dangerous in the long run. This is particularly so since courts in the past and at all times when confounded by confusion has ventured forth to interpret in the light of international norms, practices and legislations. Though the proposed Protocol tries not to derogate from the existing treaty commitments, particularly the Rome and the WPPT, nevertheless the instrument intended the exclusiveness of this new instrument to be clearly preserved.

The consequences arising from the designation as a Protocol or a treaty may not be noticed from the first impression. However, the distinction would trigger off

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[253] SCCR /4/6 Prov., April 14th, 2000, Fourth Session, April 11,12, and 14th, 2000, Draft report prepared by the Secretariat WIPO (2000), p.3.

[254] *Ibid.* p.11.

[255] *Ibid.* See the opinion of the broadcasting associations and that of the producers associations at *Id.*, pp.11-12.

different interpretations. Particularly when there is a conscious intent to accord a different treatment to the audiovisual performer. This is significant in the context of the stance taken by the European and the American delegations in the post WPPT phase. While the European and other delegations insisted on a Protocol to the WPPT and would not include any article on transfer, the United States on the other hand including a few Asian countries preferred an entirely different independent treaty with considerable deviations[256]. The important point being relied upon was that the character of the instrument should emerge as being for the protection of the performers. It was proposed by the International Federation of Actors that the instrument should reflect the primary aim of the instrument and consequently contain the words " for the protection of audio visual performers".[257]

The Objective

The proposed Protocol was intended to meet the demands posed by the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual technologies. A similarity in reasons on the technological front can be found in the WPPT as well particularly being impelled by the influx of the digital medium and imminent revolution of the convergence phenomenon. The envisaged protection while it would encompass the new media –digital devices, does not lose sight of the balance of interests that ought to pervade intellectual property discourse. Thus the rights of the performer are to be realized subject to the limitations in larger public interest. Interestingly, in contrast the Rome Convention does not speak of any such balance in its preamble[258].

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[256] The above mentioned run up to the Protocol and the developments prior to it indicate a galactic divide between nations and blocs reflecting the history and the industry practices that have gained ground in the cinematographic or audio-visual industry.

[257] They were for a strong and comprehensive instrument without undermining the protection already established by the WPPT. They mooted the need for an agreed statement on the lines of the Agreed statement for Art (1) & 2) of the WPPT. It was felt that whatever term was to be used it should substantially realize the protection for the performer. This would be in conformity with the titles of Rome and the Berne Conventions. The federation was of the opinion that this question did not warrant much importance and felt undecided to decide whether to call the instrument a treaty or a Protocol.

[258] See the "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the

The Safeguard Clauses

The WPPT and the Rome safeguard clauses have been incorporated in the new Protocol. This has been modeled after the TRIPS agreement and the WPPT. There is also a continuation of efforts to secure the rights of the author's rights in the new instrument. [259]

Rental Rights

The WPPT had granted the same right to performers in the phonograms that can only be displaced by the scheme of equitable remuneration, provided it does not cause material impairment to the exclusive right of reproduction of the performer.[260] Significantly the basic proposal for the Protocol deviates a great deal from the guarantees that the WPPT carries with respect to rental rights.[261] While Article 9 of the Protocol does provide the performer with the exclusive right to authorize rental of the original and copies of the performances fixed in audiovisual fixations. It is conditional in that it provides too wide an option to the contracting states to be compelled to implement the same. The parallel provision of equitable remuneration has been done away as an alternative. The rental right need not be applied unless the exploitation has led to widespread copying of such fixation materially impairing the exclusive right of reproduction of such performers. Thus the users are free to commercially rent the audiovisual fixation without the consent or exclusive authorization of the performers until it becomes quiet evident that the commercial rental is detrimental to the exclusive right of reproduction.

Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO(1st August,2000), p.17,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.
p.17. The options on the preamble, it did not present any striking variance with the WPPT preamble.

[259] Both with respect to obligations under other treaties as well as the protection accorded to the literary and artistic works a non-prejudice clause has been intended to be inserted on the lines of Article 1 of the WPPT.

[260] See the "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conference", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August, 2000), p.44,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.

[261] *Ibid.*

This is a relevant grant in as much as much of the exploitation in current times is through the method of rental.[262] This flexible wording of the so-called impairment test has been a compromise between Art.11 of the TRIPS to accommodate the needs of those countries such as the United States. It was not in a position to introduce the rental right in respect of cinematographic works. The position of most countries had changed since then and the rental right has been applied also to audiovisual performances.[263] There was a division between the European Community and the United States of America in this regard. This was compromised by Art 9(2) that has resorted to 11(4) from the TRIPS to leave the issue to be determined by the national law of the contracting parties.[264]

Definition of the Term 'Performer'

An assessment of the definitions attempted in the proposed treaty brings to the fore the fact that there is broad correspondence between the definition of the term 'performer' in WPPT. Article 2 of the basic proposal deals with the definition of the term performer [265]. It is understood that extras, ancillary performers or ancillary participants do not qualify for protection because they do not in the proper sense perform literary or artistic works.[266] The borderline of determination is to be left to the respective national legislations. When making this determination the contracting parties are supposed to look into the

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[262] *Id.*, p.45. Article 9 of the proposal suggests (1) performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original sand copies of their performances fixed in audio visual fixations even after distribution of them by or pursuant to, authorization by the performer.
(2) Contracting parties are exempt from the obligation of paragraph (1) unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of performers.

[263] Von lewinski, *op.cit.*,p.336.

[264] *Ibid.*

[265] Art 2(a) of the Protocol defines performers as actors, singers, musicians, dancers, and other persons who act, sing, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folk lore; *Supra*.n.14.,p.23 . It is surprising that Von -Lewinski says that there was least resistance to the adoption of this definition

[266] See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August, 2000), p.22, < http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.
The notes accompanying the Basic Proposal are supposed to have the status of an interpretative aid.

established industry practice-whether a person has a speaking role or forms a background to performance.

According to the International Federation Of Musicians,[267] it is difficult at the international level to divide performers into different categories distinguishing some as ancillary performers, extra performers or background performers. Such a distinction particularly at the international level and in the new digital context could prejudice musicians worldwide and diminish their protection. It is only at the national level that professionals or authorities could decide when a contributor does not interpret a work.[268] The delegations that supported the exclusion of extra performers, background performer or ancillary performers did so in order to not upset industry practices. However, there was already an opinion that even the existing definitions in the prior Conventions readily excluded those groups of participants because of the requirement that a performer should perform a literary artistic work[269]. However the artists do not seem to have uniform views with regard to this. The International Federation of Actors were of the view that there was no need for expressly excluding the extras and that it should be left to national legislation or national court practice to decide the question.[270]

It is interesting to note that during the committee of experts meetings the delegations of China and France warned against introducing definitions that would imply qualitative distinction. The French notion of *artistes de complement* had been subject to court cases in France where the phonogram industry tried to clear the decisions that the background decisions musicians should be considered as artistes and therefore to be excluded from protection. The French court rejected this theory notably on the basis of the Rome Convention but such a

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[267] "FIM (International Federation of Musicians) Comments on a possible Protocol to the WIPO Performances and Phonograms Treaty, Concerning Audiovisual performances for the fourth session of the Standing Committee" (2000), p.8.

[268] The Rome Convention and the WPPT benefit performers defined in these instruments without any formal exclusion of certain categories of performers. A different approach at the Protocol was expected to create legal uncertainty.

[269] See, "FIM (International Federation of Musicians) Comments on a possible Protocol to the WIPO Performances and Phonograms Treaty, Concerning Audiovisual performances for the fourth session of the Standing Committee", FIM (2000), p.8.

[270] < http://www.fia-actors.com/new/wipo_2000_comments_eng.htm >as on 1st January 2003.

case shows that any provision excluding the former category can be subject to varying interpretations.[271]

The Definition of Audiovisual Fixation in the Protocol

The definition of the audiovisual fixation attempted in the basic proposal also came in for criticism as it was found to bring in a lot under its ambit. The issue was that audio visual performances which would not per se qualify as audio visual performances would qualify once they have been embodied in an audio visual fixation.[272] Audiovisual fixation is defined[273] as meaning the embodiment of moving images, whether or not accompanied by sound or by representations thereof, from which they can be perceived, reproduced or communicated through a device.[274] The definition of audiovisual performances was deleted as being of no consequence in the Protocol.[275] However the definition of audiovisual fixation was drafted so broadly that it was to surely overlap with the same in WPPT. It depended on a narrow or broad interpretation provided to the definition in the WPPT. The performers' associations were alarmed that the envisaged instrument would potentially include provisions that would be less advantageous for the performers and more advantageous for the producers as compared to WPPT. Thus any overlap would be inimical to the intent behind the new instrument. For instance products such as the CD-PLUS where in the musical performances might be complemented by visual elements such as pictures of a landscape that the consumer might even turn off. In such instances, the producer could benefit. Since this definition was crucial for the delimitation of the scope of application of the new instrument from that of the WPPT and since the new instrument was

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[271] See, "FIM (International Federation of Musicians) Comments on a possible Protocol to the WIPO Performances and Phonograms Treaty, Concerning Audiovisual performances for the fourth session of the Standing Committee" ,FIM (2000), p.9.

[272] http://www.fia-actors.com/new/wipo_2000_comments_eng.htm> as on 1st January 2003.

Art 2 (C) of the Basic Proposal.

[274] <http://www.wipo.org/documents/en/meetings/1999/sccr_99/pdf/sccr2_4.pdf > -for a comparative table of proposals on the protection of audiovisual performances. This definition had found endorsement from among almost all the delegations prior to the basic proposal being put forward for discussions.

[275] See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August, 2000), p.23, < http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006. Art 2(C) merely speaks of it as meaning performances that can be embodied in audiovisual fixations.

expected potentially to include weaker protection for the performers than the WPPT, the solution to the problem was not as simple and required a comprehensive agreement from all sides. However, delimitation has been attempted by resort to a separate clause.

The blurring line between audio and audio-visual has been seen with anxiety by the performers organizations. As any overlap would result in a dilution of the gains under the WPPT by the audio performers, on the other hand any fusion of or merging of the identity could also result in the audio-visual fixations begetting the protection of the audio performer in fixations. It is an issue of considerable delicacy that demands a minute understanding of the phraseology, the technology and identification of what criteria should distinguish between the subject matter. It is a precarious zone particularly in an era of convergence. The performers organizations have been supportive of any definition that would not take away any of the gains that they might have had so far and to provide increased protection where it deserves the same. The definition of the term phonogram symbolizes an important division as to where the protection under the Protocol ought to begin. However the current definitional weakness points out a paradoxical situation where in the audiovisual actor would beget a lower level of protection than the dubbing performer.

The International Federation of Musicians has voiced concern over the adoption of such a wide definition. The definition follows the technical structure of fixation as defined in the WPPT; all the technical elements that are not dictated by a different subject matter are identical. The expression moving images must be understood in a broad way incorporating or recording of visual material using whatever means and whatever medium. The definition of the fixation proposed does not include the duration of the life of the embodiment necessary to result in fixation. The expression is also used to refer to any first fixation and any fixation in any subsequent copy. In addition to audiovisual performances the given carrier may incorporate several other types of protected subject matter not limited to cinematographic or audiovisual works.

The Rome Convention defines phonograms as any exclusively aural fixation of sounds of a performance or of other sounds. The WPPT formulates it differently though the effect is the same. The WPPT defines it as the fixation of sounds of a performance or of other sounds other than in the form of fixation incorporated in a

cinematographic work or other audiovisual work.[276] The first part of the definition in the Protocol is near to that of the Rome Convention but is not limited to aural fixations, however this limitation is reintroduced by excluding fixation in cinematographic work and other audiovisual work. This gave rise to genuine fears that the notion of phonograms and the consequent protection might be lost with the reproduction of the phonogram in the audiovisual fixation.

As the word used is a fixation as against the word reproduction such a fear can be discounted also because a phonogram is itself a fixation and nothing else. There is nothing till now which may be called as re-fixation as a circumstance. Thus the re-incorporation of a fixation can only be called as reproduction. Incorporation in a new media can be called reproduction or is it just re-fixation or just fixation. Apparently the difference is that the fixation does not require prior fixation. Reproduction can only be attempted through the means of exploiting the fixation. If the fixation is exclusively aural it is a phonogram but if the fixation is not exclusively aural for instance if the images of the performance of a musician are fixed simultaneously with the musical part of it then it is an audiovisual fixation. It is a fact that in most audiovisual works including cinematographic works, the music sound track is fixed separately from images. It means that the protection provided by the WPPT for music performances fixed in a phonogram covers music performances used in such audio visual in case of reproduction, distribution, rental, broadcasting, communication to the public and making available of the audio visual work with which it has become associated[277].
In other words the aural fixation remains a phonogram despite its incorporation in an audiovisual medium. The audiovisual fixation would have no consequence on its definition and its protection. To say the contrary would drastically reduce the protection particularly in the digital context, as it is more and more easy to reproduce phonograms on the digital media with accompanying images. The WPPT conference of 1996 has been clear that it was only the audio-visual fixation that had been excluded from protection and not the reproduction of

[276] See, "FIM (International Federation of Musicians) Comments on a possible Protocol to the WIPO Performances and Phonograms Treaty, Concerning Audiovisual performances for the fourth session of the Standing Committee", FIM (2000), p.10.
[277] *Id.*,p.11.

anything into the audiovisual.[278] It does not seem essential that the phonogram needs to be published or in any manner commercially exploited. What is most comforting to the aural performer is that the protection ought not to be taken away merely because the medium has been changed. [279]

Economic Rights[280]

The envisaged Protocol intends to grant the performing artist with economic rights in their unfixed performances. They are endowed with the exclusive right of authorizing 1. The broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance and the right of authorizing the audio visual fixation of their unfixed performances[281]. The right of authorizing the broadcasting and communication to the public is qualified by the statement that it will not include rebroadcast. Even though only rebroadcast is mentioned, the notes in the basic proposal mentions retransmission as also being included within the exception[282]. The right corresponds to art 7(1) (a) of the Rome Convention and 6(i) of the WPPT and 14.1 of the TRIPS agreement .the highlight of all these agreements was that both aural as well as audio visual agreements were covered by these agreements[283].

The Indian proposition literally echoed the same sentiment as in the Protocol. Japan desired the WPPT formulae[284]. The United States speaks, wants to be vocal about it, specifically about the exclusion of repeat broadcasts but does not

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[278] Explore the new product identity when a new audiovisual product emerges from the use of prior audiovisual fixations.

[279] See, "FIM (International Federation of Musicians) Comments on a possible Protocol to the WIPO Performances and Phonograms Treaty, Concerning Audiovisual performances for the fourth session of the Standing Committee", FIM (2000), p.12.

[280] Performers shall enjoy the exclusive right of authorizing, as regards their performances:(i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the audiovisual fixation of their unfixed performances.

[281]See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO(1st August,2000), p.39,< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006. Art 6 (i) (ii) of proposed Protocol.

[282] *Id.*,p.38.

[283] See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO(1st August,2000), p.38,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.
. The authors right to affix the performances corresponds to Art .6 of the WPPT and Art 7.1(b) of the Rome convention

[284] *Id.*,p.23 ,see the comparative table of proposals received as on January 30th ,2000,WIPO

extend the same rationale to communication to the public[285]. In all there was a broad agreement with the pattern adopted and the Protocol does not deviate from the WPPT.

Economic Rights of Affixed Performances

The Protocol grants the right of authorizing the reproduction of the affixed performance either through direct or indirect means. In any manner or form. This again follows the WPPT route granted to the performers in sound records. The words direct or indirect reproduction indicates the distance from the place where the fixed performance is situated and where the copy is executed would not be a significant factor to decide the act of reproduction. The reproduction can be rendered in any manner or form.[286]

Significantly the provision does not provide a hint whether the reproduction covers temporary or a permanent storage especially considering the relevance of this question in the light of the digital mode of delivery. This was objected to by the actors' organizations. It was found essential to include the words ' permanent or temporary. It was demanded that an agreed statement on the lines of paragraph 29 of the memorandum be incorporated in the absence of the same being made part of the article.[287] The agreed statement that was formulated was found applicable to the audiovisual circumstance as well.[288] The European commission wanted the endorsement of the WPPT stand. India went along with the provisions of the Protocol.[289] Almost all the countries endorsed the Protocol extent on economic rights pertaining to reproduction.[290]

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[285] *Id.*,p.24.

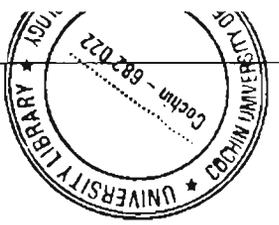
[286] *Id.*,p.40. It can be in the electronic media or by means of using whatever technique. Protocol notes.

[287] http://www.fia-actors.com/new/wipo_2000_comments_eng.htm as on 3rd February 2003.

[288] The right corresponds to Art 7 of the WPPT. See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO(1st August,2000), p.40,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.

[289] *Id.*,p.25

[290] The United States. *Id.*,p.26.



The Right of Distribution

The right of distribution refers to the physical copies of audiovisual fixations of performances of both the original and copies of the fixations. It corresponds with art 8 of the WPPT[291]. The European commission went with the WPPT. India proposed similar provisions as the Protocol[292]. The United States proposition too goes with the Protocol[293]. Not much of a difference can be discerned from the ideas expressed by other countries. It was suggested that the right of distribution should be granted with respect to copies distributed through the Internet as well[294].

The Right of Making Available

The right includes both wired and wireless means .it can be through short as well as long distances and does not cover fixed copies[295]. The technology may be analogue or digital and use any vehicular means. That can carry information[296]. The important distinctive feature of the right is that it must involve access from a place and time individually chosen by them. This would be based on interactivity and on demand access. These features bring out the distinction from the communication to the public. Further there is no exhaustion of rights in contrast to the situation visited upon the distribution of physical copies. The onus is

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[291]Article 8 states that (1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in audiovisual fixations through sale or other transfer of ownership.(2) nothing in this treaty shall affect the freedom of contracting parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer. *Id.*,p.42.

[292] *Id.*,p.27

[293] *Id.*,p.28

[294] http://www.fia-actors.com/new/wipo_2000_comments_eng.htm as on February 3rd 2003.

[295] See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences" , Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO(1st August,2000), p.47,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.
. Art. 10 of the Protocol states that the Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in audiovisual fixations, by wire or wireless means, in such a way that the members of the public may access them from a place and at a time individually chosen by them.

[296] *Id.*,p.46. Protocol notes.

specifically on the on demand functionality of access. There was broad agreement with the terms of the Protocol in the propositions put forward. The proposals do not show much derogation.[297] The European community wanted the same measures as in the WPPT.

The Right to Authorize Broadcasting and The Communication to the Public

One of the crucial sources of exploitation in the audiovisual industry has been through broadcasting and other means of communication to the public.[298] Both the terms have been defined by the Protocol.[299] The definitions take into account the width of technology and the manner of dissemination that accord with the characteristics of the digital media. It has been pointed out that the inclusion of transmission of sound in the definition of broadcasting and communication to the public if the sound track of the film is broadcast via the sound radio would not change the protective cover from the ambit of the WPPT to that of the new instrument. It is in the nature of and is used as a phonogram subject to rules of WPPT. [300] The Rome and the WPPT initiatives provide a fairly large leeway or discretion with the contracting states to regulate broadcasting and its incidental consequences. It is noteworthy that both do not provide for an exclusive right to broadcasting and communication to the public. Thus the Protocol is a major shift in this regard. Art 11 of the basic proposal grants the performer the exclusive

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[297] See, "Comparative Table of Proposals on the Protection of Audiovisual Performances, January 31st 2000", WIPO (2000), pp.31-32. Indian position is the same as the Protocol.

[298] *Id.*,p.32. From the comparative table of proposals one can discern a broad consensus with respect to the definition for broadcasting as well as communication to the public among most of the countries. The proposal of the United States also tallies with that proposed.

[299] See "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August, 2000), p.25, < http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.

Broadcasting is defined by Art 2(d) as meaning the transmission by wireless means for public reception of sounds or images or images and sounds or the representation of sounds, such transmission by satellite is also broadcasting, transmission of encrypted signals is broadcasting where the means of decrypting are provided to the public by the broadcasting organizations or with its consent.

Communication to the Public has been defined by Article 2(e) as meaning the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audio visual fixation .for the purposes of article 11," communication to the pubic " includes making a performance fixed in an audio visual fixation audible or visible or audible and visible to the public.'

[300] <http://www.fia-actors.com/new/wipo_2000_comments_eng.htm> as on 1st January 2004.

right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.[301]

Alternative Right of Equitable Remuneration

Instead of the right of authorization, a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public is proposed. Thus the contracting parties are provided with an option in the alternative to a right of authorization. However the good work in paragraphs 1 and 2 is rendered superfluous owing to the provision in 11-3, which grants the discretion to the concerned contracting party the discretion to notify the restricted use and application of paragraph 2, or that the two provisions would not be applied at all.[302] Thus the article provides a wide range of options for the contracting states to choose from.[303]

Significantly, it has to be noted that while the alternative to right to authorization that is the right to equitable remuneration is applicable to direct and indirect uses of the fixations, the right to authorization carries with it only the right to authorize direct uses as it does not mention indirect uses. While comparisons could be drawn with the WPPT- it is pertinent to note that the WPPT does not provide the right of authorization to the performer with regard to the use of their fixations in broadcasts and communication to the public. What it provides for in Art 15 is the right to remuneration. Further it must also have been published for commercial purposes. This is missing in Art.11 of the present instrument. Thus if 11-2 is

[301] Article 11 (1) of the Protocol says that performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.
Article 11(2) says that contracting parties may establish, instead of the right of authorization provided for in paragraph (1), a right to equitable remuneration for the direct our indirect use of performances fixed in audio visual fixations for broadcasting or for communication to the public. Contracting parties may in their legislation set conditions for the exercise of the right tot equitable remuneration.
Article 11(3) says that any contracting party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (2) only in respect t of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions of paragraph (1) and (2) at all. See the "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences ", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August, 2000), p.49,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.

[302] *Ibid.*
[303] *Id.*, p.48.

applied by the contracting state then it covers a wider range of activity than WPPT. Further the manner of sharing the proceeds under the Protocol is left to the nation states while in WPPT (15-2) it is first left to the performer and the producer and only in its absence the contracting states will enter the fray.

Conflicting Perspectives Regarding the Right

The formulation of Article 11 was preceded by several parleys with the producers lobby as well as the artists' NGO's and the government representatives providing significant alternatives to the discussions. It was an amalgam of statutory and collective bargaining principles that was mooted by the FIM representing the artists.[304] It is also apparent that they were not averse to the proposition of compulsory licensing also being accommodated within the ambit of protection. While the United States of America, a strong pro union and anti- statutory proponent, was in favor of a broad exclusive right of broadcasting and communication to the public, the International Federation of Musicians representing the artists proposed that with the exception of Section 11bis of the Berne Convention, the performers shall enjoy the exclusive right of authorizing, as regards their performances fixed in audio- visual works, the broadcasting and communication to the public of such performances, except where such performance is already a broadcast performance.[305] This means that all types of broadcasting and communication to the public would be covered by such a modified proposal from the USA, including rebroadcast and simultaneous retransmission.[306]

However the provision has belied the expectations of the performers in that it provides for a notion of exclusive right without any opportunity for exercising

[304] On the question of the exclusive right of broadcasting and communicating to the public , "Comments by the International Federation of Musicians(FIM). FIM (International Federation of Musicians) Comments on a Possible Protocol to the WIPO Performances and Phonograms Treaty Concerning Audiovisual performances for the Fourth Session of the Standing Committee", (2000),p.15.

[305] The last exception is surprising coming from a performers union-why has repeat broadcast been excluded. It is once again surprising that the United States has hinted the possibility of dropping the last mentioned exception.

[306] The relationship between the us lobby and the broadcasters would have to be explored as the Americans have always been clench fisted When it came to moderation with regard to cinema and other audio-visuals.

such a right either wholly or in part through a compulsory licensing system.[307] The right to equitable remuneration that is proposed excludes the notion of exclusive right.[308] The proposition moves far beyond what had been envisaged by Rome and the WPPT. The reservation clause encourages the states to keep silent on any commitment. There is an underlying tone that there ought to be a different standard of protection for the audiovisual performer in comparison to the protection extended to the phonographic industry[309].

Article 12 of the Protocol- Formulating the Rights of the Performer in Audio-Visuals

The most controversial of all the propositions placed before the several panels that discussed the issue of performers rights in the audio-visual industry has been the one regarding the relationship between the artist and the producers, the broadcasters and other communicators to the public in the post fixation stage.[310] In order to trace the lineage of the present standpoint in this regard it would be pertinent to note that works in cinematographic works had always been treated differently from the rest of the works. It can be seen that right from the Berne Convention onwards the audiovisual realm has been treated distinctly.[311]

The Rationale for the Incorporation of the Right

The need for a provision guaranteeing a clause on transfer of rights was felt essential because of the need for business certainty for the distribution and exploitation of audiovisual fixations. This was to strengthen the international legal framework for protection of performers rights at the same time preserving the

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[307] FIM Comments on Basic Proposal IAVP/DC/3(2000), Oct.11, 2000, p.10.
[308] *Ibid.*
[309] *Id.*,p.11.
[310] Von Lewinski, "The WIPO Diplomatic Conference on Audiovisual Performances" [2001] E.I.P.R. 338.
[311] See Article 14 and Article 14bis of the Berne Convention. The Berne Convention has been most accommodating to the cinematographic producer through Art 14 and 14 *bis* of the Convention.

potential for bargaining.[312] This resolve has to be seen in the light of WPPT where in there has been no mention of a transfer clause with regard to performers' rights in phonograms. This was found indispensable with respect to audiovisual fixations because the fixation normally involves a multitude of performers. On the international stage, the performers were even from different nationalities. The apprehension was based on the novelty of the new right and the way to work it in the system. The states must be possessed of sufficient means to deal with the rights. [313] The rights and the way it was being managed in different countries varied from country to country. Art 12 was found to be the compromise between these differences. The major fear was whether a single performer would obstruct the exploitation of a product that had demanded great investment and manpower. The idea received impetus from the attitude displayed by national legislations and the Berne Convention towards the relationship between contributing authors rights and the author of the cinematograph.[314]

Article 12 of the Protocol that deals with the assignment of rights was peppered with different alternatives, as it was a most contentious issue. The alternatives ranged from outright transfer to the producer,[315] entitlement to exercise rights on the part of the producer,[316] according to the law applicable to the transfers of the respective countries[317]. Owing to the strident conflict of interest the solution has

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[312] See the "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO(1st August,2000), p.52,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.

[313] *Ibid.*

[314] *Ibid.* A grave error appears to have been made in the notes to art 12 in the basic proposal for audiovisual Protocol in that the reference to Art 14bis (2) (b) was unwarranted as the Provision dealt with only the entities that were provided the authorship in the film copyright. The performer is never considered as an author of the cinematograph rather a distinct right is to be vested in the performer.

[315] Once a performer has consented to the incorporation of the performance in an audiovisual fixation, he shall be deemed to have transferred all exclusive rights of authorization provided for in this treaty with respect to that particular fixation to its producer, subject to written contractual clauses to the contrary. Alternative E. *Id.*,p.55.

[316] *Ibid.* In the absence of written contractual clauses to the contrary, once the performer has consented to the audiovisual fixation of his performance, the producer shall be deemed to be entitled to exercise the exclusive rights of authorization provided for in this treaty with respect to that particular fixation (Alternative F).

[317] *Id.*,p.57. In the absence of any contractual clauses to the contrary, a transfer to the producer of an audio visual fixation of a performance, by agreement pr operation of law, of any of the exclusive rights of authorization granted under this treaty, shall be governed by the law of the country most closely connected with the particular audio visual fixation. (2) The country most closely connected with a particular audiovisual fixation shall be (i) the contracting party in which

been elusive and the issue has become the major bottleneck for the Protocol to cross the final ratifying point.[318] The producers were vehemently for the inclusion of a transfer of rights while the performers looked upon any such measure with circumspection.

The First Alternative of Rebuttable Presumption of Transfer –Possibilities and Criticism

The proposition is characterized by a rebuttable presumption of transfer once the consent of the Performer is elicited. It is significant that it is only a mere consent that is required. There is no requirement of any mandatory formality in the like of a written instrument. These are left to the discretion of the particular nationalities jurisdictions. Another noteworthy feature is that it is not any of the rights but whole lot of the exclusive rights granted under the instrument that is made over to the producer. The extent of the transfer is limited to the particular audiovisual alone and the rights that accompany but not to the creation of another audiovisual.[319] The effect of rebut table presumption was to be confined to the economic rights alone and not to the moral rights.[320] The alternative was to be mandatory on all parties. An optional basis was however not ruled out. An option however does not impart any security to the producers, as variations would create instability to the administration of the rights. A significant facet of the rebuttal is that it must be in a written form and circumstances would not be enough to indicate the rebuttal.[321]

The need for the transfer clause was felt necessary because rules governing the contractual arrangements between the producers and performers were

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the producer of the fixation has his headquarters or habitual residence ;or (ii) where the producer does not have his headquarters or habitual residence in a contracting party, or where there is more than one producer, the contracting party of which the majority of performers are nationals; or (iii) where the producer does not have his headquarters or habitual residence in a contracting party ,or where thee is more than one producer ,and where there's no single contracting party of which a majority of the performers are nationals ,the principal contracting party in which the photography takes place (Alternative G of Article 12).

[318] The performers rights organizations participating in several international conclaves were proactive in their approach to their attempt at forging a consensus on the question of audio- visual performers rights transfer.

[319] *Id.*,p.54.

[320] *Ibid.* Though this would require a keener interpretation to find the difference or the discrimination between the excl of filtering the moral rights from the exclusive rights of authorization and the term economic rights do not qualify these rights.

[321] *Ibid.*

considered essential to provide legal security on an international basis.[322] The point being stressed was that performers rights ought not to be pursued at the cost of producers' interest. The reference was made to the umpteen numbers of countries that had a system of transfer of rights in vogue. The producer was the repository of the rights who would decide on the commercial exploitation of the audiovisual works. This was considered essential in view of the plurality of rights and need of multiplicity of clearing shops. The emergence of new delivery platforms in an e- commerce and online driven world further complicates the scenario. The detriment would be on the investment in the film production if the system of transfer of rights were not in place.[323] The alternative of choice of law option was not favored by the non-American producer coteries because the system would ultimately help American interests that held 80 percent of the share in English cinema market[324].

The performers led by International Federation Of Musicians (FIM) were very much against any presumption of transfer or of performers rights to the producers including the inclusion of a so-called rebut table presumption. They viewed this as an unfair provision. According to them this goes against fair bargaining on a level playing field.[325] Such a status of presumption is an obstacle to the development all over the world of collective management of performance rights by performance organizations. Particularly for those fixations on the blurred borderline between audio and audiovisual performances, it would certainly have a negative impact on the audio field[326]. They are concerned that the inclusion of a presumptive class would establish an inequitable balance between performers and those who purchase their services. To counter this deficiency or correct this imbalance, it would be essential for a strong performers organization to be

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[322] See "EFCA - Position Paper by European Film Companies' Alliance at The Diplomatic Conference on Audiovisual Performances", EFCA (2000), p.2.

[323] *Id.*, p.3. There was an inclination, though that the implementation could be left to the respective nation states.

[324] *Ibid.*

[325] See, "FIM (International Federation of Musicians) Comments on a Possible Protocol to the WIPO Performances and Phonograms Treaty Concerning Audiovisual performances for the Fourth Session of the Standing Committee", FIM (2000), p.12.

[326] *Ibid.*

functional however this is quiet a rare phenomenon particularly in developing countries.[327]

The United States of America had been consistently maintaining that the performers organizations in their state had agreed to the inclusion of presumption of rights transfer. However this was misleading. The FIM also opposed the philosophy behind presumption of rights, as it is apparently to ensure producers of audiovisual works the business certainty that they could exploit these works globally. In the opposition to this International Federation of Musicians have agreed with the European union, in critically pointing out that the major purpose of the Protocol was to improve and modernize the protection of audiovisual performer rather than producers who are protected elsewhere.[328]

This has been corroborated by the observations of the delegation of South Africa that felt that the performers in developing countries lacked collective bargaining mechanisms as well as lack of resources and of access to legal services. A mandatory provision of such a nature was not a feasible proposition practically according to the African group such a provision would sterilize the rights of the audiovisual performance since they would be enforceable by any one. Even the collective management of the performers rights would be difficult in such a scenario. A relationship was also attempted to be brought about between the Berne Convention provisions with regard to presumption and the current endeavor on audiovisual performance. The highlight of these proposals is that the performers can rebut the presumption through a written contractual clause. The International Federation of Musicians see that practical possibility of the performers invoking the their rights through contractual clauses to be conceptually unrealistic.[329] The presumption becomes compulsory when there is no written contract between the performer and the producer. Further according to the International Federation of Actors, the actors in several countries worked for little or no remuneration without a written contract. It is the same for musicians

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[327] *Ibid.*

[328] *Id.*, p.13.

[329] *Id.*, p.14. As stated by the ILO (International Labor Organization) the performer is a worker and there is an increasing precariousness in contractual arrangements for performers. It is natural that the performer would first try to get employment rather than haggle even if the terms are precarious.

and dancers. Performers have to individually bargain with the possible employer in order to rebut the presumption. This circumstance that is envisaged is illusory.

Another important issue that is essential fallout of this provision is the problem posed by the increasing juxtaposition of performances in audio and audiovisuals. This is particularly so because audio performances of today are also transposed as audiovisual products. This would lead to an erosion of the protection accorded to audio performances through prior Conventions and national legislation. Very significantly, the International Federation Of Musicians were of the opinion and argue that any system of presumption is not a necessity in the world where transfer of rights can be quite achievable by a written contract. Where written contracts are compulsory there is no uncertainty as to the nature or the extent of the rights. The incidence of presumption merely strengthens one side of the contractual negotiations- that is of the producer.

Alternative F

The provision was inspired from the Berne Convention .it provides for a presumed entitlement to exercise the rights. In contrast to the transfer proposed by the Alternative e. The common factor being that the written clauses to the contrary would be necessary to rebut this presumption. Once again only the economic rights are presumably to be exercised by the producer and not the moral rights. In contrast to the provision in the Berne Convention authors may not object. In that authors continue to be owners of their rights but the rights are not exercisable against the user. However under alternative f, the producer would be expressly and properly entitled to exercise the exclusive rights of authorization provided in this treaty. However the performers would still own their rights and could assert the rights against the third parties to the extent of any unauthorized use or, subject to applicable contracts or national legislation, claim remuneration from the producer. In this arrangement the producers would have certainty in the marketing of their product while the performers would be able to have continued ownership over their rights while the exercisable right is imparted to the producer[330].

[330] See the "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August, 2000), p.54,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.

Alternative G was influenced by the requirements of private international law. This is the commonly resorted form to decide on questions of legal applicability in the absence of commonly agreed legal framework between the countries. The proposition leaves it to the countries to decide on the model of protection that it would require. It takes into account the international situation and provides a solution to the situations involving an international element. It does not propose a specific model that for the sake of the performer or the producer needs to be followed by all the countries. Thus the alternative serves a functional purpose and not a plan or model for the nation states. It merely advises on the formulae to be adopted in case of confusion with regard to applicability of the law.[331]

This is subject to the existence of a contract to the contrary. It does not advise whether the transfer to the producer must be through operation of law or through mutual contract. It merely maintains that the legal regime determining this shall be according to the law of the country with which the contract is most closely connected. It provides for three points of attachment to determine which is the law of the country most closely connected with the particular fixation. This is as good as Alternative h which is a no provision providing an advantageous environment to the producer with the saving grace being the guide to harmoniously solve the private international law question[332]. In this regard the Indian proposition while agreeing with a presumptive transfer provides for certain safeguards[333]. Article 11 transfer of Rights (1) In the absence of any contract to the contrary, once the performer has by written agreement consented to the audiovisual fixation of the performance, he shall not object to the enjoyment by the producer of the exclusive rights of authorization specifically granted to the performer under his Treaty in respect of such fixation, for the purpose for which such fixation was made. (2) It is for the legislation of the Contracting Parties to determine the manner of enforcement of this provision. It is significant that India had broached the idea of a written consent. Further there is no utterance for any presumption of transfer of rights. Rather this appears in broad agreement with the

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[331] *Id.*,p.56.
[332] *Id.*,p.57.
[333] <http://www.wipo.int/documents/en/meetings/1999/sccr_99/sccr2_9.htm> on the Indian proposal.

alternative f where in the producer is entitled to exercise the rights alone. There is no transfer or assignment of rights not does any presumption come into play. Further it is clearly stipulated that rights shall apply only for the fixation for which the consent was granted. There is nothing in this, which suggests that only the producer is entitled to exercise the rights. There is nothing to suggest that the producer shall exercise the rights on behalf of the performer. This means that a parallel enjoyment of the rights is retained with the performer with respect to the performance that is affixed.

An important source of conflict was the opposing stand taken by the European union and the United States of America with regard to the incorporation of the right. The European union was against any stringent transfer of rights norms and wanted the widest possible discretionary powers to be bested with the respective nation states. It wanted the performer to retain the rights and grant the producer only the entitlement to *exercise* the rights. They wanted any clauses on transfer to be in tune with the legal traditions and practices in their respective countries. Already in different degrees the transfer of rights was being practiced in different countries.[334] Some of the countries like Japan also wanted a specific transfer of particularly mentioned rights rather than a transfer en-mass without restriction. The Japanese proposal also contained an option.[335] The United States in contrast was emphatic about the total transfer of rights to the producer. With the exemptions being limited to the moral rights and the rights of remuneration.[336]

Among the non-governmental organizations that gave its views the most vocal was the International Federation of Actors that represented several organizations actively engaged in the collective bargaining and administering process in leading film-producing counties like the United States of America. The organization was forthright about its suspicion of the alternatives presented with respect to the transfer of rights norms in the basic proposal. A mandatory transfer of rights was opposed by the IFA. Such a compromise would in all likelihood tip the balance in

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[334] See, Comparative Table of Proposals Invited for the Diplomatic Conference, WIPO (1999), p.29.

[335] *Ibid.*

[336] *Id.*, p.30. However the savings with regard to the rights of remuneration is not reflected in the alternative E Of the basic proposal

favor of the stronger party. It would transform the objective of the instrument from being a instrument for protecting the interests of the performer to being that of the producer. The proponents of the transfer policy have not been able to point out a single example were in the performers have obstructed the course of exploitation of the film because of their rights. The transfer provisions would also have an impact by way of countries lowering the protection granted to the performers. In great many countries the performers have not even recovered the dignity of written contracts and that are invariably the weaker party[337]. With respect to alternative f the organizations felt that it presented only a slight variation from the preceding alternative. Although it was modeled on the presumption of legitimation in Art 14 bis, it omits the exception granted under Art 14(bis) 3 in which only peripheral contributors are covered. The same drawbacks exist as has been inferred about the preceding option.

It is significant that the International Federation of Actors was more in agreement with the proposition G. It felt that it ought not be impossible for the instrument to recognize contracts made in other countries. It was significantly pointed out that as proposed by the alternative, the transfer must not be means of the operation of law but rather should be by means of written agreement. Otherwise it would amount to legal expropriation of the rights of the performer exclusive rights that cannot be condoned by an international treaty. This requirement cannot be said to negate the rule of law of the relevant country for the interpretation of the transfer agreement including such rules that determine the scope of the transfer. A written agreement of transfer would be absolutely essential to enable the performer to ascertain both the identity and the nationality of the producer to whom the rights have been transferred if it is based on oral agreements that would have definite disadvantages. Further in oral agreements the dependence would be on private international rules. Rights of remuneration should not be included in the transfer provisions. By assimilation exclusive rights, which are provided in the national laws, are subject to mandatory collective administration or to extended collective licensing, are in effect to carry the practical nature of the remuneration right. These should not be subject to transfer provisions. The International Federation Of Actors also advanced other conditions for the transfer

[337] < http://www.fia-actors.com/new/wipo_2000_comments_eng.htm> as on 1st January 2004.

regime to be acceptable. The agreements should specify which are the rights being transferred. There ought to be no transfer of rights in respect of uses that do not as yet exist. There ought to be remuneration paid as consideration for the transfer of rights. There is no accommodation to the stand of irrefutable presumption of transfer. These are the minimum conditions that have to be made.

With respect to the point of attachment, the organization has a critical perspective. More better than the country most closely connected with the audiovisual fixation clause, it should have been the country most closely connected with the agreement clause that should have been applied. It is unfairly narrowed to audiovisual fixations while its actual ambit should have been the audiovisual fixation. The treaty does not define who is the producer. The habitual residence criteria could result in legal system shopping. In international co productions the question as to who is the producer is unclear. This would also be subject to change.

If the criterion were based on the nationality of the majority of the performers it would result in arbitrariness and uncertainty. If it is to be the principle place of photography that too has its handicaps and is illogical. It would be the imposition of the majorities' point of nationality on the minority in which the pivotal performers and others might not determine the equation. Instead of one or the other the courts should be allowed to take all these factors as well as other possible relevant points of attachment into consideration. If these cannot bridge and resolve the issue then the silent alternative would be a safe option.

The proposed Article 12 of the Convention says that the performer shall be deemed to have transferred all exclusive rights of authorization subject to written clauses to the contrary. It is significant to note that the word used is transferred and not assigned. Thus there appears to be no need of any formality even if the consent is retracted. Secondly, there does not appear to be the need for actual fixation but only consent for fixation. The pros and cons of this subtle difference would need to be addressed. It is noteworthy that it is the written contract to the contrary that would displace the presumption. Thus any equitable circumstance is not considered at all. Further it is to be pondered whether the written contractual clauses need to exist at the time of the consent to affix or whether it could be

brought in later. The difference from the earlier Convention is stark as in earlier ones the contractual preponderance is not provided for at all.

Limitations and Exceptions in the Protocol

The Protocol envisages the same limitations and exceptions with respect to the protection of performers in their audiovisual fixations as his provided to the literary and artistic works authors under the national legislation.[338] It follows the same form as was adopted in the Article 16 of the WPPT. That is fair dealing provisions. It is to be noted that the word used is` may' and not `shall' and so even if the same pattern and standard is not followed it would be sufficient compliance. However it has been strictly laid down that this allowance should not conflict with the normal exploitation and should not unreasonably prejudice the legitimate interests of the performer. Under Article 13-2 in the Protocol wider words have been used to encompass more circumstances than compulsory licenses (that has been specified in the Rome Convention) that would obstruct the due realization of performers rights through the application of exceptions.

The Moral Rights of Performers in Audiovisuals

According to the propositions envisaged in the Protocol, moral rights are to subsist in the performer even after the transfer of the economic rights.[339] The

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[338] Article 13 of the Protocol.

[339] See the "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3,WIPO(1st August,2000), p.33.
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.
. Art 5 of the Protocol says that (1) independently of a performers economic rights, and even after the transfer of those rights, the performer shall have the right (i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and (ii) to object too any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation. Modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer shall not be considered prejudicial to the performers reputation. (2) The rights granted to a performer in accordance with paragraph (1) shall after death be maintained at least until the expiry of the economic rights, and shall be exercisable by the person's or institutions authorized by the; legislation of the contracting party where protection is claimed. However, those contracting states whose legislation at the, moment of their ratification of or accession to this Treaty, remedies not provided for Protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained. (3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the contracting party where protection is claimed.

moral right shall grant the performer in the audiovisual the right to be identified as the performer of his performances except where the omission is dictated by the manner of use of the performance. The performer shall have the right of objecting to any distortion or mutilation or other modification of his performances that would be prejudicial to his reputation. However, there are exceptions to these Rights. Art. 5 of the Protocol provides that modifications consistent with the normal exploitation of the performance in the course of use authorized by the performance shall not be considered to be prejudicial to his reputation. It is pertinent to note in this regard that this condition is absent in the WPPT.[340] It noteworthy that in the envisaged instrument the modification consistent with the normal exploitation of the performance is conceded as an allowance subject to the condition that it must be in the course of the use authorized by the performer. It is noteworthy that the exception is appended only to modification and not to objections against distortion or mutilation.

The ramifications of this provision and the exception to it are worth an analysis. The WPPT provides exceptions to the moral rights only in case of omission dictated by manner of the use of performance with respect to right of identity.[341] In the Protocol both the manner of use of the performance with respect to identity and modifications consistent with the normal exploitation of the performance with respect to integrity are taken as exceptions. In other words, the modification of the performance can be done even if it is prejudicial to the reputation of the performer if it is consistent with the normal exploitation of the performance. This exception is not provided for in the WPPT.[342] Thus mutilation and distortion cannot be saved by way of any exception. The crucial question as regards the second clause would be the point at which a modification can be termed as distortion and mutilation. The assessment of the sections would show that wide phraseology has been attempted as exceptions that could lead inevitably to a lot of confusion in interpretation. For instance the phrase 'manner of use' appears to be wider than the phrase 'normal exploitation'.

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[340] Article 5(1)& (2) of the WPPT.
[341] *Ibid.*
[342] *Ibid.*

A scan of Art 6bis of the Berne Convention reflects wide ranging differences between the moral rights guaranteed to authors and artists as distinguished from the protection guaranteed to the performers. This is particularly so with regard to the aspect of right to integrity. Even with regard to the right of identity an exception has been added that does not appear in the Berne Convention- the exception of 'manner of use of the performance'. This provides a highly flexible valve for the performer to be denied the attribution of paternity. The right to integrity is also clipped in several respects. The wordings *'other derogatory action"* in relation to the said work is missing in the Protocol and also in the WPPT and secondly the word 'Honor' that appears with the word reputation is also taken away thereby narrowing the cause of complaint still further. The clause with regard to the normal exploitation further weakens the protection.

The right to integrity against distortion, mutilation or other modification would arise only if the same is prejudicial to the reputation of the performing artist. Thus any damage falling short of this standard would not be tantamount to the violation of the moral right. The Protocol moots an objective criterion to be assessed from the point of view of an objective viewer with experience in the pertinent category of audiovisual productions[343]. The element of subjectivity appears to be fairly high in both adjudging the violation of right to paternity as well, as the right to integrity.

An aspect of significance is that the exception of manner of use with respect to the right to identity can be resorted to even with respect to uses not mandated by the author but the normal exploitation as an exception to the right to integrity can only be exercised if it is exercised in respect of uses authorized by the performer. As to the connotation of the words 'normal exploitation' a more specific elucidation appears to have met with difficulties considering the changing technological turf on which the media industry is placed.[344] In the illustrative

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[343] See , "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO(1st August,2000), p.34,< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.

[344] Von Lewinski, "The WIPO Diplomatic Conference on Audiovisual Performances" [2001] E.I.P.R. 337. A most controversial provision was the one about the moral rights. There was tremendous opposition to the incorporation of this exception particularly from the European community. The United States offered to replace the words with the phrase customary practice with agreed statement of specific inscription of what these (*F.N.cntd.next page*) customary

suggestions made in the notes to the Protocol normal exploitation has been defined as to include the use of new or changed technology, media, formats and /or methods of distribution, dissemination, making available or communication to the public. It is noteworthy that the definition takes into account only the mode of communicating the work[345]. Thus unlike the popular understanding cannot be considered to include abridgement, condensation, editing and dubbing.

The question of attributing moral rights has been considered to be of fundamental importance by the representatives of the actors. This was particularly so in a digital environment. They were skeptical of the exceptions like those of the normal exploitation. According to them it should be limited to modifications necessitated by the particular use of the fixation. The exclusion of the words 'derogatory action' was found objectionable. There was the need to include this premise as well like in the Art. 6bis (1) of Berne Convention.[346] The prospective application of moral rights was found disagreeable by the actors' organization, as it was retrospective application that was most critical in a digital environment. [347]

Duration of Moral Rights

Art 5(2) provides for the duration for which the performer or his representatives can exercise the moral rights. It is to last until the expiry of the economic rights. It does not cease upon the death of the performer, anything beyond this minimum can be statutorily granted by the contracting parties. With respect to designating the person or the institution that, after the death of the performing artist, are to exercise the rights, the Protocol provides full freedom to the contracting parties to do the needful. No minimum requirements have been made in the Protocol in this respect.[348]

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practices were composed of. The European community did not want the use of the phrase but only an agreed statement that mentioned the kind of activity like formatting or editing that would not be considered prejudicial to exploitation. Finally provisional agreement was modification taking due account of the nature of audiovisual fixation.

[345] *Ibid.*

[346] <http://www.fia-actors.com/new/wipo_2000_comments_eng.htm> as on 1st February 2003. The example of the possible situation of inserting pornographic bits into the film has been cited.

[347] http://www.fia-actors.com/new/wipo_2000_comments_eng.htm as on 1st February 2003.

[348] See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences",*(F.N.cntd.next page)*

No Mention About Means of Redress

Significantly the Protocol does not attempt to set forth or provide any hint with regard to the means of redress when the rights are violated.[349]

Waivability Not Stressed

A most conspicuous omission is the absence of any objective stricture against waivability. This can be critically said to hurt the intent of moral rights jurisprudence as the performers are always placed in an unfair bargaining position. There is no mention of the possibility of alienability of the right or even inter-vivo transfer.[350] Though this might appear to be remote with respect to the right of paternity, a transfer of the right to take a decision with respect to integrity cannot be ruled out. Further no guideline as to the manner of execution of the instrument has been proposed leaving the entire execution to the contracting states. In this regard it might be reminded that collecting societies and other administrators might not have as much interest in the moral rights regulation as in the economic rights. According to the International Federation of Musicians (FIM), the qualifications to the moral rights that have been granted would effect an unfair discrimination and enhance legal uncertainty[351]. The same quantum of protection as was carried in the WPPT has not been carried onto the Protocol and artists feel that the provisions of the WPPT need not be diluted in the application to the audiovisual performances.[352] Another significant concern was raised as to how the sound part of an audiovisual communication was to be treated from the moral rights platform.[353] The issue in question is whether the standards for the

) Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3,WIPO (1st August, 2000), p.36,
< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006.

[349] *Id.*,p.37

[350] *Id.*, p.36.

[351] See the "FIM (International Federation of Musicians) Comments on a possible Protocol to the WIPO Performances and Phonograms Treaty, Concerning Audiovisual performances for the fourth session of the Standing Committee" (2000), p.14.

[352] *Id.*,p.15. ' The establishment of a moral right in the WPPT represented a formal acknowledgement that the performance is a creative expression of the personality. It is surely illogical to suppose that this is less so in then audiovisual field than in the audio'. During the conclave the majority of members favored an extension of the WPPT clauses on moral rights to the audiovisual performances.

[353] *Id.*,p.14.

phonograms or the lesser rights in audiovisuals would be applicable to performers on the soundtrack.

One cannot discern any major deviation in sentiment among the countries that have contributed their propositions.[354] A verbatim replica of the moral rights grant under the WPPT was desired by many of them. Among a slightly varied proposal the United States proposition was noteworthy for its intent on creating a narrower space for the right to integrity. This would have essentially granted much more freedom to the producers to exploit the performance. The condition essential to violate was to 'seriously prejudice' the reputation of the performer. The final draft of the basic proposal does not carry the term 'seriously' and therefore lightens the onus on the performing artist.[355] Another aspect suggested by the United States was the incorporation of the additional clause requiring the performers moral rights interests to be accommodative to similar rights to be enjoyed by the other contributors.[356]

The provisional agreement on moral rights replaced the controversial words 'modifications consistent with the normal exploitation of a performance' with the words 'talking due account of the nature of audio visual fixations,' complemented by an agreed statement.[357]Despite the complexity of issues aggravated by opposing perspectives and practices a provisional agreement was achieved on 19 Articles of the convention and a call was given to convene another conference by September 2001.[358] However the final formalization of an instrument has remained inconclusive. However this exercise at the international realm did bring to the fore the national, organizational standpoints on various issue and also impelled several studies both by the WIPO and other jurisdictions into the question of audiovisual performers and the realization that the audiovisual

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[354] See, "Comparative Table of Proposals received by International Bureau for Protection of Audio visual Performances by Jan 31, 2000", WIPO (2000), pp.19-22.
Senegal did not provide for normal exploitation as an exception (p.20). Japan was for the application of the WPPT provision in the context of the audio visual, therefore with respect to the right to integrity no exception would have figured (p. 20). For the proposition of certain states of Africa (p.18). Certain states of the Caribbean, then European commission and its member countries were for the application of WPPT provisions (p.19). Significantly India was for the normal exploitation qualifying the right to integrity. The Indian proposition comes close to what is reflected in the Protocol. (pp.19-20).

[355] *Id.*, p.21. This was vehemently opposed by the European community a well as the performers organizations.

[356] *Id.*,p.22

[357] Von Lewinski, "The WIPO Diplomatic Conference on Audio Visual Performances" [2001] E.I.P.R. 337.

[358] *Id.*,p.340.

performers rights at the national level would need to be a fine balance between safeguards and administrative flexibility both for the performer as well as the producers.

CHAPTER 7

THE PERFORMER AND THE LAW IN INDIA

Objective of the chapter: The chapter traces the history of the status of the performer in India. It endeavors to explore possibilities of common law protection and to analyze the approach of the judiciary to the issue of performers' rights. It attempts to clinically analyze the existing statutory protection for the performer under Copyright Act, 1957 and assess its strengths and deficiencies in the light of the international instruments and the need for realizing optimum protection and efficient administration of rights. The chapter undertakes a critical evaluation of the statutory protection presently available for the performer in India.

History of Performers Status in Ancient, Medieval and the British Period in India

The tradition of performing arts and its perseverance through time in India can be attributed to its association with religion and mythological lore[1]. The genesis of performing arts can be found in the mythology of the Hindu religion in which it has been recognized as the fifth Veda.[2] Its profound presence can be felt in rituals and temple traditions. Music and the seven *swaras (*sounds) were considered as having been passed down from the gods to the mortals.[3]

The pursuit of performing arts as a professional pursuit was also in vogue in ancient India.[4] Actors were trained and used to visit the cities and villages and state capitals to seek favor and patronage from the royalty.[5] The king was to provide the protection[6]. There were exclusive dramatic troupes and the artists

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[1] M.L. Varadpande, *Invitation to Indian Theatre*, Arnold –Heinemann, New Delhi (1st edn. -1987), pp.9-10. From aboriginals to Mohenhjadaro and Indus drama took shape independently as ritual and popular entertainment.

[2] The treatise of Natyashastra. R.S.Nagar (Ed.), *Natyashashtra Abhinava Bharathi*, Parimal Publications (1st edn.-1981),p.5.

[3] S. Bandhopadhyaya, *Indian Music Through the Ages*, B.R. Publishing Corporation, New Delhi (1st edn. -1985), p.9.

[4] As the term performing arts is synonymous with theatre most commonly the association is made with the same in the various treatises on the subject.

[5] M.L. Varadpande, *Invitation to Indian Theatre*, Arnold –Heinemann, New Delhi (1st edn. -1987), p.19.

[6] *Id.*, p.21.

lived as a separate social class with a lifestyle and status of their own. The troupes used to travel from place to place for their performances. There were low wandering actors as well as well-known actors and actresses with immense patronage.[7] The actors and the supporting cast were differentiated on a theoretical scale [8]. Acting as a discipline was explored as a science and studied. documented and consolidated as a theory for practice of the same. Thus one finds a study and understanding of the pursuit of acting having an amazing academic refinement and a structured scientific methodical approach to theatre. This is symbolic of the seriousness with which the theatrical arts and in particular the performing arts was viewed in ancient India.

Though the performing arts were seen as significant component of the religious tradition nevertheless the artist did not enjoy the status that befitted the divine origin that was attributed to the arts[9]. In actual practice the artists occupied the lowermost class of society.[10] The performing arts and its practice was also affected by the stratification in the society on the basis of caste. The performing artists commonly belonged to a particular class that solidified into a caste.[11] There were connoisseurs among the kings and others who were avid patrons of the arts in ancient India.[12] The artists professionally occupied low social positions dependent on the society for patronage or the rulers for patronage and sustenance.[13] The artists lived as a distinct social class and were not generally considered of respectable status. The low social position was complemented by the low economic position enjoyed by the majority of the performing artists who

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[7] Anupa Pande, *A Historical and Cultural Study of the Natyashashtra of Bharatha*, kusumanjali Prakashan, Jodhpur (1st edn.-1991), p.27.

[8] *Id.*, p.6. Mentioned in the *Arthashastra*. Professional qualifications and standards were high.

[9] *Ibid.* They were not even considered as reliable witnesses in a court of law.

[10] M.L.Varadpande, *History of Indian Theatre*, Abhinav Publications, New Delhi (1st edn. - 1987), p.185.

[11] But this was more true to the folk arts rather than the classical arts. In the preservation of the latter art tradition the elite class were actively interested.

[12] *Id.*, p.186. Emperors of dynasties such as Chandraguptha Maurya were all ardent followers and artists themselves and played such demanding musical instruments such as veena and have a very entertaining court that provided patronage to several great performing artists.

[13] In ancient India the artists were the objects of certain special privileges and limited state patronage and were also subject to taxation. Salaries were provided to performing artists from the courts on a scale fixed by the state. Kautilya in his treatise Arthashashtra says that kkushilavva should get 250 panas per year but the maker of musical instruments must get double the amount. 1000 panas to the narrator of puranas and the bards. gamaka at 1000 panas per annum and to gain liberty her son had to pay 120000 panas or serve the king for eight years as an actor. They were to be on the personal staff and regular employment was to be given to these personnel.

had to depend on the state patronage for sustenance or on the charity of the public. Wealthy merchants and all members of the Hindu community were patrons of temples and the arts[12]. The temple too supported dance teachers[13]. When the artist began performing a part of her earning went to her guru[14]. Without the patronage of the rulers or musicians could not have developed the art to a high standard[15]. In short in ancient India dance was hereditary and patronized by the temple, the royal courts and the aristocracy.

There is documentation that shows that during the medieval period that natyas came out of the financial protection of the kings and aristocrats and from the physical limitation of their palaces and took to open spaces except *kuttiyatom*. Traditional theatre is stated to have taken roots related to the life of the people and based on their involvement and patronage. Patronage through the traditional methods was ebbing[16]. Between the 13th and the 16th centuries, the Muslim invaders extended a lot of patronage to the field of music. Different art forms like *quawwali* particularly Middle Eastern – Arabian origin found great encouragement but royal support was available irrespective of religion. Public concert was practically unknown with respect to classical musicians and they were well protected by their admirers[17]. During this period musicians who acquired an appointment at an eighteenth century or nineteenth century royal court usually received a generous monthly stipend and often a grant of landed property as well. He was ranked very highly and often enjoyed a specific honorary title[18].

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[12] Prof.V.Subramani, *The Sacred and the Secular: Symbiosis and Synthesis –Roots of Drama in Hindu Religion* in Prof .V. Subramani (Ed.), *The Sacred and the Secular in Indian Performing Arts*, Ashish Publishing House, New Delhi (1st edn. -1980), p.38.

[13] Annie Marie Gaston, *The Place of Indian Classical Dance in Traditional Indian Culture*, in Prof. .V. Subramani,(Ed.), *The Sacred and the Secular in Indian Performing Arts*, Ashish Publishing House, New Delhi, (1ST edn. - 1980), p.62.

[14] *Id.*,p.12 .The dancer was accepted by her guru at the age of seven or eight and trained for years in order to become an accomplished performer.

[15] *Id.*,p.70 .

[16] Nemichandra Jain, *Indian Theatre, Tradition, Continuity and Change*, Vikas Publishing House Private Limited, New Delhi (1st edn. –1992), p.56.

[17] S. Bandhopadhyaya, *Indian Music through the Ages*, B.R. Publishing Corporation, New Delhi, (1st edn. - 1985), pp.34-38. Though there have been instances where in *gharanas* had to venture to other fields because of lack of support. For instance the Dhrupad Gharana –*Id.*, p.109.

[18] The title " Tansen" given to Hussainnuddin Khan Saheb by the Raja of Alwar.
Naomi Owens, *The Dagar Gharana, A Case Study of Performing Artists with Special Reference to Ustad Aminnuddin Dagar*, in Bonnie C. Wade (Ed.), *Performing Arts in India (Essays on Music, Dance and Drama)*, Center for South and South East Asian Studies, University of California, Berkeley, California (1st edn.-1983), p.158.

The gharana system of imparting learning in the performing arts was prevalent[19]. Though the system can be said to have moorings in the *guru shyshya* teaching model of education. While the *guru shishya-parampara* did not restrict teaching to be imparted to the children of the teacher alone other than the restrictions based on the eligibility of twice born castes to be initiated, the musical system of *gharana* was particular that the core of the teaching ought not to seep outside the contours of the lineage.[20]. Some of the *gharanas* were quiet rigorous with respect to the innovations and style with which they were identified with that even strong strictures were laid down if ever the knowledge came into the hands of outsiders. Though there were apparently no legal norms that appear to be violated when there was an untoward seepage of the creation to the outside world without authorization but it was the norm among the *gharanas* that there should not be unauthorized practitioners of the form that was followed by the school of music. Once again it has to be noticed that it was not the performance of the same that was restricted or regulated but the transfer of learning by oral or documented means[21]. Thus there were protectionist measures but that was not synonymous with a refined notion of intellectual property as understood in Britain and Europe during the corresponding period

The advent of the British rule brought in its wake a performing culture akin to the theatre and entertainment trends in Britain and Europe.[22] Stage performances were held with professional theatre performers from England and India[23]. Good actors commanded huge prices[24]. The professional performers were hired on contracts entered into for a period of engagement.[25] However just as in England,

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[19] This model can be perceived both in the Hindu stream of classical music as well as those who pursued the Persian school of music called the Hindustani music.

[20] Even if outsiders were allowed to learn under the tutelage of the guru it was rare for them to be exposed to all the nuances of training in comparison to the rightful successors by way of lineage.

[21] There are instances were in the guru who was on his last days has agreed to teach an outsider provided the notes would be destroyed after the same was indoctrinated taught conveyed to his children.

[22] Hemendra Nath Das Guptha, *The Indian Theatre*, Gian Publishing House, New Delhi (1st edn. - 1988), p.82. On the position of the actor. The audience had to pay for entry to these performances that ranged from Rs. four to Rs. twelve to see the performances.

[23] *Id.*, p.231. Ticket rates and patronage of the ruling British was required to sustain the theatre movement

[24] *Id.*, p.236. British actors like Mrs. Bristow commanded high prices.

[25] Though they were all in dire need for money, tickets were sold to defray expenses and not to fill their pockets. Sushil Kumar Mukherjee, *The Story of Calcutta Theaters (1753 To 1980)*, K.P. Bagchi and Company, Calcutta (1st. -edn. 1982), p.82.

non-fixed performances did not or were not attributed any intellectual property relevance in India. There is no evidence of any organizational endeavor of professional theatre performers in the country. This dearth of historical precedence in organizational enterprise can be identified as one cause that has contributed to the sluggish and weak response even with the advent of fixation of performances in India.

An Overview of the Status of the Aural Performer in India

Broadcasting

The British government had made it a point to use broadcasting as a means to harmonize and knit the empire into a cultural unit. The All India Radio commenced broadcasts in India in the 1930's.[26] The radio stations followed the British model of remuneration with grading of artists with the performing artists receiving remuneration per broadcast and a percentage in the like of a royalty for the repeats as well. The royalty for the recorded western music was covered by the Indian Broadcasting Company's agreement with the performing Rights Society.[27] The system of royalties for repeats of recorded performances of artists was continued for some time in India after independence as well but has ceased to be followed from the seventies. The British hangover seems to be waning as the effect of past legal systems seem to recede into oblivion with the native systems replacing practices of the empire.

The performing artistes who rendered the original programming were graded according to their skills on a scale laid down by the broadcasting establishment[28]. They had to enter into a standard contractual agreement with the broadcaster. The remuneration was for a one-time payment with no additional remuneration for repeat broadcasts. This was for original programs recorded live at their studios[29]. Prior to the incorporation of the government broadcasting into the *Prasar Bharathi* Corporation there used to be a contractual deal where in a

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[26] H.R.Luthra, *Indian Broadcasting*, Publications Division, Ministry of Information and Broadcasting, Government of India, New Delhi (1st edn.-1986), p.2.

[27] *Id.*,p. 35. Initially it appears that the gramophone company did not raise the issue of payments being content with the publicity it got through the broadcast of discs however by the forties the companies and film producers did ask for their exploitation to be compensated.

[28] B.N.Goswami, *Broadcasting, New Patron of Hindustani Music*, Sharada Publishing House, Delhi (1996), p.130.

[29] Interview with Srimati Rajeswari Mohan, Program Producer of A.I.R. Kochi F.M., 20-11-2002.

percentage of the fixed sum was to be paid to the performing artiste for the repeats of the broadcasts, but this custom was taken away as the rules became a victim of the anxiety with respect to the commercial viability of the corporation.[30] The vestiges of the earlier system are still evident as the format of agreements used earlier is still in vogue but those clauses are struck off at the time of agreement[31]. The equitable remunerative approach has been abandoned for now as the fixed pay system is being followed. The performing artists apparently do not mind the remunerative model as the model contributes to their popularity and the windfall comes by way of other means of remuneration open to them.[32] Artistic pursuits like live performances of folk and classical forms would be greatly benefited by the repeat remuneration system, as their avenues of exploitation are scarce.

While commonly the individual bargains are those that stipulate a fixed payment to the artiste irrespective of the different uses to which his performance may be put to. There may be exceptional circumstances were in a performer with a bargaining power would have asked for a varied contractual agreement[33]. Thus the majority of the performers have to follow the customary practice of a one-time payment along with which all rights are given away. When the individuals supply prerecorded albums they are asked to give a consent letter by which they eschew all further rights with respect to the repeat broadcasts. A written authorization is made or a consent letter is taken that vests the broadcasting authority with the rights in this regard. An oral consent, it appears is not sufficient to make over future rights of exploitation over to the broadcaster. The remuneration changes according to the grading of the artistes.[34]

Audio recordings

The onset of affixation brought substantial changes in the remunerative possibilities of the performing artist in India. With records being produced to cater to the tastes spurred by the technological marvel of the gramophone,

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[30] With the Prasar Bharathi having to venture forth all on its own with self-sustaining measures in the post liberalization era considerable changes have taken place in the attitude and approach to such issues

[31] See for an analysis of contracts - discussed in Chapter 9.

[32] Interview with Rana Pratap, Program Officer, All India Radio, Trivandrum on 24-11-2004.

[33] *Ibid.*

[34] *Ibid.*

several foreign companies began to expand operations to India in order to exploit the nascent and immense market potential[35]. The performing artists were paid a minimum sum for their services in the fixed medium and there were detailed agreements drawn up with the artists that provided them with royalty payments as well. The benefits varied from one artist to the other based upon their demand in the market value and the following that they commanded among the consumers. The royalty payments were made directly by the companies (through an agent company) to the artists concerned on a periodic basis in proportion to the sales of the records in the market. However this was not extended to the accompanists of the performers of the accompanying orchestra.

With the onset of the sound or talkies in the film industry the performing artists in the audio sector were provided additional opportunities in the film music field as well. There were no collective organizations on behalf of artists in the non-film music sector though by the fifties these organizations arose in some of the regional film industries[36]. The film music was also brought out as audio records. In the early stages, the singers with respect to the film and the audios were distinct unless the sound record producer was able to meet the price commanded by the playback. The same mode of royalty payments was continued with respect to the records produced based on the film music.

However gradually this customary practice has given way to one time down payment and the terms being mostly an outcome of mutual contracts. There are numerous instances where in singers of yesteryears have been complaining of not being paid their based on royalties by the companies such as His Masters Voice. The defaults mostly go without redressal as the machinery is only through courts and no efficient organization exists to voice their grievances. The contracts do not speak of separate arrangements of remuneration for separate exploitation avenues or for future technological medium of exploitation.

Performers are also not considered as an element that receive the benefit of collective administration of rights with respect to royalty payments nor the beneficiaries of collective bargaining, as they were never considered as entitled to copyright protection. While the music composer and the lyric writer enjoy the

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[35] The practices in vogue in the countries where in the music companies were based were continued in India too at least during the initial period.

[36] Interview with late Srimathi P.Leela on 27th October, 2003 at Madras. See Chapter 9 on audiovisual industry for a more exhaustive account of the practices.

copyright protection as also the sound record producer and there fore they collectively administer through their respective organizations[37]. Even after the grant of special rights in the year 1994[38] any organizational move for collective administration by the audio performing artist is not discernible even though some preliminary attempts are noticeable but collective bargaining and formulation of minimum standard terms do not seem to have surfaced as a major agenda.[39]

A major handicap is that in the cultural life of the country there has never been a traditional notion of intellectual property rights particularly among the performing Artists.[40] Organizers of music festivals and other cultural venues do not ever ask the performer for his perrnission even if some one was obviously recording the show. If ever the permission is sought for, it is only the permission of the main artist but not that of the accompanists[41]. Artists are remunerated through contractual agreements that are based on one-time payments in case of non-fixed performances in audio, audio visual and visual performances[42]. With respect to the fixed audio performances the performing artists were remunerated on the basis of contracts drawn up and mostly in the early years it was based on the royalty system with a minimum nominal remuneration in the first instance. There was a distinction between the playback singers and the singers of other miscellaneous records. There are no collective organizations on behalf of the performing artists in the audio sector and therefore there are no collective bargaining terms entered into between the performing artists and the industry. There is no stipulation of the need for neither any standard terms nor any formalities such as written agreements in the industry. While the performing artist in the audio sector is mostly governed by a written contract, there are no separate agreements for different exploitation of the recording. The producer of the sound recording is endowed by means of the agreement to make use of the

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[37] Even after statutory benefaction these entities began to collectively administer their rights only by the late sixties. For example the Indian Performing Rights Society (IPRS).

[38] In Section 38 of the Copyright Act, 1957.

[39] For instance the start of organizations like Singers Association of India, See Chapter 9 for a broader treatment.

[40] See comments by Sri Pundit Shiva Kumar Sharma speaking at a music forum to evaluate the changes in the Copyright Act- Girish Kuber, " Music World Strikes a Different Chord, Artists Hum IPR Tune", *The Economic Times*, Calcutta, September 20th, 2000.

[41] *Ibid.* Comments by Shubha Mudgal. See Also, Sumadha Raikar, "My Music, My Money", *Indian Express*, Mumbai, September 16th, 2000.

[42] Interview with Late P. Leela, performing artist and play back singer, a career spanning nearly a century- see chapter 9.

recording for all purposes. It is a pertinent question whether the agreement for a sound recording can very well be used in other media like the audio visual without the additional remuneration and authorization from the performing artist but the contracts either oral or written provide answers to that.

The contractual uncertainties and the manner in which business practices have been conducted portray or display the vulnerable position that artists hold in a business relationship. Among the artistic dealings that are struck in India very little is decided on the basis of a formal contract. It is based on trust and this makes one very vulnerable when it comes to the question of commerce. It is often noted that the artist shies away from discussing the commercial aspect, which makes him vulnerable to exploitation[43]. They are often victims of oral trust and contracts based on the word of the mouth, misrepresentation, manipulation and fabrication of documents and wrong statement of accounts. Besides instances of contracts on restraint of trade through which the artists are bound by exclusive contracts and forced to sign royalty waiver clauses are also common and stand out for its oppressiveness. As the artistes are in a majority of situations in an unfair bargaining situation, there is little they can choose from, as it is the contract that determines their fortune. There have been great deal of instances were in the artists had to take recourse to the courts for redress against exploitative practices in the aural music industry.[44] The top artistes in the industry have not had to be at the receiving end as much as the rest of those in the lower ladder. –Those who are accompanists, folk artists and karigars. They even have to bear the brunt of seeing somebody else take credit for the work besides other problems like cancellation and non-payment of dues[45]. The accompanists are not

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[43] Anita Kanungo, " Fundamental Right ", *Hindustan times*, Delhi, 26-1-1998.

[44] Rajeev Masand, " Magnasound Hears from Alisha", *Times of India,* Delhi, 16/4/1996. All these point to the need for a minimum statutory protection for the performer. Alisha had alleged that officials of Magnasound had persuaded her to waive the royalty clause for the album –Bombay girl. They threatened not to release the album otherwise they had refused to pay her rupees two lakhs for which she had agreed to sell the record and that the copyright had not been transferred to the company. They were further infringing the copyright by duplicating the master without paying for the original. Huge commissions and royalties from pother independent transactions that she would enter with other companies. Added a second clause in the Empty space before the signature in order to make a second album. Baba Sehgal too had a similar experience when Magna Sound filed a case against him when he signed up another company. Saying he was their exclusive singer. In a counter case he sued them for dues and won the case.

[45] Jyothi Chidambaram, "Copyright Laws Meet Calls for a National Forum", *Asian Age*, Dec 17th, New Delhi, 1997

even granted a fitting acknowledgement .The instances point out to the need for a statutory protection to be granted to the performer.

The other botheration that compounds matters for the performer is the Internet or web based communication systems that has become increasingly rampant. Even though the low penetration of the Internet has not alarmed the sound record industry nevertheless the international labels have begun to be apprehensive about the same. The consequence of this is on the artist as well as the music company who do not receive any royalty or returns from the digital media[46]. While the music companies have swung into action lately by moving the courts against the dot-com, the indirect benefit would be on the performer, but the performers have failed to collectively or individually counter the threat[47]. With the bandwidth problems being overcome in the near future the Internet will or is poised to hit the music industry badly in future. It is going to a bigger threat than conventional piracy[48]. The fallout evidently would be on the performer and allied artists. This shows the need for a more sophisticated protection that takes into account the vagaries of digital media.

The manner in which the music video boom has caught on in the audiovisual industry, it has become a separate saleable proposition. The music videos in fact enhance the appeal of the music albums. However the performing artist becomes an aid to the advertisement process of the sound album through the music video. However it can be seen that the music videos have become separate entertainment capsules with music programs being programmed with the sole intention of catering to music video aficionado rather than as sound album advertisement. The performing artist receives .no extra remuneration for the music video piece, as this is part and parcel of the machinery to promote his sound record. For which he has been paid and which he is expected to promote. This is further buttressed by the fact that his legal recourse is also speculative as the audiovisual performance would be plainly outside the purview of the performers right under Section 38 (4) of the Copyright Act.

In the fifties the singers used to be paid between rupees 150 and a maximum of rs.500 per song. By the late eighties the figure was around rupees 1500 and

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[46] See Aparna Krishna,"MP3: The Strains of Music", *Business Line*, Sept .13th 2000, Delhi.

[47] The music companies (IMI) have filed cases against the portals like rediff.com and chaitime.com for displaying MP3 search engine on their home page.

[48] Aarti Dua, " Why Rediff has Run into Copyright ", *Business Standard*, Delhi, 31st March 2000.

rupees 5000. The remuneration being dependent on several factors –the budget of the film, the language in which is to be made, habits and principles of the producer and the relationship between the producer and the singer[49]. Ironically the singer does not obtain any royalty. The super success of a song need not bring in financial profits to the singer. The recording company could continue to make profits in the years to come as well. Once his services are rendered in the recording studio then there would not be any more basis of claim on the effort that is embodies for posterity in the audiotapes. The aesthetic satisfaction and the financial comfort were never in direct proportion to one another. As most of the deals are on a personal basis sometimes no remuneration is expected[50]. Being busy is the most important objective as the ancillary avenues like stage shows bring in steady revenue. No royalty is given on most recordings but only select Artistes of stature can claim royalty for the same[51]. The issue has been debated and consensus evolved but it has not borne fruit practically. The intense competition amongst the artists and absence of specific legal safeguards in place to ensure a decent payment have left the artists particularly the newcomers virtually at the mercy of the producers whims[52]. The artists desire a minimum level of protection and to be entitled to a fair remuneration particularly in the absence of a royalty system in place[53]. The reason for this chaotic state of affairs is ascribed to the lack of unity among the artists and any attempt to forge one with this objective[54]. One reason why the artists are not pressing on the royalty issue is that in the short term they are happy with the adequate that they get in a month so there is no room for complaint. The payments vary with the budgetary out lay and the producers' financial state of affairs[55]. Despite putting in

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[49] Asif A Merchant and Farida T Khan, "Underpaid", *Playback & Fast Forward*, September Issue, 1987, p.8.

[50] Says Suresh Wadkar, "I have been a paid a pittance of rupees 51 and 101 occasions...we often sing free of charge for friends or if the situation the producer is in requires us to". *Id.*, p.11.

[51] *Ibid.* Even the legendary playback singer Mukesh songs do not beget a royalty says his son Nitin Mukesh, a play back singer himself. Says he, "if I were to get a royalty for each of the Mukesh songs, I would be a millionaire".

[52] *Ibid.* Says Alisha Chinoy, an accomplished film and pop artist; "it is as if a great favor is being bestowed upon us by giving us a break". *Id.*, p.8.

[53] See comments of Kavitha Krishnamoorthy. *Id.*, p.10.

[54] Shailendra Singh, a play back singer who came to the fore with Raj Kapoor's Bobby says 'it is each for his own. If we got together and conveyed our feelings unanimously perhaps we could be heard. *Id.*, p.11.

[55] *Ibid.* Says Alka Yagnik, one of leading playback singers of Bollywood, "on an average we do record 15 to 20 songs in a month. So where is the room for complaint? Royalty is, of course, a question looming large and may seem unfair on us".

efforts to impress on the industry the need for forging a framework for the royalty, the move failed to pick up momentum. Other than instances were in individual contracts (due to the immensity of the artists bargaining power commanded in the market) would carry the royalty clauses the artists have never been able to make this a part of the practice in the industry neither collectively nor through the statutory means. The singers did unite and organize themselves into an association and embarked on measures to pressurize the industry to give into a royalty system. A strike was called and for two months all recording was halted. But then providence intervened in the form of a war with china that interrupted and turned the favorable wind away[56]. The artists were unable to sustain the momentum of their resolve in the altered circumstances[57].

The aforementioned data on the practices with respect to the performers occupation in audio and audiovisual industry in the aural realm in particular points out that the performer is neither customarily nor collectively or statutorily protected in the repeat ed commercial exploitation of his performance. In the last two hundred years the only noteworthy transition has been from total dependence on patronage to the contracts owing to altered commercial practices and proliferation of electronic and digital media. His creative intellectual labor has not been recognized, barring some exceptions, to be akin to the status of other creative contributors recognized by the copyright regime. Therefore in the absence of credible economic and social security to the performer by means of self help, state initiative nor supportive labor measures, recognition of an intellectual value in the service rendered as regards the monetary recompense is concerned, the performer was and is vulnerable to exploitation and requires urgent statutory intervention by means of intellectual property protection as a modus of a share from the profits if any that his effort fetches.

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[56] *Id.*,p.12, this was in the year 1961. Mannadey, noted playback singer with contributions to film and non-film music spanning nearly a century in Hindi and non-Hindi albums too found the lack of any royalty system unfair.

[57] Only Latha Mangeshkar was able to put her foot down and extract royalty from the producers of films and musical albums. Only Latha Mangeshkar, Asha Bhosle and Kishore Kumar have been able to get royalty-based payments system contractually working for them but others down to the present generation have not been so fortunate. *Id.*, p.9.

Efforts by the Government for the Welfare of the Artist

The Government of India has established the *Sangeeth Natak Academy* in every state in the country coordinated by a central institution, which is the Kendra *Sangeeth Natak* Academy.[58] A number of schemes have been formulated in order to help the artists in distress either in old age or incapacitated owing to illness or accident.[59] There are a good number of renowned artistes who spent the major portion of their life for the cause of arts and who are in need of financial help for their sustenance. In order to recognize and appreciate the artiste's accomplishments and their contributions to the society, the Akademi confers Fellowships and Awards.[60]

The Akademi gives monthly financial assistance to a number of artistes who are in dire necessity of financial assistance for their livelihood. In addition the Akademi also gives ex-gratia amounts to unfortunate artistes who are destined to put an end to their artistic life on account of becoming permanently incapacitated by accident and chronic disease. But despite these not all is well with the performing artists as a community. Even celebrated artists and singers have had to fend their last days in old age homes due to utter penury.[61] Even reputed and personalities of world acclaim like Rugmini Devi has not been spared the cruel finale of spending the last days as a destitute in an destitute home for artists in another country.[62] In other words while the performing arts flourished under the royal patronage of the kings and other powers in the ancient and medieval period

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[58] See < http://www.sangeetnatak.com/abt.htm> as on 10th December 2004. The institution was established by a resolution of the Ministry of Education, Government of India dated 31 May 1952. The first President of India, Dr. Rajendra Prasad, inaugurated it on 28 January 1953.

[59] <http://www.sangeetnatak.com/sch.htm> as on 10th December 2004.

[60] *Ibid.* Respected Maulana Abul Kalam Azad, the Education Minister who inaugurated the Sangeeth Natak Academy speaking at the function said 'In a democratic regime, the arts can derive their sustenance only from the people, and the state, as the organized manifestation of the people's will, must, therefore, undertake.... maintenance and development of arts as one of its first responsibilities ...".

[61] One of the foremost exponents of dance in India, Guru Gopinath said (in the early part of this century), " There is no future for this art...I have switched from culture to agriculture. My income is from my land and coconut trees, I hardly get an annual income of rupees 1000 from my dance school". Susheela Mishra, *Some Dancers of India*, Harman Publishing House, New Delhi (1st edn. -1992), p.15.

[62] *Ibid.* Rugmini Devi left the mortal coil at the age of 86 in an actor's home in New Jersey U.S.A. The actors' home is where old needy actors, dancers, musicians and the like are looked after.

it does not seem to have sustained effectively in the modern age despite the modern welfare state having taken over the responsibilities in this regard.[63]

Common Law Protection for the Indian Performer

The Indian jurisprudence shares a lot in common with the Anglo-Saxon system followed in United Kingdom owing to their shared political and legal history. There is no reason to think otherwise with respect to the application of the common law principles as applied by the courts in England and followed by the courts in India. With whatever restricted territorial application that the common law principles might have had both with respect to the territory as well as with regard to the subject matter both the law as well as the common law of England has had an infectious influence and consequence on the Indian dominion. Jurisdictional perspective finds that until 1726 both the statute and the law had an application and impact on the Indian dominion of the east India Company. From the copyright common law stand point this would mean that the case laws of *Donaldson* v. *Beckett* (1779) 98 E.R.257 and the *Statute of Anne* would have had repercussions on the Indian soil in the subject matter if any that might have come up. However similar to the English experience and interpretation it can be said that the statute of Anne dealt only with writings and the extinguishment of common law rights therein upon its publication. After 1726, laws of the United Kingdom required a separate declaration or testatum to apply it to another colonial territory[64]. Thus the 1911 Copyright Act could be extended to India only through the promulgation of a separate enactment, which was the Copyright Act, 1914. This also carried the preemptive provision against common law copyright. However the prohibition was expressed against any copyright or similar right being attributed to the entities protected by the act. It is significant that the Act did not contain any protection for the performer nor to their performances. Therefore

[63] The comparative appreciation need not be fair and could be relative to the historical, social, political and economic context in the sense that the patronage even if it must have nurtured the art form need not have been egalitarian in distribution of benefits during the ancient and medieval period. Though the arbitrary nature of endowment is still much contested and provokes indignant protests considering the subjectivity even if certain objective guidelines are prescribed.

[64] After 1726 the application of English laws into the foreign territory required a separate provision in such statutes extending it to the Indian territory –this was introduced so that non-Indian laws were not to affect Indian subjects of the British Empire and the natives were not to be discomfited. See S.K. Puri, *Indian Legal and Constitutional History*, Allahabad Law Agency (1999), p.157.

the common law right in the performances remained unaffected by the Copyright Act in India. It is appropriate to recollect that the reason for refusing a common law property right in performances was the prevalence of Dramatic and Musical Performances Act, 1925 that intended, according to the courts only a criminal remedy and no civil rights. Thus the existence of a statute in England preempted the attribution of civil rights and status to the performer. It is important to note that the Dramatic and Musical Performances Act though a pre-independence legislation was never extended into India. Therefore the rulings of the court prior to the independence or after on the question of performers 'rights in the context of the Dramatic and Artistic Performances Act would not be applicable to the Indian subcontinent.[65] Even though no occasion had been given to the courts in India to resolve any dispute regarding the status of the performer in the country by resort to common law principles nevertheless from the aforementioned analysis it becomes clear that nothing could have logically prevented them from an attribution of common law property rights to the performers' performance in India.

It is important to note that the two case laws that referred to performers status and position under the copyright law was never asked to go into the question from the perspective of common law property rights. Therefore their observations regarding the non-existence of any rights for the performer under the statute can only be confined to findings regarding the absence of rights in the statute and nothing more.

Judicial Perspectives with Regard to Performers' Rights

Performers' right in India was not a subject of judicial debates as the issue never surfaced directly before the courts by way of litigation. Intellectual property rights protection does not appear to have been high on the agenda of the performers

[65] Even if one were to extend the ambit of Article 372 of the Constitution of India to pronouncements of the courts from the United Kingdom prior to independence still none of the case laws in the United Kingdom have discounted the existence of common law property rights in intellectual creations other than those entities specifically enumerated by statute. Article 372 of the constitution says that subject to other provisions of the constitution all the laws in force in this country immediately before the constitution commencement shall continue in force until altered or repealed or amended by the competent legislature or by other competent authority. See D.J.De, *The Constitution of India*, Vol.2, Asia Law House, Hyderabad (2nd Edition), p. 2998.

organizations (if any) across the country. Rather the state and the organizations appear to have been concerned more with labor and social security issues of the performers.[66] There has never been a direct approach by any performer to the courts for inclusion of the performer within copyright law either directly or by means of any stretched interpretation. The only reported occasion where in the issue was dealt with by the courts was once in 1977 as a self confessed obiter[67] and then in 1978 in the case filed by the well-known film actor Devanand.[68] The latter case explored the possibility of performance in the film being protected by copyright. It concerned the performer more directly than the former that was self confessedly a footnote and an obiter. It is noteworthy that both these cases dealt with the cinematograph medium, in other words the audiovisual medium. In the aural medium there has not been any decided reported case laws with respect to performers' rights either claimed through interpretation of the statute or any contractual misunderstanding.

Significance of IPRS to the Performer

From the standpoint of performers, the IPRS case law is significant because the apex court stressed the need for giving copyright protection to the creative contributors like singers other than the traditionally protected entities. The point was significantly made in the context of agreements regarding engagement of creative contributors in films. Though the case law dealt with the rights of music composers and lyric writers nevertheless it was a pointer to the manner in which the recognized entities under the copyright umbrella are treated in the context of the film industry and therefore of consequence to entities that would be endowed with a similar status in the future.[69] Even if the performers were to be hypothetically granted rights in their performances in films under the copyright

[66] Even these were not high on the priority list of the state. The onus seemed to be on the preservation of cultural heritage rather than bettering the lot of the performers status economically and socially.

[67] *IPRS* v. *Eastern India Motion Pictures Association*, AIR 1977 SC 1443.

[68] *Fortune Films* v. *Devanand,* AIR 1978 Bom.17.

[69] Even with respect to the sound record industry the consequences are not different considering the fact that the legislative breadth or width is the same with respect to films as well as the sound record industry.

umbrella, the fate of the entity in the judicial perception would have been the same as that of other creative contributors in films.[70]

The litigation in *Indian Performing Rights Society Ltd.* v. *Eastern India Motion Picture Association and Others*[71] arose out of the imposition of tariffs, fees and royalties that the IPRS proposed to collect for the grant of licenses for performance in public of the works in respect of which it claimed to be an assignee of copyrights and to have authority in the aforesaid licenses[72]. A number of individuals including the various associations of producers of cinematograph films who claimed to be the owner of films including the sound track there of and cinematographers exhibitors association of India filed objections respect of the aforesaid tariff. They repudiated the claim of the IPRS that it had on behalf of the its members the authority to grant licenses in public of all existing and future musical works that are incorporated in the sound track of the cinematograph film in which copyright may subsist in India or the right to collect any fees, charges or royalties.[73] They also claimed that their members engaged composers and sound writers under contracts of service for composing songs to be utilized in their films therefore all the rights that subsist in the musical works in the composers and their works including their right to perform them in public became the property of the producers of the films and no copyright subsisted in the composers.[74] Further it was averred on behalf of the producers that as they were the authors and first owners of the copyright in the cinematograph film and that they had the exclusive right inter-alia to cause the said films in so far as the same consisted of sounds which include musical works to be heard in public as also the exclusive right to, make records embodying the sound track of films produced by them including any musical work included therein and the producer has the right to cause them to be heard in public.

The Cinematograph Exhibitors Association too filed objections challenging the right of the IPRS and besides the aforementioned objections they pointed out that copyright in a cinematograph vested in the producers meant copyright in the entirety of the film as an integrated unit including the musical work incorporated in

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[70] Perhaps Section 38 (4) of the Copyright Act was in accordance with the prior sentiment of the Supreme Court as expressed in *IPRS* and *Devanand* cases.
[71] AIR 1977 SC 1443.
[72] A.I.R. 1977 S.C. 1443 at p.1444.
[73] *Ibid.*
[74] *Ibid.*

the sound track of the film and the right to perform the work in public[75]. The agreement with the distributors of films and the exhibitors of cinematograph films includes the right to play in public the music that is an integral part of the film. The producers lease out copyrights of public performance of the films vested in them to the distributors who give those rights to the exhibitors under an agreement and that when an exhibitor takes a license for exhibition, it is complete in all respects and a third party like the IPRS cannot claim any license fee from the exhibitors.

The Copyright Board decided that in the absence of proof to the contrary the composers of lyrics and music retained the copyright in their musical works incorporated in the sound track of cinematograph films provided such lyrical and musical works were printed or written and that they could assign the performing right in public to the IPRS.[76] The Copyright Board further held that the tariff as established by the IPRS was reasonable and they had the right to grant licenses for the public performances of music in the sound track of copyrighted Indian cinematograph films and it could collect fees, royalties and charges on respect of those films with effect from the date on which the tariff was published.[77]

However, the producers and exhibitors moved the High Court as against the order of the Copyright Board and the High Court upheld their claim holding that unless there is a contract to the contrary the composer who composes a lyric or music for the first time for valuable consideration for a cinematograph film does not acquire any copyright either in respect of film or its sound track which he is capable of assigning and the owner of the film at whose instance the film is made becomes the first owner of the film and of the copyright in the composition.[78] The composer can claim a copyright in his work only if there is an express agreement between him and the owner of the cinematograph film reserving his copyright. The High Court further went on to say that Section18 was of no effect as in the circumstances assignment of future work is of no effect. The IPRS moved the Supreme Court against the judgment of the High Court.

The petitioners argued that if any one made a cinematograph film without a license granted to him by the owner of the copyright and he exhibits the same in public the work containing a musical work he has to take the permission not only

[75] *Id.*, p.1445.
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*

of the owner of the copyright in the cinematograph film but also the permission of the owner of the copyright in the literary or musical work that is incorporated in the cinematograph film.[79] This is because according to Section 13(4) of the Act, the copyright in a cinematograph film or a record does not affect the separate copyright in any work in respect of which or substantial part of which the film or as the case may be the record is made.[80] The provisions of Section 17(b) of the Act will have no application to the literary or musical work or the artistic copyright there in and do not take away the copyright in a literary or musical work embodied in the cinematograph film. The only method by which the owner of the copyright in the literary or musical work can be divested or ceases to be the owner of copyright in the work is by assignment, by relinquishment and by the composer composing the work in the course of his employment under a contract of service with an employer in which case the employer becomes the owner of the copyright.[81] In case of an assignment of copyright in a future work and the employment of the author to produce the work under a contract of service, the question of priorities would be decided on the basis of the principle that where equities are equal, the first in time shall prevail.

The Judgment

The Supreme Court held that the work created by the literary or musical author was capable of assignment. Both the existing as well as the future work of music composer and the lyricist in their respective works as defined in the Act is capable of assignment subject to the conditions mentioned in the Section18 of the Act as also in Section19 of the Act being met and that required an assignment to be in writing signed by the assignor and by his duly authorized agent[82]. The second part of the question to be answered by the Court was whether protection to the composer of lyric or musical work in terms of Section2 (p) meant only notational written, printed or graphically produced or reproduced music and whether he retains the copyright in the lyric or musical work if he grants a license or permission to an author owner of a cinematograph work for its

[79] *Id.*, p.1446.
[80] *Ibid.*
[81] *Ibid.*
[82] *Id.*, p.1447.

incorporation in the sound track of a cinematograph film?[83]. Interestingly as the question appears to be confined to this (by the defendants own admission) the Court suggested that the copyright of written music would have to be treated differently from that which is unwritten. It is noteworthy that nowhere does the Court say expressly that the music which is not in a notational form or unwritten will not qualify for copyright protection. However, the reference to Section 2(p)[84] while considering this issue gives reason to guess the Courts inclination in this respect.

Relying on a harmonious and rational construction, the Court found that the producer acquires upon completion of the film, by virtue of Section14 (1)(c)[85], a copyright which gives him the exclusive right of performing the work in public - the visual to be seen and the acoustic portion to be heard in public, without securing any further permission from the author of the lyric or the music composer for the performance of the work in public[86]. The Court clearly laid down that the music composer could not restrain the acoustic portion of the film to be performed or screened in public for profit or from making any record embodying the recording in any part of the sound track[87]. The owner of the copyright in the film can also communicate the film by radio diffusion as Section 14 (1)(c)(iii) expressly allows the same. The composer of a musical work retains the right of performing it in public other than as a part of the cinematographic film and no restraint can be brought to bear upon him.

Though the Court rationalized that there might be a conflict between S.13 (4) and S.14 (1)(a)(iii)[88] on the one hand and S.14 (1)(c)(ii) on the other, a harmonious

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[83] *Id.*, p.1448.

[84] Section 2(p) of the Copyright Act, 1957,as it existed then said "(p) musical work means any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced".

[85] As has been mentioned before, the case of IPRS has to be seen in the context of the statutory enactments, as it existed then. By copyright in the film it meant under Section 14(1)(c), the following rights.

In case of a cinematograph film to do or authorize the doing of any of the following Acts, namely-(i) to make a copy of the film ;(ii) to cause the film in so far as it consists of visual images in public and in so far as it consists of sounds, to be heard in public;(iii) to make any record embodying the recording in any part of the sound track associated with the film by utilizing such sound track;(iv) to communicate the film by radio diffusion.

[86] A.I.R. 1977 SC 1443 at p.1450.

[87] *Id.*, p.1451.

[88] Section 14(as it then existed), " Meaning of copyright –(1) for the purposes of this Act copyright means the exclusive right by virtue of and subject to the provisions of this Act, ---(a) In the case of literary, dramatic or musical work, to do and authorize the doing of any of the following Acts, namely –(i) to reproduce the work in any material form;(ii) to publish the (*f.n. contd.on next page*)

and rational construction instead of a mechanical construction lead it to the conclusion that once the author of a lyric or a musical work parts with a portion of his copyright by authorizing a film producer to make a cinematograph film in respect of his work and there by to have his work incorporated or recorded on the sound track of a cinematograph work, the latter acquires by virtue of 14(1)(c) on completion of the cinematograph film, a copyright that gives him the exclusive right of performing the work in public that is to cause the film in so far as it consists of visual images to be seen in public or the sound track heard without any further permission of the author of the lyric or musical work for the performance of the work in public. The Court relied on the report of the British Copyright Committee set up in the year 1951 to guide the British legislators in their resolve to enact a new legislation. The distinct right that vests in the film has both the right relating to making of the copies as well as performing the same in public. According to the Court, Section 13(4) would not stand in the way for the enjoyment of these rights by the cinematograph producer.

The composer of a lyric or a musical work retains the right to perform the work in public for profit otherwise than as a part of the cinematograph film and he cannot be restrained from doing so. The composer cannot restrain the producer from using the acoustic portion of the film to be performed or screened or projected for profit or from making any record embodying any recording in any part of the sound track associated with the film by utilizing such sound track or from communicating the film or authorizing communication by the radio diffusion.

As Section14(1)(c) expressly permits the author of the cinematograph film to do all these, the Court noted that any other construction would defeat the intention of the legislature particularly in the backdrop of the growing importance of the cinematic medium and the immense costs involved in the production of the cinematic film. The recording in the soundtrack is treated distinctly from the recording otherwise rendered. Thus the Supreme Court judgment IPRS was

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work ; (iii) to perform the work in public (iv) to produce, reproduce, perform or publish any translation of the work;(v) to make any cinematograph, film or record in respect of the work ;(vi) to communicate the work by radio diffusion ,or to communicate to the public by loud speaker or any other similar instrument the radio diffusion of the work;(vii) to make any adaptation of the work;(viii) to do in relation to a translation or an adaptation of the work any of the Acts specified in relation to the work in Cls.(1) to (vi)".

restrained from imposing its tariff policy with respect to performance of musical works in cinematograph films.

On the important question whether mere engagement would necessarily deprive the music composer to the performance right in the recording?[89], the Court interpreted that by virtue of Section 17(b) and Section 17(c) of the Copyright Act, when a producer commissions a composer of music or a lyricist for a reward of valuable consideration for the purpose of making a movie or for composing the music there of the sounds for incorporation in the soundtrack that is included in the film, the copyright is vested in the producer as the first owner of the copyright therein. No right is retained or shared by the composer and the same consequence follows upon the composer being employed. This would be the presumption subject to a contract to the contrary.[90]

A Self Confessed Obiter with Profound Implications

Justice V.R.Krishna Iyer made a little variation (it was announced at the outset that the observations were an obiter and an otiose footnote) from his Brother Judge with whom he had concurred, with respect to the balance of rights between the contributed work in the film and the rights enjoyed by the owner of rights in the film as a whole[91]. The learned judge observed that though the producer is entitled to exercise his rights under Section 14(1)(c) but he is stopped if the music is performed or produced or reproduced separately in violation of Section 14(1) (a) .For example, pieces of the soundtrack cannot be played separately and played in the cinema and other theaters by the producer. The exception only arises in case the circumstances show the application of Section 17(c). So the producer has no further right beyond a cinema show and would infringe the right of the composer. In contrast to the sentiments of his Brother judge, he sees the copyright of the composer capable of being invoked if the music were played in any restaurant, airplane or radio station or cinema theater[92].

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[89] A.I.R. 1977 SC 1443 at p.1452.

[90] To fortify the decision the Court relied on the decision of *Waller Stein* v. *Herbert,* (1867) 16 L.T. 453 which dealt with the music composed for reward in a play and not in an affixed performance.

[91] A.I.R. 1977 SC 1443 at p.1452. Justice Jaswant Singh rendered the judgment on behalf of the two-judge bench that included Justice V.R.Krishna Iyer.

[92] *Ibid.*

Significantly, Justice V.R.Krishna Iyer did not mention the relevance of Section 17(b) in the context and does not discuss the Section at all.

The learned Judge acknowledged that the artistic or the literary works of man is exploited and even the works of masters are the subject of piffling payments. He recognized the fact that the right of the musical composer and the producer co-exists under the bounds of the Copyright Act, 1957 and this is achieved via Section 14, which balanced these rights.

A Profound Vision

The most important contribution to the copyright jurisprudence in India was his articulation of the need for a protective cover under copyright law for the performing artists. The learned judge pointed out the neglect that the performing artist in the music industry was suffering in comparison to the music composers and lyricists who were protected and benefited from the statutory provisions. He added a new dimension by not only crafting a balance between various right holders contributing to the film but also recommended the need for extension of copyright protection to new entities like the performing artist. According to him despite being active intellectual contributors in the work, law has not protected them. The law till now has not recognized the soulful voice and the wonderful rendering of the songs by the performing artist as deserving protection under the copyright umbrella[93]. Under the present law, it is only the composer who is recognized as an author in relation to a musical work. Similarly the musical work includes only the composition that has been printed reduced to writing or otherwise graphically produced or reproduced. This lack of recognition of the performer singer was un-Indian as both the composer and the singer deserved to be protected. The laws of the respective countries must protect the right of aesthetic creativity wherever originality is contributed. The learned Judge felt that the existing infirmity in law needed to be cured and hoped that the singer is conferred with a right.[94] Though from the perspective of the film industry, the emphasis was on the singer being conferred a right nevertheless it was also a

[93] *Id.*, p.1453.
[94] *Id.*, p.1454.

call impliedly and logically to recognize intellectual creators who were as yet not acknowledged or protected.

Inferences for the Performer from the Judgment

The decision is significant to the performer for two reasons. It hypothetically points to the situation that can arise if rights are granted to the performer under copyright and the performers creations are treated as works. The producers' rights would overwhelm the rights of the contributor performer just as it did to the rights of the music composer and the lyricist in their works. Most importantly, a presumption of employment and pass over of rights to the producer takes place upon mere engagement subject to a contract to the contrary. A mere engagement would invoke Section 17(b) or Section17(c). Secondly, the thoughts of Justice V.R.Krishna Iyer clarify the fact that no right under the existing statutory copyright canopy exists for the singer or performer.

A Critical Look at a Significant Judgment

The observations of the judge in the context of the IPRS is significant even though he spoke about the same while commenting on the topic of the music composer's and the lyricist 's right. It is also noteworthy that his sentiments went out for the singer in particular in the context of the rights of the music composer. But in principle the case law dealt with the right of the creative contributor in the film or the cinematograph and therefore its relevance in the context of performers rights. Even though the IPRS case dealt with the rights in the cinematographic medium it is relevant to other affixed media like the sound records as well. The status of the sound recorder is not much different from that of the cinematograph under the Copyright Act[95]. Therefore any inference with respect to the cinematograph rights would have an equivalent impact on a like issue with respect to the sound recorders copyright and underlying rights therein. Therefore the creative contributor in both the sound and the audiovisual medium would be affected by the observations and ratio of the case law. The performer if granted a

[95] A comparison between the provisions with respect to cinematograph and sound records reveals that other than exclusion from 17(b) of the copyright, the features of copyright of the sound record are identical to that of the cinematograph.

copyright in the near future or a right in the nature of a copyright would surely be affected by the IPRS judgment as other copyright protected creative contributors have been by the IPRS decision.

Though several statutory changes have been made in the Copyright Act since the IPRS judgment[96], the rationale of the judgment still stands tall as no further judicial interpretations in the altered legal environment upon similar facts has been pronounced by the judiciary. The judgment makes Section 13(4) of the Copyright Act superfluous by its attitude to sideline or belittle its significance. The literal interpretation gave way to a new jurisprudence based upon considerations of practical convenience rather than legal logic.[97] The judgment presumes a grant of rights to the owner of the cinematograph film or annihilation of the rights of the contributed work despite absence of agreements as stipulated under Section 18 and 19 of the Copyright Act[98].

The judgment categorizes, in the absence of the work being a preexisting work that any engagement of creative labor with respect to the film would be work rendered on commission with respect to the cinematograph at the instance of the cinematograph owner or it must be a work rendered as an employee unless there is a contract to the contrary[99]. Therefore in the absence of a contract to the contrary, all relationships between the film producer and the creative contributor would fall into either of these slots. The creative contributor is deprived of the rights of an independent contactor by an erroneous presumption of transfer of rights or extinguishments of rights. The endeavor to marginalize the rights of the creative contributor was not intended by the Act.

The judgment wrongly comprehended the extent of and ambit of S.17 (b) and erroneously included the contributors of underlying works into the category of

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[96] Changes have been made in sections eighteen and nineteen, the definition of musical composition, in the rights of the cinematograph copyright. These were the vital provisions based upon which the IPRS judgment was rendered and these changes would make a vital difference to the manner in which the facts of the IPRS case would be viewed today. Further a new class of special rights has also been introduced by way of performers rights. Though it does not extend to the cinematograph medium, it does hold significance to the sound and the visual recording mediums.

[97] See K. Ponnuswami, "Performing Right of the Intellectual Worker: Judicial Annihilation", 28 J.I.L.I. 470 (1986).

[98] *Ibid.*

[99] Section17(c) says that 'in case of a work made in the course of author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall in the absence of any agreement to the contrary, be the first owner of copyright therein

commissioned works by which the ownership of the contributed works is transferred to the person at whose instance the film was made. In fact Section 17(b) pertains to only the author of the film who is the producer whose authorship would be hit if the film is made or commissioned at the instance of another person.[100] By extending the ambit to all works of authorship that came into the cinematograph film the court read in an inclusiveness that was not intended in an otherwise exhaustive section.

Post IPRS: Not Inspiring Either

In *EIMP* v. *BPRS*[101], the High Court of Calcutta, despite facts being distinguishable from the IPRS judgment, held that the BPRS could not collect the tariff from film producers and exhibitors. The decision was despite the circumstances and persuasive evidence adduced by the BPRS that rights were expressly reserved in the contracts entered into between the contributor and the film producer in England.[102] This would have lain to rest the requirement of the Supreme Court in the *IPRS* decision that a contract to the contrary is required for the rights to subsist in the contributor.[103] Even the fact that these were matters of contract entered into with respect to foreign authors in other jurisdictions was not given credence by the court[104]. The court found the claim alarming and equated it with seeking copyright in the film by the contributing entity. The court failed to notice that the Supreme Court had very carefully avoided any such observation in its judgment in the IPRS a the claim being tantamount to seeking a copyright in the film work and rather based its decision on other interpretational instruments. The Calcutta High Court did not feel convinced about the evidence regarding contracts to the contrary or the contractual practices in England, which was pointed out by the BPRS. Even assuming that the IPRS decision was sound, the

[100] Section 17(B) says that 'subject to provisions of clause (a), in case of photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein.

[101] AIR 1978 Cal. 477.

[102] *Id.*,p.479.

[103] AIR 1977 SC 1443.

[104] India is a signatory to the Berne convention. National treatment will always be subject to the law according to what the Supreme Court lays down with respect to the issue in the country were in the protection is claimed. It cannot be said to be a case of disregard for foreign work but that the court did not find the contract amenable to such a construction.

High Court was not true to the application of its reasoning to the facts of the case at hand. From the performers standpoint therefore the IPRS dicta still supervenes and influences the judgment of the courts in India.

M/s. Fortune Films International, Appellants v. *Devanand and another, Respondents* [105]

The issues in this case revolved around the rights of remuneration and distribution with regard to the film Darling-Darling starring Devanand. The producers who are the appellants engaged the respondent cine artist for his services in December 1972[106] and the production of the film commenced in may 1973. It is alleged by the producer but disputed by the cine artist that in July 1973 they had entered into an agreement with Mavani for the East Punjab territory and in July 1974 with one G.N.Shah for the Bombay and oversees territory. In August 1974, when about eight reels of the motion picture was completed a written agreement was entered into between the producer and the cine artist in the form of a letter written by the producers and confirmed by the cine artist. Further there was some more correspondence between the two sides as well as the laboratory that also point to the real agreement between the sides. The case turned on the interpretation of the agreement and the consequent correspondence that complements, alters or qualifies the same. The motion picture was released in the East Punjab territories on the 30th of May 1977. It is the case of the actor that the release was without his knowledge and consent. It was also released in Mysore and CPCI territories but this was with the consent and knowledge of the actor. The lab without the knowledge of the actor delivered thirteen prints for overseas distribution as well.[107] According to the actor this was without his knowledge and consent and was also in breach of the agreement made in August 1974.

The issue turned on the interpretation of clause 6 of the contract, which stipulated the conditions, as well as the mode of payment. The payment to be made to the actor was according to the territories and the value appended to it specifically.

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[105] AIR 1977 Bom.17.

[106] The statement made is 'Sometime in December'; it points out to the lack of proper documentation. *Id.*,p.19.

[107] *Ibid.*

The contract contained a package of remuneration according to the territory of exhibition.[108] The payment was to be made by procuring suitable annuity policies of the LIC of India. It was stipulated that the actors work in the picture on completion was to belong to him absolutely and the copyright therein was to vest in him and the producers would not be entitled to exhibit the picture until full payments as under clause 6 is secured by way of the annuity policies.[109] Upon the delivery of the annuity policies, the actors copyright shall vest in the producers. The producers agreed that until the said policies are delivered to the actor they will not release the said picture nor exhibit or distribute or part with any prints to any party directly or indirectly for the purpose of exhibition, distribution and exploitation in the territories specified under the clause 6.

The question mainly contested was whether the prints could be distributed or exhibited by making per territory payments or the entire remuneration had to be paid for affecting the release of the prints. The actor sought an injunction on the ground that no release even for the territory for which money had been paid could be made until the producers met the full commitment of Rupees Seven lakhs. The cine artist contended that by reason of the agreement the copyright in the motion picture was to vest in him subject to the condition of payment.

There was a negative covenant and an express prohibition agreed to by the producers until the full payment was made. Though there was a relaxation made in respect of territories within clause 6 that the prints could be distributed as and when payments are received for each territory, there could not be any release in the territories not specified in clause 6 including Bombay and overseas until the full payment was made. Further the copyright in his performance was firmly vested in the cine artist until the sum was fully paid.

The appellant producers contended that the copyright in the motion picture was not to vest in the cine artist but it referred to the cine artists' work in the motion picture.[110] As there was no provision with respect to the copyright in the picture

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[108] That in consideration of your services to us for the said picture you will be paid remuneration as under Rs. One lakh on or before the release of our picture in the Delhi up territory, Rs. 350000 on or before the release of our picture in the Bengal territory, Rs. 75000 on or before the release of our above picture in the Nizam territory, Rs. 50000 on or before the release of the picture in the CPCI territory, Rs 25000 on or before release in the Tamilnadu territory and 25000 in the Andhra a territory, totaling rupees seven lakhs.

[109] Stipulated in Clause 7 of the agreement. *Id.*, pp.19-20.

[110] *Id.*,p.20.

under the provisions of the Copyright Act the copyright in the motion picture would belong to the producers[111]. As the cine actor's performance was not any work according to the Act despite the provision in the agreement there could not be any legal vesting in the actor. In other words a non-existent right was conferred on the actor or a right that was not protected by law in question. It was also contended that the prohibition applied only in respect of the territories mentioned in clause 6 when harmoniously read with clause 7. Even if it is assumed that the copyright vested in the actor that was no reason to grant an injunction as the prohibitions were expressly with regard to the seven territories specifically mentioned under clause 6 of the agreement.[112]

The Judgment

The High court was hesitant to conclude that the provisions of the agreement would bestow a copyright in the whole picture to Devanand as it was stated that the work in the picture on completion would belong to him absolutely and that the copyright therein shall vest in him and that after the delivery of the annuity policies his copyright would vest in the producers. The court felt that it required a strained reading in order to accommodate the copyright claim to the whole picture of the performer from the words of the agreement.[113]

The court examined the contention of the producers that such a copyright in the work of the performer was not recognized under Indian law of copyright.[114] The copyright protected only the work to be found in the definition of Section2 (f) and only work that was tangible in nature could be protected. It was contended that the performance of the actor though a component of the film was not a tangible entity.[115] The cine artist had contended that the performance of the artist was covered by the words artistic work and dramatic work in Sections 2 (c) and 2(h) of the Copyright Act, 1957. Therefore the artist's film must be considered as a component of the film that would be entitled to protection as falling within the definition of the term work.

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[111] *Ibid.*
[112] *Ibid.*
[113] *Id.*, p.21.
[114] *Id.*, p.22.
[115] *Id.*, p. 23.

The court discounted the possibility of the performance coming within the parameters of the term artistic work, as it was exhaustive in the five categories that it included.[116] As for the eligibility within the definition of 'Dramatic Work', the court was obstructed by the fact that there was an express exclusion of the cinematographic film in the definition of the term 'Dramatic Work'.[117] It was advanced on behalf of the actor that the performance of the acting form in the film would fall within the definition. Since 'Dramatic Work' was an inclusive definition even if the performance fixed in the negative would not fall within the ambit of the words used, but in the very nature of things by inference the performance should qualify. As for the question of exclusion of cinematographic film it was contended that it included the totality of the film and not the performance of the actor and that the singular component would remain protected. On the other hand it was also proposed that the definition of cinematographic film would also accommodate the performance of the actor that is also inclusive and not exhaustive.

The court found striking similarities between the British and the Indian Copyright Act in the country with respect to the definition of the term 'Dramatic Works'. Both had excluded the cinematograph from the term dramatic works that was otherwise inclusive.[118] The court could not accept the contention of the cine artist that the performance of the actor could be included within the recitation or a choreographic work or entertainment in a dumb show[119]. It has to be fixed in writing. The words 'other wise' provides only for the modern means of communication such as a tape recorder or a Dictaphone and similar instruments. Though it is an open-ended definition still all exertions of a dramatic nature cannot be included within the ambit of the definition. The court was however unsure whether the work on stage or performance in a drama would be covered by the definition a 'Dramatic Work'. The court felt that the words 'fixed in writing or otherwise' suggests a point of time prior to the acting or scenic arrangement which requirement would need to be satisfied before the work can secure the 'Dramatic Work' protection.[120]

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[116] *Ibid.*
[117] *Ibid.*
[118] *Id.*,p.23.
[119] *Ibid.*
[120] *Id.*,p.24.

The court was unsure and saw as debatable whether the record of the acting or scenic arrangement after the scene is arranged or acting done or contemporaneous therewith would be covered.[121] Thus while the acting ingredient within the dramatic work may qualify for protection, according to the court (though it is unsure), once affixed, the proposition seems to be arguable. (The court does not seem to have ruled out the possibility either by these observations).

The question whether the cinematographic film would contain the performance of the artist was considered next by the court. The definition mainly protects the film and the soundtrack attached to the film. The copyright in the entire film may cover portions of the film in the sense that the owner of the copyright in the film will be entitled to the right in portions of the film. (This does not amount to joint authorship recognition.) But the court felt that this idea couldn't be extended to encompass an idea that there would be one owner of the cinematograph film and different owners of portions thereof in the sense of owners' performers who have collectively played roles in the motion picture.

In this regard reference was made to the preceding case of *IPRS* [122]decided by the Supreme Court. Though what the court relied on was a self-admitted or confessed 'otiose' footnote by the learned justice V.R. Krishna Iyer. Though the court did make a note of the observations of the judge as an aside it appears to have provided the final shape to their inclination against grant of copyright to the actor's performance.[123] The Judge had noted that the existence of the separate personality in the contributing works under Section13 (4) couldn't cut down on the copyright of the film. The court noted that other than this case no other precedents of the Supreme Court or the High Court or any English decision were referred. Therefore it was important to consider the matter with reference to the statutory provisions alone. The court felt that in view of the definitions of the 'artistic work', 'dramatic work', and 'cinematograph' film in the Copyright Act, it

[121] *Ibid.* The court observed," it is debatable whether the record of the acting or scenic arrangement made on a film after the scene is arranged or acting done or contemporaneous therewith, would be covered by the definition ".

[122] AIR 1977 SC 1443.

[123] *Id.*,p.24.

could not recognize the performance of an actor as work that is protected by the Copyright Act.[124]

The court then noted that the film in its entirety is protected as also the small portions of the mixture. The protection was not available to the certain components and elements if this mixture that is the artists performance but may be available to the story, screenplay, scenario or the music.[125] In case these satisfy the requirement of a written or similar record. The court attempted to assess his chances in getting an injunction the terms of the other provisions in the contract. .

A Critical Look at the Judgment

The court did not explore whether such a copyright can be vested by means of contract other than by way of statute. That is by means of mutual contracts. That is while the copyright holder cannot proceed on the basis of the statute as a legal right he can do so on the basis of a contractual right. Particularly since there is no law, which prohibits grant of copyright by means of contract to any individual no matter he happens to be a performer.

The IPRS decision never categorically decided on the question whether performers had a right under the Copyright Act. It was a mere desire that was expressed by the learned judge that the contributors particularly the musicians needed to be recognized along with the composers. Nothing was mentioned about audiovisual performers or performers in general nor was the statute explored to find whether performers fell into the defined space of the copyright protected entities. Justice Krishna Iyer lamented and wished for a legislative enactment without exploring either in the ratio of the fellow judge with whom he concurred or in his own footnote that cannot even be called an obiter. Thus IPRS is not a precedent to be taken into account in order decide the question of existence of performers protection within the folds of the Copyright Act, 1957. This cannot be considered as not carrying forward the case of the performer or the actor with respect to audiovisual performances as the aforementioned

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[124] *Ibid.*

[125] *Ibid.* This is in contradiction to the majority judgment in the IPRS case that recognized rights in portions of contributors subsist only in versions other than in the film.

observations clearly pertained to the musical composers and the performing artists status. Further compositions that were written or graphically represented were to be treated differently from the rest.

One of the intriguing aspects of the *Devanand* Case could be the decision of the court to disallow the request for Certificate of Appeal by the Honorable High Court of Bombay. Though no reason was adduced, it was merely stated that the entire case turned upon the question of interpretation of the contracts and therefore there arose no reason for the certificate of appeal. This is astonishing considering the fact that the High Court did explore the possibilities and came upon certain findings that by no width or yardstick can be considered as obiter. It has substantial precedent value and could stand in the way of any performers rights grant in the whole of India and not merely in the State of Maharashtra as it was a central enactment that was being interpreted.

The question of law involved in the case was unprecedented and the decision with respect to that would certainly have had an impact on the interpretation of contracts. For if the copyright character existed in the performers contribution then the attendant legal consequences and formalities would have undergone a change and thereby the extent of the contractual arrangement and its interpretation too would have been different. It would be apt to infer that the contractual interpretation was given stress when the law worked to the dissatisfaction of the actor. But the contractual reliance has given only a partial reprieve rather than what would have been begotten in the sense of a perpetual injunction had a copyright been granted or found to exist in favor of the performer.[126]

Authorship of Films or Audiovisuals in India

The 'producer' is recognized as the author of the cinematograph as well as the sound records under the Indian Copyright Act.[127] The term 'producer' has been

[126] It was a warning to the artists that no copyright under the statute existed for them other than through contractual stipulation. See, Krishnaswami Ponnuswami, "Performers' Rights and the Copyright Law ", 14(4) *Indian Bar Review* 608 (1987)., p.611.

[127] See for an exhaustive analysis of the Indian position on film authorship and trends world wide, Jayadevan.S.Nair, " Who is the Author Among Them All? - Film Authorship In India" [2004] C.U.L.R. 119.

defined as one who takes the initiative and responsibility for the making the work[128]. It is noteworthy that the definition of the author of the 'cinematograph' need not display any creative characteristic to be considered an author though the quantum of originality may have to be displayed by the cinematograph or the sound recording. The contributors to the film such as the music composers or the lyricists do not have any right to authorship in the film other than the separate right in their works. This too remains overshadowed by producers' rights in case of exploitation through the film (if the IPRS case law is any guidance and final word). The Indian position is in contrast to the changing trends the world over with authorship in films being apportioned between new entities like the director, the script writer etc. Though performers have not yet been considered as co-authors nevertheless performers in audiovisuals have been provided with separate rights.

Old Contracts --New Uses in India.

Though the interpretation and the inference of the courts may not be unanimous in this regard it is noteworthy that the judiciary in India has underlined the need that the new applications would be dependent on the content and interpretation of the old contracts.[129] Thus where the contract has not envisaged the new use then, the courts have denied the right to a new application.[130] A significant feature has been that these cases have involved the audiovisual fixation. A complete transfer of rights for rights to all future uses would only be read if the contract or implied circumstances inspired such an inference.[131]The grant of a total right to the performer akin to the copyright would certainly provide security for the performer against unenvisaged uses. However this would require a similar application of the assignment and licensing rights to performers with its requirement of minimum formalities.

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[128] Section 2(u)(u) of the Copyright Act, 1957.
[129] *Maganlal Savani* v. *Rupan Pictures*, 2000 PTC 556.
[130] *Video Master* v. *Nishi Productions*, 1998 IPLR 388 (Bom.). Entitlement for broadcasting rights recognized.
[131] *Raj Video Vision* v. *K.Mohanakrishnan*, AIR 1998 Mad. 294.

International Instruments and the Indian Performer

The Rome Convention and the Indian Law

India is not yet a signatory to the Rome Convention despite the fact that it had participated wholeheartedly in the deliberations of the Rome conclave in the year 1961.[132] It was only after a lapse of more than 33 years that the India ventured to incorporate the performers rights into the Indian copyright law in the year 1994.[133]

The Safeguards Clause: Absent Under Indian Law

A fundamental feature of any international instrument or national legislations that has extended recognition to new media either as a copyrightable entity or a new subject matter requiring protection has been that the traditional entities like the literary and the artistic subject matter have always been accorded an explicit protection from any kind of dilution of their rights and status in the face of new additions.[134] The Indian law surprisingly departs from several other national legislations or international instruments like the Rome Convention by the fact that there is no securing provision that preserves the status of literary and artistic works in the context of the performers rights granted under Section 38 of the Copyright Act. This might be rationalized on the ground that the right granted under Section 38 of the Indian law has only been of a special character or a special right and does not carry a co-equal copyright status or even a neighboring

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[132] See Eugen Ulmer, "The Rome Convention on Neighboring Rights, Part III", 10 BULL.COPR. SOC. 227(1963). India has wholeheartedly participated and even voted in favor of the incorporation of the contentious Art 12 of the Rome Convention.

[133] The feeble interest to standardize Indian law to international norms might have reasons that are not quite logical, nevertheless one reason could be the least priority accorded to intellectual property as a matter of domestic policy until TRIPS happened or in the run up to TRIPS with barriers being taken away in several areas of trade including entertainment industry. There was also felt an increasing need to subscribe to the Rome convention being an entertainment exporter and also that countries such as United Kingdom had already become members of the same.

[134] See the Berne convention, Article 14bis(1), protection of copyright in any work in the provision granting similar rights to cinematographic works. Article 1 of the Rome Convention, Article 1(1) (2) of the WPPT, the WCT with reference to compilation of databases –Article 5 a clause protecting already copyright protected entities is provided, and in Article 9 and article 10 of the TRIPS. Article 211-1 of the French Intellectual Property Code.

rights status.[135] This absence of qualification can fuel juristic speculation, as the exact character of the term special right cannot be discerned from the provisions of Section 38. The omission of the safeguard clause could be owing to the apparent lack of likelihood of any parity in the nature of copyright or rights enjoyed in comparison to the traditional entities. But a closer analysis of the Section reveals that the performer could in reality possess much more than what is apparently a lesser grant of rights.[136] Significantly, it has not been forgotten to incorporate the safeguard clause for copyright protected entities in the Act specifically in the context of protection accorded to sound and cinematograph recordings.[137]

The Definition of the Performer Under Rome and Indian Act

The definition of performer in the Copyright Act[138] is considerably advanced compared to the elucidation of the same in the Rome Convention. Under the Rome Convention it means actors, singers, musicians, dancers and other persons who sing, act, deliver, declaim, play in or otherwise perform literary or artistic works[139]. For affording protection to the performer, the performance under Rome convention has to be derived from a literary and artistic source and any performer who executes a performance other than those derived from a literary or artistic works would not be able to avail the protection. This hard-line position had however been softened or watered down by the Article 9 which enables the respective nation states to provide more protection or wider definition to the performer whose performance is not based on any literary or artistic work. But the minimum guarantee warrants that a performers work to be based on a literary and artistic work to be granted protection.[140]

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[135] However this is not justified considering the fact that in all other countries such as United Kingdom and France near co-equal rights are granted but the safeguard clause is a reassuring presence. It appears that such a fear was not nursed by the Indian legislators art all or it was not brought to their notice.

[136] See infra in this regard: Section 38, A Critique.

[137] See Section 13(3) a and Section 13 (4) of the Copyright Act, 1957.

[138] Section 2(qq) of the Copyright Act, 1957. According to it a performer includes an actor, a musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.

[139] Article 3(a) of the Rome Convention.

[140] Under the terms of Article 7 of the Rome Convention.

Rome does not define a performance but the Indian Copyright Act does define performance. Performance under the Indian act is defined as any visual or acoustic presentation made live by one or more performers.[141] Though the General Report of the Rome convention accepts it as a generic term in the sense of recitation and presentation.[142]

The necessity of any quantum of originality or whether any originality is at all required other than the proof of a nexus with the written literary or artistic work is not clear from the text of the Rome convention. But the French text with respect to the convention [143] uses the words artiste *interprete ou executant* rather than artist executants – a function of interpretation and inventiveness therefore appears essential to attribute performer status. But a suggestion of this nature is not even faintly discernible under the Indian Act. Very wide latitude is provided under the Indian Act as even ancillary performers; extras, folk and variety artists all come under the ambit of protection. Neither is the term 'performer' nor is the term 'performance' linked to literary and artistic works under the Indian Act. The definition of the performer is inclusive by nature under the Indian Act. The Rome Convention on the other hand does not bar such an extension though a much more restricted view would suffice for the minimum terms of the Rome Convention to be complied with.[144]

Rights Under the Rome and the Indian Act

The Rome Convention does not provide any positive rights of authorization to the performer. In this regard one can notice considerable similarity between the Rome and the Indian provisions. The protection granted under Rome only provides for the possibility of prevention.[145] It provides countries the freedom to choose from any assortment of measures to prevent the infringements provided under Article 7 of the Rome Convention. The minimum protection has been provided in the Convention while the states are left free to decide on any higher

[141] Section 2(q)
[142] See Claude Masouye, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO (1981), p.22.
[143] Masouye, *op.cit.*, p.21.
[144] See Article 9 in comparison with Article 7 of the Rome Convention.
[145] Article 7(1) of the Convention.

quantum of protection.[146] Seen in the backdrop of the Rome Convention, the Indian Act not only endows on the performer any possibility of preventing the acts if done without his consent, as mentioned in the convention but also goes several steps ahead.

Section 38(2) provides a special right for the duration of 50 years while the Rome Convention had granted only a period of 20 years.[147] The infringements under the Indian Act are visited with civil as well as criminal remedies.[148] Even though no authorization rights have been granted nevertheless, the infringement and consequent grant of civil and criminal measures that include the right to an injunction, are as good as endowing civil authorization rights. Further the right to assign and license the right has been granted without much elaboration or any qualifications. Though there is no explicit grant under the Rome Convention, moves in this direction are not discouraged as the words prevention of exploitation gives a wide rope for the states to choose from.

Joint Exercise of Rights

The Indian act fails to provide for a means to facilitate the administration of rights when the performance is in a group that when several performers participate in the same performance. This is found expressed in Article 8 of the Rome convention. Though the signatories need not mandatorily follow the provision in the Convention.[149]

Non-Retroactivity

An area of correspondence between the Rome Convention and the Indian Act is with respect to the lack of any provision for retroactive application of the rights[150]. This secures all the transactions prior to the activation of the rights that is the year 1995.

[146] Article 21 and Article 22 of the Rome Convention.
[147] Section 38(2) of the Copyright Act, 1957.
[148] Section 39A.
[149] The word used is "May".
[150] Article 20 of the Rome Convention.

Equitable Remuneration

The concept of equitable remuneration of performers and producers was heralded in the Rome Convention, 1961. But the Convention did not make it a mandatory provision leaving it to the states to decide whether to implement it. The method of implementing it was also subject to the limitations mentioned therein.[151] The equivalent of Article 12 of the Rome Convention dealing with secondary uses of phonograms and its benefits significantly does not find mention in the Indian Copyright Act either with reference to performers nor with respect to phonogram producers or the broadcasters. It can be noticed that once the affixation is made, the Convention does not grant the performer any exclusive right to the broadcasting or other communication to the public.[152] Therefore a very potent segment of exploitation has been left unregulated both in the Convention as well as in the Indian Act as no exclusive right to broadcasting or communication to the public is provided once the initial fixation has been done with the consent or if the width of the contract so provides. It is also pertinent to note that there is a total absence of collective administration system for the performer in India though there is an institutionalized mechanism working in this regard for the sound recorder, the music composer and the lyricist.[153] Without a sound collective administration mechanism in place there cannot be an efficient equitable remuneration system in place. This is a striking difference in the system envisaged by the Rome Convention and India. Though this provision is not mandatory so as to be a critical disadvantage for the Indian law to adopt the Rome Convention. The absence of any attempt to establish a system of single equitable remuneration will only lead the performer to be poorer as currently most of the exploitation is based on these modes of communication.

Performer in the Audiovisual

One of the noticeable areas in which the Indian law and the concept of protection nursed by the Rome Convention agree is in respect of the protection to the performer in the audiovisual. The Rome Convention through Article 19 and the

[151] Art 12 of the Rome Convention.
[152] Other than protection against recordings from broadcasts and communications to the public.
[153] For instance the IPRS and the IMI.

Indian Copyright Act through Section 38(4) almost identically exclude the performer in the cinematograph film. The only apparent distinction is in the vocabulary used. While the Rome Convention uses the term visual and audiovisual fixation, the Indian Copyright Act uses the term cinematograph.[154] The distinction in this regard could be negligible considering the fact that the connotation of the same has been enlarged through amendments to the definition of the word cinematograph as well as judicial decisions in India. However the use of the word 'visual recording' in Section38 granting rights to the performer narrows down the meaning to be attributed to the word 'cinematograph' in 38(4). The term 'visual and audiovisual fixation' as used in Rome encompasses a wide ambit that includes the cinematograph.[155]

In these circumstances it would be a matter of speculation whether firstly, the convention countries' can grant rights to the performers in the audiovisuals and secondly, whether through mutual contracts, the performer can accomplish what is not countenanced under the treaty or the law. On both accounts it appears from authoritative guides that there is allowance to grant rights and attribute credence to contracts in contradiction to the convention ideals.[156] It only means that the Convention does not grant a minimum guarantee with respect to the performer in the audiovisual. Whether the same rationale (the same rationale cannot prevail as India is not a member of the Rome Convention) prevails with respect to contracts entered into between the performer and film producer in India is speculative considering the fact that it is a legislation that has excluded the performer in the audio visual in India.[157] In this context, it should be recollected that even without a strident exclusion by means of statute, the court refused to attribute copyright on the performer even when the same had been bestowed by means of a contract, all because the beneficiary was a performer.[158] Therefore though there is a similarity between the provisions in the Rome Convention and the statutory provisions in India, the actual ramifications in practice could bring a different inference. Under Section38, nothing is stated and no indirect reference made with regard to the common law property rights in

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[154] Section 38(4) of the Copyright Act, 1957.
[155] Claude Masouye,*op.cit.*,p.66.
[156] *Ibid.*
[157] It was only the legal rights that were negated.
[158] In *Fortune Films* v. *Devanand,* AIR 1978 Bom. 17.

performance and whether the consent to affix could extinguish the common law property right or whether the effect is to be confined to the special rights granted under Section38 alone.[159]

The TRIPS and the Indian Performer

The Indian ratification of the TRIPS agreement and the passage of the 1994 amendment incorporating Section 38 in the Indian Copyright Act[160] are coincidentally within the same time frame.[161] The winds of change in the international arena were compulsive factors to alter national perspectives with respect to the performers and other factors in the intellectual property framework as the character of emerging international instruments like the TRIPS came with a rider of being fused with mandatory benefits and sanctions in the trade arena. This obligatory clause ensures that the content of the TRIPS would be carried forward into the letter and spirit of the national legislations who were signatories of the GATT and the TRIPS agreement. In contrast both the Rome Convention as well as the ensuing WPPT was optional in its obligations.

The TRIPS does not deviate nor add significantly to these obligatory limits cast by the Rome Convention. The resolve to grant a possibility of prevention to the performer is continued thereby providing a wide ambit of options for the countries to choose from. The performers are provided with the right to prevent the unauthorized fixation of their unfixed performance and the reproduction of such fixation[162]. The broadcasting by wireless means and the communication to the public of their live performance without the performers authorization are also

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[159] This can mean that consent can extinguish only the performers' rights under 38 but the property right would require to confirm to modes of proper authorization that could be influenced by customary practices in the industry.

[160] Section 38 under Chapter VIII of the Copyright Act that came into force in the year 1995 after the Parliament passed it in the year 1994.

[161] The agreement was concluded between the World Trade Organization and the World Intellectual Property Organization on December 22, 1995 and entered into force on January 1, 1996. See, *Agreement Between The World Intellectual Property Organization and The World Trade Organization (1995) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)(1994),* WIPO, Geneva (1997), p.5.

[162] Article 14(1) of the TRIPS says that in respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

recognized under TRIPS as a violation of the performers rights.[163] The broadcasting and communication to the public of the live performance covers audiovisual performances as well and therefore these acts would require the consent of the performer. The TRIPS only explicitly grants protection to performances affixed in phonograms. In contrast to this the Indian provision grants the right of consent to affix from live performances to sound and visual recordings as well.[164] The 1994 amendment in the Indian Act carries so much of the sentiment in the TRIPS agreement.[165] The protection extended to affixations against unauthorized reproductions in India was a qualified protection but TRIPS places no conditions in this respect.[166] The protection of performances affixed on phonograms arise even if the reproduction has been rendered in tune with the purpose that had been granted for affixation but without the express consent of the performer. On the other hand in India, there is need for the further consent to reproduce if the reproduction is not in tune with the purpose intimated at the time of grant of consent for the affixation or recording of the performance.

A subtle yet importance difference is the use of the term 'authorization' in TRIPS rather than 'consent' that is used in the Rome Convention. In authorization a more assertive, formal and positive grant is required. Its manifestation requires more definitiveness. The word used in Section 38(3) of the Indian Act is 'consent' and therefore the rigor of formality required could be lesser than that warranted under TRIPS.

There has been no attempt to define the term 'performer' in the TRIPS and therefore the countries are free to have a definition of their choice. The silence of TRIPS in this regard does not appear to create any difficulties as the Indian definition is wide to encompass all performers who render any performance without qualifications like appending them to creative works. The Rome shadow in this regard does not seem to fall on the TRIPS.

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[163] Article 14 (1) of the TRIPS. *Agreement Between the World Intellectual Property Organization and The World Trade Organization (1995), Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)(1994)*, WIPO, Geneva (1997), p.21.

[164] See Section 38(3) (a).

[165] See Section 38(3) of the Copyright Act, 1957.

[166] Section 38 (3)(b)(I)(II)(III).

The TRIPS does not make any reference to performers' rights in audiovisuals. At least the express exclusion with respect to the same in the Rome[167] and the careful maneuvering followed in WPPT later on is not carried forth in the TRIPS agreement. Rather there is a complete silence with respect to the audiovisual affixations. The Indian Act under Section 38(4) follows the Rome pattern and extinguishes all rights of the performer if he has consented to the incorporation of the same in a cinematograph. Further, the Indian Act exceeds the grant of rights of the performer as envisaged in the TRIPS in that the former grants and applies the right to assign and license the performers rights. It also provides for civil and criminal remedies. The TRIPS does not spell out its ideas in this respect. Though there is nothing preventing any further grant with a broad spectrum of options to realize the possibility of prevention and the minimum guarantees.[168]

The live performer in the broadcast and the communication to the public, whether it is in the audiovisual format or in the audio format, is endowed with protection under Section 38(3) of the Copyright Act. Under the TRIPS agreement too the live performance of performer in the audiovisual and the audio in its broadcast and communication to the public is granted protection and the consent of the performer is required. Nowhere under the TRIPS has it been stated that the performers rights shall subsist in the live performance. It has only been stated that the duration shall commence either from the fixation or the date of performance. Under both the instruments, there is no mandate for consent to be required from the performer for his consent to broadcast or communicate to the public from the fixation of the performance.

The TRIPS granted a period of fifty-years to the performer as against the 20 stipulated under the Rome Convention. Though India (1994 amendment) had initially granted only a period of 25 years there was a subsequent amendment that extended the durational platform at par with the fifty mandated by the TRIPS agreement.[169] The correlation between the Rome Convention and the TRIPS inevitably lead to the Rome effect being applicable to India as well. The rights conferred under TRIPS provide for conditions, limitations, exceptions and

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[167] Article 19.

[168] Article 1 (1) of the TRIPS.

[169] Article 14(5) of the TRIPS. By virtue of amendment made in the year 1999 in Section 38(2) of the Copyright Act, 1957.

reservations to the extent provided for or permitted by the Rome Convention.[170] The ambit of exceptions provided under the Indian Act includes the specifics provided in the Rome convention.[171] The provisions of Article 18 of the Berne Convention would also be applicable to the rights of the performers and producers of phonograms.[172] Therefore in spite of the fact that India has not been a signatory of the Rome Convention, with the TRIPS carrying several of the attendant provisions and features of the Rome Convention, India can be said to indirectly pay its respect to the Rome Convention.

The WPPT and the Indian Standpoint

The WPPT[173] in its endeavor to meet the new technological challenges has attempted to clarify existing norms, interpret, adapt and introduce new norms to suit the digital environment.[174] In other words it modified existing rights as also created new rights for entities that it covered in particular the performer. The instrument for the first time granted positive exclusive rights of authorization to the performer to be utilized in a digital era and ancillary rights to combat technological circumvention.[175] India, (with the largest entertainment industry in the world) has not signed the WPPT to date.[176]

The amendment to the Copyright Act with respect to incorporation of the performers rights took place in 1994 prior to the creation of the WPPT in the year 1996. The Indian delegation did refer to the recent amendments in the law during the discussions and acknowledged that the previous sessions of the WIPO committees were useful in preparing the amendment legislation.[177] The 1994 amendments made delectable alterations to the Copyright Act. The change was

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[170] Article 15 of the Rome Convention.

[171] Section 39 of the Copyright Act. In fact the Section takes use of the freedom provided by both Article 15 (1) and (2) of the Rome convention.

[172] Article 14(6) of the TRIPS. *Agreement Between The World Intellectual Property Organization and the World Trade Organization (1995) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)(1994)*, WIPO, Geneva (1997), p.22.

[173] As mentioned in the preamble to the WPPT. See *WIPO Performances and Phonograms Treaty (WPPT) (1996)*, World Intellectual Property Organization, Geneva (1997), p.9.

[174] T.C.James, "Performers Rights in the Digital Era" , Paper Presented at the National Seminar on Challenges of Internet Cyber Law and Enforcement of Copyright Law, March 3rd to 4th, 2001,Indian Law Institute, New Delhi, p.3.

[175] The phonogram producer was already endowed with authorization rights under the Rome Convention.

[176] However, India had participated in the WPPT and contributed responsibly to the proceedings.

[177] See INR/CE/III/3, International Bureau WIPO, 1994, p. 5.

not merely confined to the introduction of performers' right alone. The amendments made significant changes in provisions in order to make the Act digital friendly. But this digital preparedness may not seem to have touched upon or rubbed off on the protection granted to the performer under Section 38.

Fixation

The terminology used in the WPPT has been impelled by its aim of adapting traditional notions and processes to those in play in the digital environment. Therefore WPPT has taken meticulous care to define terms representing objects and processes so as to minimize all possibilities of ambiguities and stall the possibilities of escape from the legal streamlining that is attempted in the treaty. The word 'fixation' has been one that requires an exact description particularly since the characteristics of the same in the analogue media varies with that in the digital environment. The word 'fixation' is not used under the Indian Act at all. Rather the word 'recording' is used in conjunction with the term sound recording. A separate definition of what is meant by a recording is not provided in the Copyright Act, 1957. Therefore the exact ambit of the word 'recording' is shadowed by the specific medium that it seeks to explain. Even though the definition of a sound recording[178] is large enough to cover all mediums it does not help in clarifying the exact metes of the word 'recording' and when it can be said to have taken place. This would have an important bearing on the issue as to when a reproduction could have taken place to constitute an infringement of the affixation or the reproduction right. Affixation connotes much more in terms of impermanence or transience in tangibility than the word recording. The absence of the word in the copyright legislation in India seriously affects the precision of legal discourse that surrounds the subject in the digital environment. Fixation in the WPPT is defined as meaning the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device[179]. The specific words 'embodiment of sounds and representation' take it beyond the technological restraints imposed by the word recording. The word 'recording' might just fall short of the rigor that process

[178] Section 2(x)(x) of the Copyright Act, 1957.
[179] Article 2 (c) of the WPPT.

in the digital world might otherwise require in the absence of any definition in the Indian Act.[180]. Despite amendments in the eighties and the nineties to meet the digital demands in the Copyright Act[181], terminological changes have not been meticulously effected in the Indian Act in harmony with international perspectives, nor have the existing words used in the statute been manifestly reformulated in order to cater to the new world of technology. This places the Indian creator including the performer at a disadvantage as the right to stop the recording or the reproduction cannot be directly inferred from the statutory provisions in the context of the processes afforded in a digital age and has to be at the mercy of judicial discretion with the fear of interpretational inconsistency. Thus there is a lack of terminological parity and definitional equivalence between the WPPT and the Indian legislation.

Phonogram or the Sound Record

The word phonogram[182] is not used in the Indian Act. The application of the word might be of amusement interest only considering the fact that sound record is good enough alternative to the term. But it is in the interests of legal certainty to see that the latter term is up to date with the technological possibilities available today and equal to the specifications of the definition of the word phonogram. For example the use of the words fixation along with representation of sounds in the WPPT changes a lot by way of legal possibilities that has nothing to do with the medium on which the record is made but is suggestive of the manner in which the recording is rendered. The WPPT has exposed the drawbacks and the over confidence reflected in the Indian legislation effected by the 1994 amendments.

The word *phonogram* has not been defined under Indian Copyright Act. However the word sound record has been used. It has been defined to mean a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced[183]. The definition covers a wide ambit[184]. It is important to note that it

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[180] The Rome Convention does not define the word 'fixation' but that was not disturbing as the international instrument had only the analogue and electrical means to counter.

[181] Digital impelled changes can be considered to have begun from the eighty-four onwards but the major changes took place in the year 1994.

[182] WPPT defines "Phonogram" as meaning the fixation of the sounds of the performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.

[183] Section 2(xx) of the Indian Copyright Act.

does not exclude the audiovisual or the cinematograph medium from its definition. This can have grave consequences considering the fact that the rights, infringements and remedies for the performer in the audio and the audiovisual can be distinct. If the sound record would also encompass the soundtrack then the performer of sound or audio in the cinematograph film would claim rights akin to the audio performer.

But the word 'recording' in sound record does shrink possibilities in this regard. It raises questions such as whether a digital temporary or transient storage could be considered to be a recording. The word recording carries with it an element of permanence. This ambivalence comes out strongly in the face of the definition of 'phonogram' attempted in the WPPT supplemented by its definition of the word 'fixation'. The WPPT defines a phonogram as a fixation of the sounds of a performance or of other sounds, or a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work[185]. Firstly there is a clear exclusion of the cinematograph and the audiovisual from the purview. This is not so in the Indian context. This can certainly raise questions whether the performer in the sound records can claim a right in the audiovisual or the cinematograph after incorporation in its sound track of the film. This is despite the exclusion from the cinematograph by virtue of the Section38 (4) of the Act.[186]

Section38 (3) of the Indian Copyright Act demands that the consent of the performer is taken for the sound recording or the visual recording, therefore with the meaning of the word 'recording' left undefined there is a possibility of conventional analogue media alone being covered.[187] Particularly since the word 'recording' has not been defined and recording has by a common understanding a character of permanence and might not include a temporary existence. The prevailing provisions are therefore susceptible to various interpretations leaving the terrain uncertain and unpredictable.[188]

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[184] Its wide ambit would essentially or can essentially include the analogue and the digital medium as well.

[185] Article 2 (b). *WPPT (1996)* WIPO, Geneva, (1997), p.11.
[186] Article 2 (C). *WPPT (1996)*, WIPO, Geneva, 1997,p.11.
[187] Section 38(3) A of the Copyright Act, 1957.
[188] See for views in this regard Dr. N.S. Gopalakrishnan, "WIPO Copyright and Performers and Phonogram Treaties", 21 Ac.L.R, 12(1997).

Publication

Section 3 of the Copyright Act, 1957 defines *publication* as meaning making a work available to the public by the issue of copies or by communicating the work to the public. The WPPT defines publication of a fixed performance or a phonogram as the offering of copies of the fixed performance or phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.[189] The Indian definition is applicable to a wider range of subject matter including phonograms while the definition of publication in the WPPT pertains to phonograms alone. It is interesting that the WPPT uses the words fixed performance or a phonogram but the term fixed performance has not been defined, (though affixation has been defined). Secondly the agreed statement to WPPT clarifies that the phonogram will pertain only to tangible copies. Further it is also mentioned that the same has to be in reasonable quantities. Both these qualifications are absent in the Indian law as the general definition under Section 3 applies to the performer, the phonogram producers as well as other right holders. The Indian definition brings communication to the public also within the ambit of the definition of the term publication. This is not so under the WPPT.

The Definition of the Performer under WPPT and the Indian Legislation

The WPPT defines the performer as "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"[190]. The Indian enactment in contrast is wider and goes beyond the limits restricted to the performers of folklore[191]. This is an inclusive definition and neither the derivation from literary works nor fulfillment of the criteria of folklore really matters under the

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Paper by T.C. James, "Performers Rights In The Digital Era", Paper Presented at the National Seminar on Challenges of Internet Cyber Law and Enforcement of Copyright Law, March 3rd to 4th, 2001,Indian Law Institute, New Delhi, p.5.

[189] Section 2(e) of the WPPT.

[190] As has been already explained in chapter two.

[191] Section 2(q) and Section 2(q)(q)

Indian definition of the performer.[192] It is important to note that this open-ended character is not expressed in the WPPT. Thus the Indian law is far advanced than the sentiment in the WPPT with respect to the definition of the term performer. It is noteworthy that the word 'interpret' is not found in the Indian definition. This could reduce the interpretative possibility as to extension of the definition to cover those who have worked behind the scenes as well and also the doubt whether the protected need to be further distilled or filtered according to their originality or creative content.

The Rights Granted by WPPT and the Indian Law

The Right of Reproduction

The word "reproduction" has not been defined in the Indian Copyright Act but the right has been granted to all copyright protected entities and[193] the performer has been granted a right to prevent the reproduction of the fixation of his performances in sound and visual recordings made without his consent. But this can be activated only if the initial affixation has by itself been unlawful or made for purposes different from that for which the consent was granted or made for purposes distinct from the circumstances of fair use.[194] The WPPT does not define a reproduction in its definition clauses[195] but the right of reproduction has been unconditionally granted to the performer in the WPPT[196]. This very important right that found only a late presence in the Berne convention of 1967 has been conspicuously included in the WPPT as a positive authorization right for the performer. The significance as regards its presence in the WPPT is two fold in that it has been for the first time that an international instrument is providing a positive authorization right to the performer particularly the right of reproduction

[192] Article 9 of the Rome Convention. The Indian concept of the performer could be considered to be a reflection of the concession provided under the Rome Convention under articles nine or the liberal sentiment contained therein.
[193] See Section 38(3)(b) of the Copyright Act, 1957.
[194] *Ibid.*
[195] See Art.2 of the WPPT.
[196] Art. 7 of the WPPT. T.C. James, "Performers Right in the Digital Era", Paper Presented at the National Seminar on Challenges of Internet Cyber Law and Enforcement of Copyright Law, March 3rd to 4th, 2001,Indian Law Institute, New Delhi, p.4.

that is vital towards a copyright identity[197]. Secondly, the formulation of the same is in tune with the demands of the digital era and the right has been impliedly and overtly framed to meet the challenge of digital technology.

The right of reproduction has not been granted to the Indian performer under the "special rights" granted under Section38 of the Copyright Act. The right of reproduction granted to the literary authors and artistic works is the only right under the Copyright Act that is equipped explicitly to deal with the electronic environment[198]. In comparison to this, the provision made in the WPPT with respect to the performers right of reproduction provides a wide ambit to the means of exploitation and that is further qualified by an agreed statement[199]. There is no explanation in the Act whether the electronic storage is restricted to permanent storage or whether the temporary storage would be excluded from the ambit of electronic storage. This ambiguity with respect to the extent of storage or the nature of storage is apparent in both the WPPT as well as in the Indian Act with respect to literary and other works. But by means of the agreed statement the WPPT has accommodated all kinds of reproductions rendered without authorization to be infringing reproductions regardless of whether they are temporary or permanent. It is clear that the performer is not bestowed the status of authorship under the Indian Act and even if so identified still the right would have to be extended and accorded to him in the digital context[200]. Therefore the infringing use mentioned in Section 38(3)(b)(I) and (ii), where in reproductions of the recordings made without the consent of the performer or made for purposes different for those mentioned for which consent was given is not likely to extend to the digital context. As performers do not form part of the class covered by Section14 and nor is reproduction defined generally in terms of the digital technology, the law will need amendment and clarity in this regard.

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[197] The Rome convention does not explicitly grant such a right.

[198] Section14 (1)(a) of the Copyright Act lays down that in case of literary work, dramatic or musical work, not being a computer program –1. To reproduce the work in any material form including the storing of it in any medium by electronic means.

[199] Article 7 of the WPPT says that performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of the performances fixed in phonograms, in any manner or form. The agreed statement says 'it is understood that the storage of a protected performance or phonogram in digital forming an electronic medium constitutes a reproduction. See chapter ii.

[200] See the definition of the word 'author' in Section 2(d) of the Copyright Act, 1957.

The Right of Distribution

The performer has not been provided with a right to authorize distribution of the fixed performances in India. It has not been provided even as an ancillary to the right of granting consent to record or to reproduce those records.[201] If the purpose of the reproduction has been for distribution as against what had been agreed upon at the moment of affixation then distribution would certainly invalidate the grant of consent for reproduction and therefore it can be considered an infringement.[202] The WPPT grants the performer the right to authorize the making available to the public of the original and the copies of their performances fixed in phonograms through sale or other transfer of ownership.[203] The right pertains to the making available of original and tangible copies of the same. In India, though Section 14(ii) does extend the right of issuing copies to the public to the literary, dramatic, musical and artistic works. For the rest of the works like cinematograph and most significantly the sound recording, the right is further restricted to selling and giving on hire to the public- the words issue of copies is not used. There is no word as to "issue or distribution" of the original in the Indian Section in contrast to this being specifically spelt out in the WPPT.

The Right of Rental

Under WPPT, the performers are granted the exclusive right of authorizing commercial rental to the public of the original and copies of their performances fixed in phonograms even after distribution by them by or pursuant to authorization by the performer[204]. But the Indian legislation does not grant an exclusive right to rental to the performer. In a statute where in no right of distribution has been granted to the performer, it is farfetched to expect a right of rental that follows the distribution of performances. The right granted under the WPPT is for fixed copies that are tangible objects. Therefore the idea is

[201] Section 38(3) of the Copyright Act, 1957.
[202] The Indian courts have before pointed out the connection between the reproduction and the right to the copies or mode of distribution. See the case law of *Penguin Books Ltd., England* v. M/s *India Book Distributors*, A.I.R. 1985 Delhi 29.
[203] Article 8 of the WPPT.
[204] Article 9 of the WPPT.

concentrated around the off-line product range that includes compact discs and the like. Therefore point-to-point online rental does not seem to have been contemplated under the WPPT. The Copyright Act grants the right of rental through the 1994 amendment to the compute programs, the cinematographs and the sound recorder[205]. Thus while the right of rental is contained in the hire provision with respect to the sound recorder, there is no hint in the Act as to manner in which the remuneration must be distributed to the owners of the sound recorder, the cinematograph and the computer program.

The Right of Making Available

One of the most significant contributions of the WPPT in the digital context with respect to the performer has been the grant of the exclusive right of making available of fixed performances.[206] It encompasses the making available to the public of their performances fixed in the phonograms, by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them[207]. This takes into account the new format of marketing and use chosen through the digital circuits like the computer and the Internet. There is a major vacuum in the Indian law in this respect both with respect to the performers as well as other works recognized under the Copyright Act.

While there is no separate mention of the right of communication to the public under WPPT, in India the right of communication to the public apparently encompasses within it the right of making available. The definition has been understood and interpreted by law scholars as being adequately prepared to meet the digital necessities. The communication to the public of the live performance without the consent of the performer is an infringement under the special rights that has been granted to the performer in India. This applies only to the live performance and not to recorded performance. But the issue would be whether on demand sourcing could be impliedly read in to the definition of communication to the public in India or whether it is only a variation of broadcast.

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[205] See, N.S.Gopalakrishnan," WIPO Copy Right and Performers and Phonogram Treaties – Implications for India", 21 Ac.L.R.12 (1997).
[206] Article 10 of the WPPT.
[207] Article14 of the WPPT.

The right of making available takes into account fixations in phonograms but the Indian Act deals with only unfixed performances in communications to the public with respect to the performer. Further, there is a lack of clarity, as the words communication to the public has not been replicated in the Section with respect to the performer. Rather the words *"communication of the performance to the public"* and *"communicates to the public"* has been used[208]. The phrase communication to the public as used in the definition clause pertains to "works" into which category the performers are yet to be included. Therefore the performer cannot avail of the protection against unauthorized digital delivery.

Equitable Remuneration and the Indian Law

The only area of broad correspondence between the WPPT and the Indian legislation would be in respect of the rights of the phonogram producer. Indian legislation on the same had already been far in advance of the WPPT and copyright status had already been accorded to the sound recorder along the same lines as that for the cinematograph film[209]. Other than art 15 of the WPPT that deals with equitable remuneration with respect to the sound recordings that are either broadcast or communicated to the public there are no striking differences between the Indian intent and the right of the sound recorder recognized in the WPPT. This is particularly striking considering the fact that the Berne convention does not recognize the sound recording as a protectable entity. The Indian Act grants the right to make any sound recording embodying it, to sell or give on hire and to communicate the sound recording to the public. Thus while the right of rental can be found in the provision, there is no hint as to the manner in which the remuneration must be distributed to the sound recorder nor any proposition regarding a remunerative model[210].

Another conspicuous absence from the Indian legislation with respect to performers as well as sound recordings and cinematograph films are the anti circumvention protection measures and protection of rights management

[208] Section 38(3)(d).
[209] See Section 14 of the Copyright Act, 1957.
[210] However it would still be a question mark whether the Indian Act is prepared for the digital delivery and equitable remuneration associated there with? Despite certain conspicuous and pronounced changes having been made in this regard since the year 1994.

information provided for in the WPPT[211]. Our legislation has not incorporated provisions to protect and meet these technical eventualities that go hand in hand with e digitization.

Moral Rights

A most conspicuous feature of the WPPT had been the grant of moral rights protection to the performer.[212] Both the right to integrity and paternity had been granted to the performer with exceptions. Though it was not as extensive as granted to literary and other entities recognized in the Berne convention under Art.6 Bis. This is strikingly absent in the special rights granted to the performer under Section 38 of the copyright act, which appears to follow the Rome trend.

The Model Law and The Performer

The ILO, the UNESCO and the WIPO resolved in the year 1974 to formulate a model legislation with the ostensible objective of providing a guide to the implementation of the Rome Convention.[213] It is a significant product considering the fact that the interests of the developing countries were kept in consideration while framing the provisions. The exercise provides an assuring insight into the possibilities that Rome Convention provides in its actual implementation and clarifies several gray areas that were susceptible to doubt and misgivings.

The Model Law largely follows the same definitional clauses as in the Rome Convention except for the definition of the term 'Fixation' that had not been attempted in Rome and changes to the definition of the term reproduction[214]. Fixation has been defined as the embodiment of sounds, images or both in a material form sufficiently permanent or stable to permit them to be perceived, reproduced or otherwise communicated during a period of more than transitory

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[211] Article 18 and 19 of the WPPT.
[212] Article 5 of the WPPT.
[213] *Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations with a Commentary*, ILO, UNESCO, WIPO (1982), p.1. Courtesy: Division of Arts and Cultural Enterprise, UNESCO.

[214] *Id.*, p.6. Section 1(ii).

duration. It is important to note that the definition excludes the fixations in a transient form. This is important considering the fact that otherwise ephemeral fixations would also have been amenable to charges of violation. Such a definition has not been attempted in the Indian Act.

The definition of 'reproduction' states that it is the making of a copy or copies of a fixation or substantial part of that fixation.[215] The addition of "substantial part of the fixation" to the definition brings the substantiality test into operation unlike the ramification that would have been caused by the use of the word 'part of the fixation.' This also opens up the possibility of imitations of the fixations being considered as a violation.

Importantly the "consent" of the performer required in the Rome is changed to the term' authorization of the performer[216]. This is a subtle but important change over. It has to be mentioned that under this instrument the broadcaster and the producer too have been treated to similar phraseology as the performer. The enumeration of their rights also begin with the words," without the authorization of the .....".

Section 2 (1) says that "without authorization of the performers, no person shall do any of the following acts – broadcasting of the performances except where the broadcast is made from a fixation of the performances other than a fixation made under the terms of Section 7(2) or is a rebroadcast authorized by the organization initially broadcasting the performance". Similarly, authorization is required for the communication to the public except where it is made from a fixation of the performance or is made from a broadcast of the performance.[217]

The authorization of the performer is required for the fixation of their unfixed performance. The authorization is required for the reproduction where the program was initially fixed without their authorization or where the reproduction was made for reasons different from those for which the performers gave their authorization and reproduction was rendered for reasons different from fair use exceptions.

It is also significantly provided that in the absence of a contractual agreement to the contrary or of circumstances of employment from which the contrary would

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[215] *Ibid.* Section 1(viii).
[216] *Id.*, p.8.
[217] *Ibid.* Section 2(1)(b).

normally be inferred.[218] This shows that there is no restriction to mould obligations by means of the contract. This is an important addition as it provides guidance in case of an employer –employee relationship existing between the performer and the organization. However the law does not take away the rights but only leaves it to the contractual terms.

The model law speaks on post authorization for broadcast and authorization to affix and reproduction so that the silence in this regard would not lead to any wrong notions of extent of authorization[219]. This lack of clarity was very much evident with respect to Rome as well as the Indian legislations. The model law clearly states that the authorization to broadcast does not imply an authorization to license other broadcasting organizations to broadcast the performance (b) the authorization too broadcast does not imply the authorization to fix the performance (c) the authorization to broadcast and fix the performance does not imply an authorization to reproduce the fixation and (d) the authorization to fix the performance and to reproduce the fixation does not imply an authorization to broadcast the performance from the fixation or any reproduction of such fixation. These clarify the limits of the authorization granted. The lack of such precise clarification has led to ominous interpretations of the rights of the performer with the rights believed to be lost with the consent granted to the user in India and upon consents the user being endowed with the right to deal according to the way he deems it best.

A most significant provision on the model law is the at once the performers have authorized the incorporation of their performances in a visual or audio visual fixation, the provisions of paragraphs (1) and 2(c) and 2(d) have no further application[220].

This is a significant provision it qualifies with precision the rights that are lost upon authorization of the performer in the visual and the audiovisual. In India rights en-mass are supposedly lost, however in the model law it is a qualified loss of rights. In India the visual fixation is not covered unless by means of interpretation the extent of cinematograph is stretched.

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[218] *Ibid.* Section 2(2).
[219] *Id.*, p.10.Section 2(2)(a)(b)(c)(d).
[220] *Ibid.* Section 3.

However the performer is allowed to procure more favorable terms for the use of their performances through contract than what is provided by means of statute.[221] Duration of 20 years is laid down buy the statute as a protective term.[222] Civil remedies have been provided to the performer in the event of violation or threatened violation, which includes the instrument of injunction, damages including any profits and exemplary damages if the damage is the result of malicious intent. The criminal remedies envisaged includes both the imposition of fine as well as imprisonment. However knowledge has been made a component of the criminal offence.[223] It has to be remembered that this is a mere reflection of the possibilities that 'possibility of prevention ' afforded by the Rome Convention. The law in India carries both remedies though it is the same as that afforded to the copyright entities.

The attitude of non-retroactivity on both the rights as well as the performances and that have taken place is provided in the model law through two alternatives.[224] It is important to note that non-retroactivity commonly does not require specify enunciation unless the statute is to specifically have a retrospective application. However the provision aids in imparting clarity. The Indian law does not carry any specific provision on this. Therefore it is prospective application of the statute that is accorded.

It is important to note that while civil remedies are provided, no provision for assignment and licensing rights have been explicitly provided. Though care is shown while the performer authorizes someone else to exercise rights on his behalf. The authorization is required to be in writing. There is no definition of the term authorization with respect to Section2 and therefore whether any formality is required for the authorization from the performer lacks from any guideline. As a national statute such a guideline would have been welcome.

The Model Law provides that the provisions are not to affect the protection afforded by any other law or international treaty.[225] A like provision of this nature is absent in the Indian law and therefore the status of the performer under the

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[221] *Ibid.* Section 4.
[222] *Ibid.* Section 5.
[223] Section 9. *Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations with a Commentary*, ILO, UNESCO, WIPO (1982), p.34. Courtesy: Division of Arts and Cultural Enterprise, UNESCO.
[224] Section11. *Id.*,p.36.
[225] Section12. *Id.*,p.38.

alternate protection afforded by any common law or other law and its impact is prone to interpretation. However this appears to be an unnecessary provision under Indian conditions and norms of interpretation as unless there is any express prohibition, such an interpretation of prohibition is not likely by implication.

The Model Law is an eye opener and an important aid in its interpretation. Though the Model Law has no compelling effect or the model law need not compel any particular interpretation nor is it a legitimate guide to interpret national statutes nevertheless it does throw light on the possibilities inherent in the Rome Convention if any state intends to appropriate its statute to its standard for the efficient protection of the performer.

Protection for the Performer under other Common Law Principles

The performer in India had not been granted any statutory right in his /her performances until the enactment of the amendment to the Copyright Act in the year 1994. The principles of tort law such as the right of privacy, the right of publicity and the tort of personality passing off can be considered to have governed the Indian legal environment and not abhorrent to Indian common law traditions. The performer in India could always take recourse to these principles when their image or likeness or more specifically their performance either aurally or visually was being utilized without authorization and commercially or otherwise utilized without recompense to the performer[226]. These principles were the only aid for the performer to turn to in order to be protected against unauthorized exploitation of their performances. Upon a minute scrutiny of these doctrines it will be possible to discern that none of these might possibly with precision and certainty fulfill the protective requirements of the performer.

Nevertheless the performer can be considered under common law notions to be equipped with civil instruments of injunction and damages in order to enjoin another from appropriating their labor without gratification. In spite of there being few reported case laws compounded by a scarcity of indigenous academic

[226] The right of personality is a wide right that might have to be shrunk or extended to suit the nature of performances. The approach is that of a civil property right and not of the recognition of the intellectual property right in the performance. Therefore several of the advantages and disadvantages might be found to be absent in these.

literature with respect to this branch of law, the proprietary right to personality is recognized in India. Though theoretically variations may well be discerned between the application of the pure doctrine of personality or publicity rights and that when applied to the performances of the performer[227].

However despite indirect references to the doctrines of publicity mentioned above very few cases have come to the fore with respect to the performers seeking recourse against unauthorized appropriation or utilization of their performances in India. The only reported decision wherein the principle has been shown to be an accepted doctrine as applicable to live persons but which did not in the circumstances apply to the events in the like of ICC world cup was in the case of *ICC Development (International) Ltd.* v. *Arvee Enterprises*[228] There are not many cases reported with respect to the tort of personality passing off in India though passing references are made which is a testimony to the recognition granted to this doctrine in India.[229] But an occasion for the serious appraisal of the doctrine is still to be taken up in India. However in *ICC Development (International) Ltd. v. Arvee Enterprises*, the court's observations during the course of the finding whether persona value inheres in non living entities is significant and forms the ratio of the case. It is significant to note that the court referred to *MacCarthy's on the Rights of Publicity and Privacy* (2nd Edition) at p.460 and to the American

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[227] Making use of the personality for other commercial promotional purposes is slightly different from the use of the performance for publication without authorization. Though financial or other appropriation of goodwill of the artist cannot be denied there would be a variation in the degree of loss to the performing artist when a mere performance is appropriated in contrast to the appropriation for the commercial purpose of passing off.

[228] 2003 (26) PTC 245(DEL).

See, Pravin Anand, "Intellectual Property Awakens in India", *Legal Media Group*, September 2004 Issue, <http://Www.Legalmediagroup.Com/Mip/Default.Asp?page=1&SID=2415&Imgname=Indiaspecial04.Gif&=F=F>. According to the author this is the only case reported with respect to the right of publicity in India. "The Delhi High Court in a landmark decision on the right of publicity in an event such as the World Cup Cricket South Africa, 2003, in the World Cup case observed that the right of publicity could not extend to non-living entities, such as events, because (1) there are alternative theories for protection of such events within intellectual property laws; (2) protection afforded to an event would be against the basic concept of persona, which, by its very definition can inhere only in an individual or any indicia of an individual's personality. The court explained that though an individual may acquire the right of publicity by virtue of association with an event, that right does not inhere in the event in question, nor in the organization behind the event. This was the first decision on the right of publicity by any court in India ".

[229] See *R.R. Gopal and Another* v. *State of Tamilnadu* J.T. 1994 (6) SC 514 as observed in the *Phoolan Devi* v. *Shekhar kapoor,* 1995 PTC 46 (Bandit Queen case).

Position of Law therein and said," *the right of publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individuals personality like his name, personality trait signature, voice etc. An individual may acquire the right of publicity by virtue of his association with an event, sport, movie, etc..... Any effort to take away the right of publicity from the individual, to the organizer (non human entity) of the event would be violative of the Articles 19 and 21 of the Constitution of India. No persona can be monopolized. The right of publicity vests in an individual and he alone is entitled to profit from it. For example, if any entity was to use Kapil Dev or Sachin Tendulkers name/Persona /indicia in connection with the World cup without their authorization, they would have a valid enforceable cause of action*".[230] It is notable that in coming to this conclusion the court also relied on the *Zachchini* case that brought out the similarity of intent between the right of publicity and copyright.

In the *Phoolan Devi* decision,[231] the court clearly found that the right of privacy inheres in the public figure also unless the same was to be exposed with the authorization of the individual. This decision has immense ramifications for the performers' moral rights as well as the economic right aspirations and it shows that distortion and depiction impinging on the privacy of the performer would not be condoned unless the authorization of the performer and a proper intimation to the performer was provided. The court also considered the fact that the victim was not shown the film after it was made as she could have objected to the same after the preview. In the facts of the case the filmmaker deviated from the book from which the screenplay of the film Bandit Queen was to be based. The court disapproved this. From the performers standpoint any depiction beyond the role and script that was intimated to him which impinged on his right to privacy would therefore be actionable. The court however did not delve into the question whether privacy did have a property character in it to be traded. This also exposes the openness of the Indian judicial attitude to causes of action in common law considered anathema by the British purists. The recourse and reference to American juristic position is a further testimony to the non-conservative attitude of the Indian judiciary.

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[230] 2003 (26) PTC 245(DEL)., p.254.

[231] *Phoolan Devi* v. *Shekhar Kapoor and others*, 1995 PTC 46., p.64.

Protection of the Performer Under the Copyright Act, 1957

Prior to the amendment in 1994, the courts inferred that the right in the performance of the Actor could not be brought within the ambit of dramatic works, within the spectrum of the Copyright Act, as the definition of Dramatic Work specifically excluded the recordings of cinematographic works.[232] The court did not venture forth to make any further opinions or rather felt unsure to do so. It foreclosed any option of exploring the Copyright Act to help the performing artist particularly in the audiovisual media with any rights and even contractual investment of copyright upon the performer was disallowed. The musical or the aural performer was totally omitted because authorship of the musical works and its contours were statutorily recognized as being authored by the music composer alone.[233] The reciter of a literary work too would not come within any protective ambit of the Copyright Act.[234] Therefore the performer of works and others could not claim authorship and are not afforded any protection under the Copyright Act.

The Act was amended in the year 1994 in order to accommodate the performer with in the Copyright Act[235]. It is noteworthy that the measure was starkly distinct from certain attempts made initially in United Kingdom by making a separate legislation for the performer[236]. The reasons that impelled the need for the amendment were the cascading international developments in the context of the General Agreement on Tariff and Trade, the impending TRIPS agreement and the need to be statutorily prepared to endorse the demands of the changing international order. The copyright changes went through a full committee procedure in the parliament.[237] The elaborate exercise did not bring about any significant changes in the original bill of 1992 or the policy thrust underlying it. The Joint Parliamentary Committee made several changes and submitted it in

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[232] See *Fortune films* v. *Devanand*, A.I.R. 1978 Bom.17.
[233] *Id.*,p.24.
[234] *Ibid.*
[235] Substituted by Act No. 38 of 1994, w.e.f. 10th. May, 1995.
[236] See the Dramatic and Musical Performances Act, 1925 that was a separate legislation with only a criminal remedy.
[237] Rajeev Dhavan, "Coping with Copycats", *Frontline*, 28/7/95, p.94. During the procedure the joint committee received the memorandum from 42 persons and organizations and received evidence on twelve occasions from 32 persons. There was a preponderance of pressure from the government witnesses and film, cable, music and computer interest with a lesser emphasis by authors and publishers

August 1993.[238]The amendments were brought into effect on the 5th of May 1994 through an official notification in the Gazette of the Government of India.[239]

Performers' Rights

In the newly incorporated Section 38 under Chapter VIII of the Copyright Act the performer is granted a Special Right called the Performers' Right.[240] The right is to prevail for the benefit of the performer for a period of 50 years following the year of the performance.[241] The Act defines the term 'performer' and 'performance'. An inclusive open-ended definition is provided for the term performer and it includes an Actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance[242]. It can be noticed that the definition does not mention any further qualifications or categorization on any basis namely originality or skill etc. Also it does not mention the need for any derivation from literary or artistic works, which is starkly distinct from the inclination that national as well as international instruments have shown. Performance has been defined as meaning any visual or acoustic presentation made live by one or more performers[243]. It is noteworthy that the reference is only to a live performance. It is further qualified by the use of the terms visual or acoustic presentation. The absence of the use of the words 'cinematograph' or 'audiovisual' or any reference to them is noteworthy as it appears to be completely excluded from the coverage of the rights. The definition also limits the protection to 'presentation' of live performances and not to recordings. The performance can be rendered either singly or by several numbers.

During the subsistence of performers' rights, it is an infringement if the following Acts are committed without the consent of the performer with respect to

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[238] *Tribune* (Delhi), *Patriot* (Delhi), *National Herald* (Delhi), *Observer* (Delhi), *Business Line* (Delhi), *Hindustan Times* (Delhi), *Asian Age* (Delhi), 11/5/ 95.

[239] See *Indian Express* (Bangalore), *Rashtriya Sahara* (Delhi), *Tribune*, (Chandigarh), Dated 11/5/1995.

[240] The Section 38(1) says "where any performer appears or engages in any performance, he shall have a special right known as performers' right in relation to such performances

[241] Section 38(2) says that the performers' right shall persist until 25 years (now 50 years) from the beginning of the calendar year next following the year in which the performance is made.

[242] Section 2 (qq).

[243] Section 2 (q).

performances on a sound recording or a visual recording.[244] It would be an infringement of the right if the affixation of the performance were made without the consent of the performer. The reproduction of the affixation would be an infringement if the original affixation has been rendered without the consent of the performer. The reproduction would be an infringement if it were made from a recording, which had been made for purposes different from that for which the performer had given his consent for the affixation. The broadcast of the live performance would be an infringement if made without the consent and similarly any communication to the public would also be an infringement if made without the consent of the performer. However, if the broadcast or the communication to the public were made from a sound recording or a visual recording then it would not amount to an infringement. A rebroadcast of an earlier broadcast that did not infringe the performers' right would be valid.

A broadcast from a recording made without consent does not appear to be an infringement. This could also mean that a recording made for the sake of broadcast would be a valid one even if made without consent. With respect to rebroadcast the only condition to be fulfilled is that the initial broadcast ought not to have violated performers' rights. This can only mean that the initial broadcast should have received the consent of the performer from his live performance. Whether the recording from which the initial broadcast has to be made is valid or not is not clear though the need for the same to be valid for the repeat broadcast can be inferred with some stretched interpretation.

The communication of the performance to the public is an infringement if made without the consent of the performer. However, it is not considered an infringement if it is made from a sound or visual recording or under the fair use

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[244] Section 38(3) says that during the continuance of the performers' rights in relation to any performance, any person who, without the consent of the performer, does any of the Following Acts in respect of the performance or any substantial pat thereof, namely-
(a) Makes a sound recording or visual recording of the performance or (b) reproduces a sound recording or visual recording of the performance which sound recording or the visual recording of the performance was –(I) made without the performers' consent; or (ii) made for purposes different from those for which the performer have his consent (iii) made for purposes different from those referred to in Section 39 from a sound recording or a visual recording which was made in accordance with Section 39 ; or (c) broadcasts the performance except were the broadcast is from a sound recording or a visual recording other than one made in accordance with Section 39, or is a rebroadcast by the same broadcasting organization of an earlier broadcast which did not infringe performers' rights.; or (d) communicates a performance to the public otherwise than by broadcast ,except were such communication to the public is made from a sound recording or a visual recording or a broadcast shall subject to the provisions of the Section39 ,be deemed to have infringed the performers' right.

exceptions under Section 39. In this instance too the need for the recording from which the communication is rendered to be valid is not expressively made out.

The application of performers' rights are excluded to the extent that the fair use provisions mentioned under Section 39 would operate, as allowances for exploitation would not be taken to be infringements.[245] The making of the recording for private use or for bonafide teaching or research would not be an infringement. The use of excerpts for the use in reporting of current events or for review, teaching or research would not be considered an infringement. Most significantly 39 (c) mentions such other acts with necessary adaptations and modifications if it would not be an infringement under Section 52 of entities protected by copyright. Thus this Section vests a subjective discretion for enabling fair use according to circumstances subject to the aforementioned limitation.

The performers' rights are qualified by the operation of several other provisions of the Copyright Act that are generally applied to the copyright entities as well.[246] The provisions that govern the assignment and licensing of copyright generally govern the performers' rights (Sections 18,19,30). Both civil and criminal provisions invoked upon infringement are applicable to the copyright entities are equally applicable to the performers' in the administration of their rights (Sections 53 & 55). The provisions applicable to search and seizure are also applicable to the performer. It is noteworthy that the application of these provisions (39-A) is that, similar to the qualification to fair use provisions, it is mentioned that these sections shall apply with any necessary adaptations and modifications. A recent amendment has brought in Section 40-a and 42-a regarding the treatment to be

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[245] Section 39: Acts not infringing broadcast reproduction right or performers' right. No broadcast reproduction right or performers' right shall be deemed to be infringed by –(a) the making of any sound recording or visual recording for the private use of the person making such recording or solely for purposes of bonafide teaching or research; or (b) the use, consistently with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for bona fide review, teaching or research ;or(c) such other Acts, with any necessary adaptations and modifications, which did not constitute infringement of copyright under Section 52.

[246] Section 39-A; other provisions applying to broadcast reproduction right and performers' right. Sections 18,19,30,53,55,58,64,65 and 66 shall with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and performers' right in any performance as they apply in relation to copyright in a work: provided that where a copyright or performers' right subsists in respect of any work or performance that has been broadcast, no license to reproduce such broadcast shall take effect without the consent of owner of rights or performer, as the case may be ,or both of them.

accorded to foreign performers' and performances, which is at par with similar provisions for copyright entities. [247]

A most important exclusion of the right is when the performer has consented to the incorporation of his performance in a cinematograph film. The performer would not enjoy performers' right as provided under the terms of the Section as the Sections from 38(1), (2) to 38(3) have no application. [248]

The proviso to Section 39 (a) lays down that there is the need for consent from the performer or the owner of rights in case of reproduction from the broadcast of the performance. The reproduction from the communication to the public has not been hit by the proviso therefore there is a void in the protection granted to the performer as today the most demanding challenges have come from wired communication to the public through the digital means. It is important to note that what requires consent is for a reproduction of the broadcast. But it is not specifically mentioned that consent is required for either a recording from a broadcast or a reproduction from the recording made from a broadcast.

A Critical Assessment of the Performers' Rightsunder Indian Law

An open-ended inclusive definition has been provided to the word 'performer' which is laudable considering the restricted approach of various jurisdictions and the international instruments. However there is no mention of the need to meet any criteria regarding the creative quality and originality. The statute does not differentiate among performers on the basis of their intellectual labor. The definition nor the following provision give any guidance with respect to this nor does it express any accommodation with respect to the practices of trade. The term 'performance' too does not refer to any requirement of fulfilling the need for originality. However slender the quantum of originality and creativity which is required, even for protection under the copyright canopy, there is the need for this criterion to be fulfilled[249]. This also points out to the continuing treatment of

[247] These sections correspond to Sections 40 and 42 of the Copyright Act that apply with respect to works generally.

[248] 38 (4) of the Act says that once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of sub Section (1), (2) and (3) shall have no further application to such performance. However a confusing picture is presented as the difference between cinematograph and a visual recording appears to have been made through subsequent commentaries including those by the Government of India. See <http://www.education.nic.in/htmlweb/cr_piracy_study/cpr7.htm> as on February 1st 2003.

[249] Section 13(1)(a) of the Copyright Act, 1957.

the performer at par (though not similar to) with the broadcasters, sound recorders and the cinematograph producers despite the creative labor being much more than the task of accomplishing transmission or production and more equal to authors of literary and artistic works.

The duration of the protection of fifty years too belie the actual authorial prowess of the performer and the rationale of creating the same environment of secure returns and duration of protection as has been extended to authors of literary, artistic, musical and dramatic works. It can be recollected that the call of Justice V.R. Krishna Aiyer in the *IPRS* v. *EIMP,* AIR 1977 SC 1443, was for the extension of copyright protection to performers. The present rationale does not secure the performer in the long run nor his heirs and successors to enjoy the fruits of his labor. There is no reason why the same rationale of durational protection need not be extended to the performer as has been extended to the authors.

The definition of the term 'performance' means either visual or acoustic presentation made live. However there is no guidance in the Act as to what is the exact connotation of these terms. Further the use of the words in the order "...acoustic presentation made live" could also raise interpretations, which suggest that the presentation should be before an audience.

Extent of Rights

Apparently, Section 38 of the Copyright Act, 1957 does not provide any positive rights akin to authorization rights provided to copyright protected entities. An infringement is committed when without the consent the live performances (in the enumerated ways) and with qualifications - reproductions of records is exploited. The following analysis will point reasons for alternate interpretations. Section 38(1) of the Copyright Act grants a special right to the performer called the Performers' Right.[250] Amusingly, the Act does not provide any clue with respect to the exact connotation of the term Special Right and Performers' Right. Even the relationship with those traditional entities enjoying the copyright status has

[250] The Section 38(1) says, "Where any performer appears or engages in any performance, he shall have a special right known as performers' right in relation to such performances"

not been spelt out by the endowment of what apparently is a special right.[251] It is significant in this respect that the definition of performers' rights or a description of the same has not been attempted in the Act other than the statement in Section 38(1) that the performer shall possess it in the performance or when he renders a performance. The composition of the right does not carry any enumeration of the composition of the rights nor is there any suggestiveness as to its inclusive or exhaustive character.

The features of the statute create ambiguities and provide avenues for interpretation. The analysis in this context imports two possibilities to the statute either of which can determine the rights for the performer in India. The first standpoint follows the version in which it has been ordinarily understood, that the provision providing for the infringements also represent the rights of the performer and therefore the extent of the same is limited to the provisions of infringement and no further or two, that the lay out of the rights suggest that performers' rights of a common law property nature might exist separate from the infringements provided, the limits of which can be identified by the contractual extent and is not provided in the statute. The statute merely provides infringements, fair use limitations and modalities for assignment and licensing. The right has been left undefined and it need not have separate manifestations unless specified by the contract like a reproduction right, a distribution right etc. However, treading on either of these possibilities is fraught with contradictions, anomalies and logical disharmony. In an extreme sense it can be said that the very Section of the Act would be void for vagueness and for incoherence in arrangement as it provides for remedies and possibilities of exploitation without specifying the rights.[252]

Analyzing the structure of the statutory instrument in which the performers' right is placed and the pattern of arrangement of the sections, it must be believed that

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[251] Most of the jurisdictions provide a safeguard clause by which the traditional interests are protected explicitly from any protection provided to neighboring rights beneficiaries so that there is no dilution of the existing rights and no untoward expansion of the special rights but the Indian legislation has glaringly omitted to provide for the same.

[252] The grant of a right in the performances is an explicit recognition of a property right in the performances, the limits of which would be laid down statutorily through regulations in the like of copyright or performers' right. But where the lines have not been drawn but the right ids recognized then general civil rights and remedies would govern the unoccupied space. The general civil remedies can be invoked in case it is violated or damaged by tort or principles of property rights.

the facets of performers' rights has been spread out in various sections under Section 38. Therefore 38(3) reflect instances of infringement rather than as an elucidation of what constitutes performers' rights. This inference or observation points out to the grave anomaly in regarding instances of infringement as representing the rights possessed by the performer. This provides a vast and immense scope for interpretation rather speculation of the extent of performers' rights. It contributes to the confusion as to the manner of disadvantage that a special right entity should suffer *vis a vis* the copyright protected entity.[253]

It is appropriate to be reminded that the methods of arrangement under the scheme of the Copyright Act has been to classify the rights and those infringed in the Act separately.[254] A non-articulation of what constitutes the rights of the possessor of the special right called the performers' right would have immense ramifications considering the fact that there are always immense differences between degrees of rights enjoyed between the copyright as well as neighboring rights entities.

Ramifications of Consent

Unlike popular conception that performers' rights mean the need for consent for various uses of the live performance, there is sufficient ground for interpretation that that mere consent as provided only regularizes the use of the performance for the particular use by the user and does not sum up the rights in total or point to a total exhaustion of the performers' right in the performance. In the absence of any further specifications and the consent being provided only for the affixation, reproduction (qualified) or broadcast and communication to the public of the performance, the performer would continue to retain the right to restrain any exploitation unspecified by him. While a mere consent would suffice for the affixation, broadcast, communication to the public, that does not mean that the performers' property right in the performance has been transferred to the user that is the affixer, the broadcaster or the person who communicates the same to the public. It can neither amount to alienation nor to licensing. It only diminishes the need for formalities that would otherwise be required in the case of other

[253] The distinction is not explicitly presented rather it has to be inferred and collected from the scattered provisions in the section.

[254] See Section14 that explains the rights of the copyright entities and Section51 that deal solely with infringements.

copyright entities. Any further exploitation must therefore essentially entail, a further consent of the performer. The view appears credible considering the grant of the right to assignment and licensing of performers' rights. This is fostered by the view that the lack of consent is a violation and that the utilization or exploitation without proper assignment and licensing would also be a violation. Otherwise the grant of the right of assignment and licensing under the Act would be superfluous[255]. It shows that the right of consent falls short of the possibilities of use thrown open by assignment or licensing rights. Thus until an assignment of the performers' right in the performance takes place, mere consent would only allow limited uses but the right would continue to subsist in the performance. Any further use or exploitation of the performance would necessitate a further consent or a proper assignment or license from the performer[256]. While a variety of means to exploit the performance legitimately by eliciting the mere consent of the performer can be found in the Section 38(3) to facilitate exploitation there is no suggestion of the performers' right or the special right being transferred or lost with the grant of the consent. Further the very fact that 38(4) specifically mentions that performers' rights does not subsist with the consent in cinematograph shows that it subsists after the grant of consent on the other media. This only puts the performer and those who deal with him in a less rigid regulatory but enabling platform than the entities enjoying copyright protection. Thus it can be said that a range of uses is possible with the mere consent of the performer. This is unlike the need for a formal licensing or assignment that is required under the norms of copyright for a proper authorization.

Quiet significantly, there is no stipulation in the Act that the performers' right extends only to the need for asking the consent of the performer. Therefore the provisions can provoke the interpretation that the performers' rights continues till it has been assigned or licensed in accordance with Section 18 or 19 of the Copyright Act. While a separate list of minimum bundle of rights has not been guaranteed to the performer like it has been for the copyright entities, it is

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[255] See Section 39A of the Copyright Act.

[256] This brings to the fore an interesting possible situation about the post 1994 audio recordings were in all the singers and instrumentalists would have a continuing right in the recording as most of them would not have assigned the performance envisaged by the Copyright Act by deed. So the same would be the case with respect to any rendition made with respect to radio or other communication to the public.

significant that the performer has been granted the right of licensing and assigning his right. Therefore the right can be apportioned during the period of protection and traded in the manner they would like to. Though a grant of the right of assignment and licensing need not essentially mean endowment of the copyright status but this does not seem to be in harmony with the ordinarily understood right of consent that has been granted to the performer which is considered to be synonymous with performers' rights for the Indian performer. An unqualified consent would not extinguish the right of assignment and licensing inhering in the performer as the consent merely regularizes the utilization of the performance for the specific purpose. This indicates that the right does not cease with the grant of consent. The right of assignment and licensing imparts to the performers' right a property status that could be interpreted to be much more extensive than the specific bundle of rights being enjoyed by the copyright entities. Further not only a criminal recourse that is commonly associated with a minimum measure of prevention but also a forthright grant of civil remedies has brought the performer to be at par with the copyright entities. The lack of specification with respect to the rights composition compounded by the grant of civil remedies and rights of assignment and licensing imparts to the special right a character of property akin to the common law right of property. It appears to endow on the performer the right to assign or license the same in any measure that suits him.

Lack of Definition of Performers' Rights

A definition of performers' right has not been attempted and therefore the requirement of consent cannot be considered to fully define the composition of performers' right rather it can only be considered as one instance of an infringement. This can only mean that the performers' right would still subsist after the grant of consent to the enumerated uses. There is no hint that performers' rights in the performance are exhausted with consent subject to the contract to the contrary. There is thus no presumed unlimited grant of rights once the consent has been provided to the affixation or other uses. Rather there is only a grant as specified either expressly or impliedly. The affixer does not have a complete right to do all that he wishes merely upon the grant of the primary consent. This is particularly so since the performer is also eligible to use the

provisions relating to assignment and licensing in its dealings. Therefore there cannot arise a situation that the use of these rights can be rendered superfluous through the grant of total rights to the affixer by the grant of a mere oral consent.
If one hypothetically considers the fact that by assignment is meant the assignment of the right to give consent. Such an authorization right is not apparent on the face of the Act. Other than the need to elicit consent by the user there is no expression of the right to give consent in the Act in the like of authorization right. This once again confounds the position pointing to the fact that assignment & licensing refers to performers' rights beyond mere consent. The provisions are sufficiently ambiguous to trigger such interpretations.
Caught in the context of instances of infringement as indirectly specifying the rights, the co-existence of assignment and licensing with the practice of trade through consent could mean that the consent could provide rights to the respective right to record etc and an assignment can convey the right perpetually. (However the difference between the license and consent is even subtler. The important question would be when would infringement action based on the violation of licensing requirements arise and when would the regularization of the deal based on (oral) consent cease). Such a grant would restrict all further grant of consent to all others. The assignment can be restrictive to certain uses as well as prohibitive. The same could be attempted by way of licensing as well.

Why are formalities like assignments and licensing provided if consent was all that was required under the Act? What about licensing and assignments for brief periods of time or fulfillment upon other conditions. Further contradictions arise when one thinks of consent as an accepted means of exploiting performers' rights but it is repugnant to the notion of assignment and licensing, which requires formalities. Therefore the applicability of the assignment and licensing provisions complemented by other aforementioned factors clearly point to the existence of something more other than the supposed rights in the provisions specifying infringements. Sections 18 and 19 have been made available to the performer without carrying out corresponding amendments in the sections to accommodate the demands of Section 38 for the performer with its special requirements. It is important to bear in mind that Section 18 and 19 are not in themselves part of the copyright bundle but are means to deal with the separate rights that compose

copyright. It enables the right to assign the copyright, which is a bundle of rights. Therefore the applicability of Section 18 and 19 to Section 38 means that performers' right (whatever be its manifestation) can be assigned to another.

If one construes the provision on infringement provisions to indirectly mean or represent the performers' right then the performer can be considered to have the option to assign or license the special right. This would mean the right to grant consent for recording sound and the visual recording, the reproduction of the same subject to fulfillment of conditions, the broadcast of the live performance, and the communication to the public of the live performance. One can either assign or license the same singularly or one can do so separately.

To simplify the contradiction, while the positive right of consent has not been provided to the performer if any one does the acts mentioned without consent of the performer then the performer can initiate proceedings against them. There is absence of express grant of any positive rights of authorization to the performer. But at the same time, to add to the contradiction, the right to assign and license have been granted. If avoidance of the grant of authorization rights was the underlying intent then the grant of assignment rights are counter to that intent and meaningless for the right to assign is granted without specifying the rights to be assigned.

Common Remedies for Dissimilar Rights

The remedies being common to both the copyright as well as the special rights grantees, there is definitely an overlap that does not take into account the need for proportionality between infringements with respect to copyright entities as well as those with respect to lesser rights in the mantle of performers' rights. The special right with a shorter duration therefore in effect provides the same deterrence as is invoked when copyright is violated. These are some vignettes that point to the existence of a nebulous performer right despite the claim of performers' rights being encompassed in the cited list of infringements under Section 38(3) of the Copyright Act. This gives cause to believe that there exists a right in the mould of performers' right distinct from that listed by way of infringements.

Application of Common Provisions

The common application of certain provisions that deal with the performers' right as well as copyright subject matter elevate or give reason for the performer to be elevated to another platform nearer to the status of copyright. This is particularly so with respect to assignments and licenses. The grant of the right to assign and license only indirectly points to the existence of a property right. On a comparative level, this goes beyond the preventive right as a minimum guarantee envisaged under the Rome Convention as well as Performers' Protection Acts in United Kingdom that provided only criminal remedies in case of violation.

Unclear Meaning of Words

The Special Right would be further susceptible to varying interpretation, as several terms such as reproduction and communication to the public etc. have not been separately defined with respect to the Performers' Right. Though many of these words are not separately defined with respect to the copyright as well, there is a meaning that has come to be attributed. For instance the word 'reproduction' would, in the copyright parlance, encompass not only copying directly from the original but also the substantial copying of the original. Neighboring rights entities commonly do not enjoy the right of substantial copying-imitation though this is not spelt out in as many words[257].

The meaning to be attributed to the word 'reproduction' assumes importance in this regard. Reproduction is most often synonymous with the idea of substantial copying and therefore the protected entity could avail of copyright protection even if the subject matter was the target of imitation or as called in copyright terms of substantial copying. From the literal meaning exuded from the breadth of the Act Section 38 this – substantial copying seems to be a difficult right to be attributed to the performer. Section 38 speaks of reproduction only in relation to what is affixed. It says that reproductions from the affixations shall only be legal if the

[257] See Section 2(m) of the Copyright Act, 1957. The definition of the words 'infringing copy' and note the difference in terminology between what is infringing copy with respect to the literary and allied works and the leaner term 'copy' used with reference cinematograph and sound recordings. See the difference in the words used in Section14 with respect to the rights granted to the literary, dramatic, artistic and musical works I comparison to the rights granted to the cinematograph And he sound recordings. Though the latter two have been endowed with the right of copyright status even otherwise. The latest decision of he star India private limited adds to the disadvantage as substantial copying has been found to be lacking g in the quiver for rights in the cinematograph.

initial affixation had been with the consent of the performer[258] Thus the reproduction is connected with the affixed performance. There is no hint of reproduction being a violation if rendered from a live performance or from an affixed performance by way of substantial copying or reproduction by way of imitation. There is the need for a procurement of an affixed performance in order to enable a legal or lawful reproduction of the performance. This can also be interpreted to mean that substantial copying or an independent imitation is possible from a lawful affixation of the performance. But this construction seems farfetched because the appropriateness of substantial copying has never been in the context of propriety of affixation but rather in the original having been endowed with copyright. Though affixation is an integral part of that process. As the special right is endowed on the performer at the moment of the live performance then the substantial imitation of the live performance could also amount to reproduction.

Does the Right Extend to Imitation or Independent Performance of the Song?

The ambiguity in the rights granted is evident in the controversy generated in the entertainment industry in Kerala when Vinod Yesudas asked singers and organizers to pay royalties for the use of songs sung by Yesudas at public performances.[259] The claim was based both on the sound recorders performance rights as well as the performers' right granted to the singer. The demand impels one to explore whether the performers" right does cover the right to stop the imitation of a performance. First of all the right is prospectively applicable from the year 1994 alone. Therefore the majority of the songs by the legend remain unprotected under the canvas of the special right. Secondly, the word imitation encompasses only a direct or indirect copying from the fixation or recording and not an imitation or an independent creation. This inference is lent credibility in the manner in which the word reproduction is used and the right of the need for consent is granted to the performer for reproducing his performances different from the purposes for which consent had been granted for recording purposes. The word 'copy' for the sound recorder as well as the

[258] Section 38 (3)(b) of the Copyright Act, 1957.

[259] Note, "Royalty not demanded: Vinod Jesudas", *The Hindu* (online edn.), 1st April 2004, <http://www.hindu.com/2004/04/01/stories/2004040105460400.htm> as on 1st January 2006.

cinematograph too is provided with this limited direct copying right alone from the recordings and does not cover an independent creation or imitation. The lack of a definition of the term 'reproduction' is a handicap in order to ascertain the true extent of the right. The complexity is compounded by the lack of a precise enunciation about the exact extent of rights, as a construction is well nigh possible that with the consent to record, there are no further rights retained by the performer in the affixation. The episode exposes the deficiencies in the statute and also wrong impressions and contradictory impressions nursed by those in the entertainment industry.

Employer –Employee Relationship and the Performer

The performers' status *vis-à-vis* the employer-employee relationship and the commissioner has gone unexplored and does not find expression under sections 38 to 42-A. Therefore when dealing in such circumstances, the performer does not lose the right unless the right has been either transferred by licensing or assignment. This is a jarring omission considering the fact that all the copyright entities do lose their rights or have their rights transferred either to the commissioner or to the employer in such circumstances.

Audiovisual Performer and Performers' Right

The term 'cinematograph film' as defined in the Act and interpreted by numerous judgments encompasses all recordings whatever may be the format in which the moving images are recorded[260]. No statutory rights and remedies for infringements prevail in respect of the performers' in the cinematograph film. Therefore even visual recordings such as video or digital images would be affected by 38(4). However this seems not to be confined to affixed performances alone rather it extends to live performances intended for cinematographic uses as well because 38(4) lays down that upon a consent by the performer for incorporation in a cinematograph film, no performers' right granted from 38(1) to 38(3) will prevail. Thus the very notion of performers' rights does not subsist in a

[260] Section 2(f) of the Copyright Act, 1957 says that "Cinematograph film means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and ' cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films".

live performance with respect to the affixation in a cinematograph film. It may also be surmised that even the statutory need for consent of the performer is not required to record or affix a performance in a cinematograph film. Therefore, no statutory remedy can be expected for the unauthorized affixation of the performance in a cinematograph. The protection against an unauthorized affixation of a live performance can only be attempted through other tort-based actions like the right to privacy and publicity. In this respect, it is noteworthy that when the provision says that 'once the performer has consented ', it need not mean that the consent of the performer with respect to affixation of an audiovisual performance is mandatory as it is specifically provided that all rights including 38(1), (2) and (3) are abrogated in such an eventuality. The disadvantage might be considered graver than the prohibition imposed in the Rome convention to which the Indian legislation has great similarity.

Another surmise that is portended is that once consent has been provided for affixation in a cinematograph then that performance would be completely denuded of all rights (as stated in Section 38(4) and therefore even with respect to other media - aural- the performer would not be able to would not be able to exercise his rights. Though such a construction would be remote nevertheless the Section without any reservation and qualification does open up possibilities of argumentation in this respect.

It is noteworthy that the words used are 'once the performer has consented to the incorporation of his performance in a cinematograph film'. The use of the word 'incorporation ' is unique considering the fact that the words such as recording or reproduction have not been used. Incorporation is an uncommon word in the copyright parlance. It is neither affixation (recording) nor is it a reproduction. According to the dictionary, it is an act of merger or amalgamation or integration or assimilation. The word is yet to form part of the copyright vocabulary signifying a method of use or a right. Rights are lost upon the incorporation of a 'performance' – which means a visual or an acoustic presentation rendered live but not a recorded performance.[261] This could mean that if performers' rights subsist in a recorded audio performance or a visual recording then the bar would not operate even upon consent for incorporation from the same. When an audio

[261] According to Section 2(q) of the Copyright Act, 1957.

recording or a visual recording is reproduced for affixation or incorporation into the cinematograph then 38(4) cannot be invoked and if this is done without consent beyond the purposes for which the original recording had been made then it would be an infringement provided the purpose requirement under 38(3)(b) is fulfilled.

This raises an important issue whether the process of dubbing or playback singing can be categorized as the incorporation of a live performance or reproduction or incorporation from a recording. If it were incorporated from a live performance into the cinematograph film then it would snuff out performers' rights by Section 38(4).

It is worthy of note that if consent is the crux of the right under section 38(3) then where is the question of abrogation of rights when the abrogation supposedly takes place after consent is given. From the manner in which the provisions are laid out this once again points to the performers' right being something much more than mere requirement of 'consent' or what is specified as infringements under section 38(3) requisitioning the consent of the performer.

Section 38(4) can also be interpreted to mean that it is not any of these actions with respect to the cinematograph alone that would not be construed as infringements but any of the applications 38(1) to 38(3) like recording for sound records or visual recording, reproduce the same and even broadcast and communicate to the public the live performance would not be available to the performer once he has consented to the incorporation in a cinematograph. This is a grave consequence as even with respect to other media, the artist can contemplate no action for infringement and no rights prevail. These consequences are once again owing to the lack of clarity in the formulation of the statute.

It appears that the statute is not reflecting what was actually contemplated by the legislatures. If the performers rights, the period of protection and the right to take infringement action is lost with the consent for incorporation in a cinematograph and if with respect to other recordings it is not so lost then it once again points to the prevalence of an undefined right beyond what is commonly understood that performers' right means the right to take action for infringement for exploitation without consent. Therefore in the face of these confusing meanings and illogical outcomes that the literal statute exudes, it can be said that the present lay out is

fraught with contradictions and ambiguities. The grant of assignment and licensing rights without elucidating performers rights also pops up issues whether it is only the right to take civil or criminal action that is assigned or licensed when one reads rights into infringement provisions under 38(3). Such conjectures arise due to the lack of a proper definition of performers' rights.

Sound or Visual Recording

The use of the words sound or visual recording in Section 38(3) of the Copyright Act creates a further difficulty in assessing the impact of Section 38(4) in that Section 38(4) completely excludes the performances on audiovisuals (cinematographs) from the purview of performers' rights. The words visual recordings appear in contrast to the intent of disallowing performers' rights with respect to the cinematograph films. The term "visual recording" has not been defined in the Copyright Act. However it does appear in the definition of the cinematograph. There is no copyright granted for a visual recording nor is there a mention of any authorship nor has it been categorized as a work. It is a puzzle to attempt to decipher the extent of the word visual recording and its exact extent. Though a visual recording does not have any right by itself, it is evident from the terms of Section 38 of the Copyright Act that the performer in a visual recording has more rights than the performer in a cinematograph film. Considering the distinct terminology used it becomes important to speculate whether the latter term has been used in a narrower context of cinema or in visual recordings in the like of cinema. Without a sound delineation on a juridical basis between the words visual recording and a cinematograph film, it is as good as making the two terms in the Copyright Act a lame presence without any consequence. Surely that cannot be the rationale behind the two words found inscribed.

The Section extends protection to both audio as well as visual recording. The use of the term visual recording creates difficulties. The word audiovisual has not been conspicuously used nor has its equivalent – the cinematograph been used with respect to the medium provided protection. The term " visual recording " creates interpretative difficulties because it has not been defined in the Copyright Act and secondly if analyzed in itself creates difficulties in technological definition. The word visual recording appears to bring forth a *sui generis* media that poses difficulties in identification. It also indicates a medium sans sound. Though

cinematography is defined as a visual recording it includes a sound recording as well.[262] This can also mean that while all cinematograph works are visual recordings all visual recordings are not cinematographs. This leaves a medium that is not protected under the Copyright Act but the performers' therein would be protected. That is they would enjoy the performers' right and their consent would have to be taken to this end. But this creates a problem in identity as to what is visual recording and how is it distinct from cinematograph.

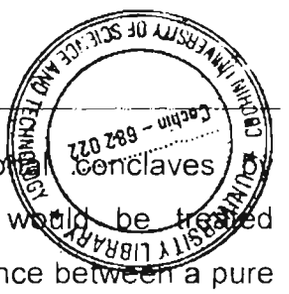
The term visual recording cannot be considered as a distinct species out of the pale of Section 38(4) of the Copyright Act. From the standpoint of courts it would take some conviction to draw a distinction between a visual recording and the cinematograph film as they have long ruled that the cinematograph film encompasses both video films and allied recordings. This was even prior to the amendment to this end made in the Copyright Act. Therefore the observations to the effect that the consent of the performer would be required with respect to recordings on the videotape is misplaced and a wrong interpretation. The point is that if the Act wished to make a difference between the visual recording and the cinematograph then it has been irresponsible by not providing the inputs for a more assured inference regarding the status. It could mean that the performer is protected in an unprotected medium. The consent of the performer would have to be taken during the 50-year period during in, which the performance subsists and the producer of the visual recording would be left with no rights at all in such an eventuality. Surely this could not have been the intent of the legislatures.

Need for Delineation between Audio and Audiovisual Fixations

There is the need for clearer delineation between the definitions of audio and audiovisual fixations. Under the Indian law the terms representing these have been sound records and cinematographs respectively. While the word cinematograph does encompass the sound track as well it can be noticed that the sound record does not exclude the sound track[263]. This can create scope for speculation where in the sound track performers' could either qualify for sound record performer protection and vice versa. The clear-cut enunciation would be

[262] There is no necessity of the cinematograph being always accompanied by sound. It is specifically stated in the definition (Section 2(f) that ".... and includes a sound recording accompanying such visual recording....".

[263] Section 2(f) and Section 2(xx).



important considering the fears raised at the international conclaves by performers' particularly since the audiovisual performer would be treated separately from the treatment of audio performer. The difference between a pure audiovisual fixation of sound and a reproduction incorporated into an audiovisual would need to be maintained to this end. This is compounded by the lack of a definition of the term audiovisual performer. This would create ambiguities with respect to the position of sound track performers' like dubbing artistes, voice over and playback artistes. It also raises a problem of sound records made from soundtracks

Absence of Formality

Another significant characteristic of the performers' rights in its present form has been the total absence of the need for any kind of formality such as the need for a written instrument with respect to the consent taken for primary affixation of the live performance. However the application of sections 18 and 19 making performers' rights amenable to assignment and licensing creates a contradiction[264]. In the absence of a contract or assignment in the written form as

[264] Section18; assignment of copyright (1) the owner of the copyright in a existing work or the prospective owner of the copyright in a further work may assign to any person the copyright either wholly or partially and either generally or subject to limitation and either for the whole of the copyright or any part thereof.
Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.
(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright the assignee as respects he rights so assigned, and the assignor as respects the rights not assigned shall be treated for the purposes of this Act as the owner of the copyright and the provisions of this Act shall have effect accordingly.
(3) In this section, the expression 'assignee ' as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

Section19: mode of assignment. (1) No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent.
(2) The assignment of the copyright in any work shall identify such work, and shall specify the rights assigned and the duration and territorial extent of such assignment.
(3) The assignment or copyright in any work shall also specify the amount of royalty payable, if any, to the author or his legal heirs during the currency of the assignment and the assignment shall be subject to revision, extension or termination on terms mutually agreed upon by the parties.
(4) Where the assignee does not exercise the rights assigned to him under any of the other sub-sections of this Section within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of such period unless otherwise specified in the assignment.
(5) If If the period of assignment is not stated, it shall be deemed to be five years from the date of assignment.

mandated by the sections 18, 19 and 30 the rest of the provisions as provided in the Section19 apply (other than for licensing purposes. This means that where there has been no recourse to a written contract or if there has been a written contract then if there has been no mention or reference to the minimum terms that need to be spelled out then the minimum statutory terms would be invoked. If an assignment has been made without subscribing to the modalities as prescribed then the minimum guarantee impliedly laid down by the law would govern the agreement. The minimum terms demand that the rights assigned needs to be mentioned specifically, the duration and the territorial extent of the exploitation in case of an assignment. It shall also specify the amount of royalty payable and whether the contract of assignment shall be subject to the revision, extension or termination on terms mutually agreed upon. If the period of assignment is not stated then it shall be deemed to be five years from the date of assignment. If the territorial extent were not stated then it would have to be presumed to be intending the territory of India. Thus the Section lays down statutory safeguards in the absence of specific terms to the contrary in the agreement as required by law. This does not however set aside the expression of indefinite assignment if specifically provided in the contract. A conspicuous exclusion has been the omission of 19 A from the sections applicable to the administration of performers' rights. It provides for a mechanism for resolution of disputes pertaining to assignment of copyright. The absence is not rationally answered as it is found to be a significant appendage to sections 18 and 19 of the Copyright Act, 1957. The prevalence of two pronged formalities with respect to utilization of performances exposes a bifurcation of rights enjoyed by the performer.

The absence of the form of licensing has also left the performers' rights practices ambiguous and poorer. By leaving out Section 31 A from among the provisions that have to be adhered or can be resorted from the enumerated ambit provided

(6) the territorial extent of the assignment of rights is not specified, it shall be presumed to extend within India.

(7) Nothing in sub Section (2) or sub-Section (3) or sub Section (4) or sub Section (5) or sub-Section (6) shall be applicable to assignments made before the coming into force of the copyright (amendment Act) 1994.

by Section 39A of the Copyright Act, there is considerable ambiguity with respect to the formalities that has to confirmed to when the performance is to be licensed. While Section30 is to be applied with respect to the performers' rights administration there is no mention of Section 30- A in the same manner as Section 19A has been left out[265]. However while the absence of 19 A takes away only the manner of tackling disputes, with respect to the assignment of copyright the absence of 30 A takes away both 19 as well as 19 A from determining the manner of licensing Activity under Section 30. This means that the minimum guarantees granted to the author under Section 19 are absent to a performer-licensor under Section 30. This leaves the performer a likely victim of unfair bargains and in the absence of explicitly written contracts the presumption would lie heavily in favor of the licensee. A licensing practice without statutory safeguards and minimum guarantees would expose the performer to unfair exploitation especially since the onus of proving the presumption to the contrary would be on the performer who evidently would be the weaker of the two in the bargain.[266]

Use of Recorded Performances

A major drawback of the Act is that it is apparently limited to only the need for consent from the performer for recording live performances, broadcasting and communication to the public of the live performances. The only control over the recorded performances is with respect to the reproduction of the recording, which would be considered an infringement if the initial recording was without consent or if the purpose for which the initial recording was made is different from that for which the performer gave his consent. The Section does not clearly say that it would amount to an infringement if the reproduction is used for a different purpose from that for which consent for the recording was granted by the

[265] Section 30; license by owners of copyright; the owner of the copyright in any existing work or the prospective owner of the copyright in any furor work may grant any interest in the right by license in writing signed by him or by his duly authorized agent:
Provided that in the case of a license relating to copyright in any future work, the license shall take effect only when the work comes into existence.
Explanation. Where a person to whom a license relating to copyright in any future work is granted under this Section dies before the work comes into existence, his legal representatives shall in the absence of any provision to the contrary in the license, be entitled to the benefit of the license.

[266] The presumption of rights being retained in the absence of express statement of the same in the contract would be doubtful and the performer would have to prove the same from circumstances that would be cumbersome and challenging.

performer. It only says that reproduction would be an infringement if the initial recording were used for a different purpose from that for which the performer gave his consent for recording. It also brings to the fore the fact that the Act does not say that the application for a different purpose would be an infringement but that a reproduction of a recording that had been applied for a different purpose from the purpose for which the initial consent for the recording was given would be an infringement. Once again the Act lacks in clarity of purpose. However it can also be inferred that if the act of reproduction or the purpose of reproduction is different from the purpose for which the initial consent for recording was granted by the performer then that would amount to infringement. The issue of intent & purpose imparts sanctity to contracts exploiting performers 'rights and provides possibilities of extension of rights into the use of reproductions from recorded performances for purposes different from that for which consent had been granted. It indirectly expands the ambit of Performers' rights.

Questions Over Broadcasting from Records

The Act does not require the consent of the performer with respect to the use of recorded performances for broadcasting and communication to the public. It is not apparently an infringement. The need for consent is required only for the broadcast or communication to the public of the live performance. Surprisingly it is not an infringement even if the initial recording that was broadcast was without the consent of the performer and is an illegal one. This is a serious deficiency considering the immense potential for exploitation. It is not clear whether initial consent for the recording should have been begotten by the broadcaster from the performer or would consent granted to record to anybody suffice for the purposes of the Section for legitimizing broadcasting from the recorded performance.

Collective Administration

The Section is silent with regard to the application of collective administration as a viable mechanism for the benefit of administration of performers' rights. Section 33 (Dealing with registration of copyright society) or Section 34 (administration of rights of owner by copyright society) does not find mention among the specified rights under Section 39-A that applies to the performer. However it may be indirectly find mention by the fact that the wording of Section 33 that deals with

collective administration of copyright entities also brings within its scope *other rights* administration for regulation, scrutiny and recognition under the Act.[267] It has taken into consideration the possibility of collective rights administration being extended beyond the traditional confines. Though no right is extended any entity-copyright subject matter or to any other entity to have a collective rights administration, there is nothing averse in the Act with respect to the same being exercised by the other rights holders. However there is no mandatory obligation that there ought to be a collective administering body to deal with the rights of the creators. Section 34 to 36-A of the Copyright Act, only provides a regulatory framework in case the entities decide to run a collective administration scheme. However there is no reference to the same in Sections 38 to 41 of Act. Even with respect to copyright entities there is no separate right to administer their rights collectively rather the means of regulating their enterprise in this regard alone prevails. Collective administration would be a useful tool in scrutinizing the exploitation of the performances in the multitudinous ways possible today. Therefore the silence of the Act needs to be altered particularly in the context of international understanding with respect to performers' rights and avenues for exploitation to be managed by means of equitable remuneration growing by the day.[268]

Application of Provisions Common to Copyright Entities

Section 39-A of the Copyright Act demands the application of Sections 18 to 66 to the performers' as well but with a qualification. The sections are to be applied with necessary adaptations and changes. It is not clear as to how the degree of adaptations and modifications is to be wielded and who is to do that. There are no guidelines in this regard and this creates a lot of uncertainty that had been created with the provisions adopted with regard to the administration of performers' rights. Deviations would take place under the guise of modifications

[267] Section 33 says '(1) no person or association of persons shall, after coming into force of the copyright (amendment Act) 1994 commence or, carry on the business of issuing or granting licenses in respect of any work in which copyright subsists or in respect of any other rights conferred by this Act except under or in accordance with the registration granted under Section (3).

[268] The concepts of single equitable remuneration and rental etc has been mooted by the Rome convention as well as the WPPT and has found favor with several countries in the world including United Kingdom and France, United States of America (though the impetus is on collective bargaining in combination with collective administration).

and adaptations that can affect the protection accorded to the performer either negatively or positively. If the issue is to be decided by the courts as and when disputes arise then the majority of the performer would be left in a disadvantageous position considering the despairing unfair bargaining position they occupy in commercial deals and the cost of litigation. The provision making room for adaptation with regard to manner of dealings in exploitation and the safeguards therein would be susceptible to changes based on convenience of the powerful (the person in an advantageous bargaining power) making use of the leeway-flexibility provided by the Section as an opportunity). It is not mentioned clearly whether the adaptations should be read in favor of or to advance the rights of the performer. Though this appears to have been the major intention as the legislation is meant for the protection and welfare of the performer. The adaptations and modifications should not negate the minimum guarantees afforded by these provisions. It should be borne in mind that the adaptations and modifications should not be detrimental to the performer nor extinguish the security afforded to him. It should not be made to evade the observance of the grant of rights. In the absence of necessary modifications and adaptations being made by the law or the rules, the basic guarantees similar to that enjoyed by the copyright entities must apply without variation.

The Act does not appear to have taken into account the character of the performers' profession and its distinctive requirements nor its specific attributes, though it has realized that the same conditions as for the copyright may not apply in reality and cannot be expected there of. Whether this is in the nature of dilution or whether it is in the nature of additional safeguard to protection or not is left to speculation considering the special rights status of a *sui- generis* kind bestowed on the performer in contrast to the rights and status enjoyed by the copyright entities.

Fair Use Provisions

The lack of assuredness with respect to the exact extent of the right is prevalent with respect to the fair use provisions under Section 39(c) as well. It would need to be debated whether fair use in respect of copyright entities should be considered as fair use in respect of performers' as well and vice versa. But as at present the fair use with respect to the performer has been appended to that of

the works even if it is totally an independent performance without the involvement or being derived from any of the works. A lack of certainty pervades the fair use provision in 39(c) as other Acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under Section 52, are exempted. This raises a vital question as to whom, how and to what extent the necessary extent of adaptations and modifications are to be decided.

Compulsory and Statutory Licensing

The aforementioned in coherence in the formulation of Section 38 is compounded by strange omissions. The absence of any provision for compulsory or statutory licensing or application of the existing provisions to performers' would make administration of performances difficult. This would be so because as performers' rights would continue to subsist till it is alienated by means of assignment or through licensing, any exclusion of the performers' rights from the purview of Section31 or the fair use of provisions of Section 52 would pose immense difficulties for the administration of rights. The performers' under the above-mentioned circumstances can very well obstruct the administration of rights, as both these provisions do not have any application to performers' rights.

With respect to remixes of originals in the market, the need for prior permission was to be met in terms of Section 52(1)(j) of the Copyright Act. While the provisions could be interpreted as if the prior permission of the author of the underlying works and the sound record producer was essential there is perceivably no mention of the performer as an entity whose prior permission was essential to bring out an album imitating the original. But recent case law on the subject suggests a more broad approach as if there is an importance attributed when the singer is changed and the permission of the original owner of the work the sound record is required while making an adaptation and using a new singer. [269] However there is no suggestion to the effect that the permission of the singer needs to be procured. The fair use provision in Section 52(1)(j) applies to sound recordings based on literary, musical or artistic works. The performers' right has not been recognized as a work under the Act. However all the provisions of Section 52 can be made applicable to the performers' rights under Section

[269] *Super Cassette Industries Limited* v. *Bathla Cassette Industries Pvt. Limited* (2003) 27 PTC 280 (DEL), pp.291-292.

39(c)[270], which means Section 52(1)(j) can also be an exception to the rights though there is a subjective satisfaction and discretion endowed on the authority deciding on the issue. The performer being a vital ingredient in all-audio performances requires a more decisive voice when it comes to allowing remixes. This is so as the remixes that are attempted after a period of two years would certainly eat away into the potential sales of the recording and proportionately into the royalty if any to percolate to the artist. Therefore straightforward explicit amendment needs to be carried out in the Copyright Act in this respect.

Moral Rights

A glaring omission from the array of rights granted to the performer is the moral rights of the intellectual creator. The right has been granted to the entities possessing copyright status. The moral right of integrity and the right of paternity has been granted to the authors under Section 57 of the Copyright Act[271]. However there is no mention of the extension of the right to the performer, thereby leaving a huge difference between the performer and the other entities. The deficiency also exposes the performer to the abuse of his affixed performance by way of mutilation and distortion that could most inevitably ruin his esteem and honor.[272] This is particularly so in a digital environment without geographical limits. The manipulation of sound and images and the technological tools to facilitate the same do not warrant much monetary investment and technical skills. This anomaly requires rectification at the earliest. Despite the multifarious means by which the performances are susceptible to be appropriated

[270] Though with necessary adaptations and modifications.

[271] Section 57 of the Copyright Act says that independently of the author's copyright, and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right –(a) to claim authorship of the work; and (b) to restrain or claim damages in respect of any distortion, mutilation, modification or other Act in relation n to the said work which is dome before the expiration of the term of the copyright if such distortion, mutilation, modification or other Act would be prejudicial to his honor or reputation: provided that author shall not have any right to restrain or claim damages in respect of any adaptation of a computer program to which clause (aa) of subsection(1) of Section 52 applies. Explanation. Failure to display the work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section. (2) The right conferred upon an author of a work by Sub-Section (1). Other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

[272] The only limited recourse for the performer are the tort based Actions of defamation and the right to privacy. But both these actions are deficient in affording an effective remedy as public performers' have only a narrow scope for privacy right in their professional exploitation and defamation depends upon the fall in reputation in the eyes of the public but the role may well fetch them accolades and awards despite the distortion.

and manipulated in a digital age, the Act fails to take into account the possibilities of abuse in this regard. With respect to distortions or modifications by others while the sound recorder and the visual recorder can utilize the moral rights with respect to the sound record and the visual records, the performer is left with no resort. India is yet to recognize any moral right for the performer in any context be it in digital or otherwise. Therefore amendments have to be made in the Act in order to secure a right for the performers' in this regard, which has been made available to the literary and other creators under the act. The digital realm would be most susceptible to easy manipulation and distortion and in the absence of protection; performers' would be an easy prey.[273]

Representative Action

The provisions do not facilitate the means of managing group performances through a representative action.

No Safeguard Clause

No safeguard clause is expressly provided securing the rights of copyright holders. Further there is no provision similar to 13(3) and 13(4) of the Copyright Act streamlining the relationship between the cinematograph, sound recorder and the performer.

Rental Right

As no rights are expressly provided from the recorded performances several rights available to entities protected by copyright are not available to performers. Even the rights available to the authors of cinematograph and sound recorders such as the right of rental (hire) have not been made available to performers. This takes away a major segment of exploitation from the purview of statutory protection. The Act immensely falls short of current national and international standards primarily because no express authorization rights are granted. To confound matters there is no elucidation of what constitutes performers rights, it has to be matter of inference to be made from the infringement provisions.

Digital Preparedness- the Indian Law and the Performer

The preparedness of the Indian law to meet the challenges posed by the digital realm needs to be explored for the performers' just as it is important for the traditionally protected entities. The only certain reference to the advent of the

[273] *Id.*, p.39.

computer age into the scheme of the copyright law other than of course the protection accorded to the computer programs has been the reference to electronic storage in the right of reproduction granted to the literary works.[274] Other than with respect to reproduction, in none of the other rights such as the issue of copies, performance or adaptation does one find the explicit notion of electronic medium and its specific characteristics. The term 'communication to the public' is upon interpretation supposed to define the process in the digital medium. The concept of 'making available' cannot be read in upon a preliminary reading of the section. Secondly, there is no mention of the need for taking care of interactive situations where programs are made available on demand at a place and time chosen by the recipient. Therefore commonplace situations in a digital world cannot be expressly identified in the statute but have to be read in by interpretation.

In the provision concerning reproduction where in the electronic medium has been taken into consideration there is no suggestion as to whether even temporary storage or inadvertent storage would be construed to be reproduction. The medium of the internet being a process where in even temporary access would require access in one form or the other to the computer memory, unless the law clearly specifies taking into account the subtleties of the medium even those who would not nurse the intention of actual reproduction would be liable. A right to authorize reproduction has not been granted to the performers'. Even if a reproduction right can be read in by means of section 38(3)(b) it cannot be said with certainty that the specificities of digital medium has been taken into consideration. Importantly the law does not suggest as to what constitutes storage – permanent or temporary. There are no case laws to provide guidance in this respect either.[275]

It is important to note that the there is no reference to temporary storage with respect to copies, distribution or communication to the public right of either the cinematograph or the sound recordings. The absence of such specifications would have a detrimental effect on the performers' protection, as these rights are quiet interconnected. While the definition of the words 'cinematograph' and

[274] Section 14 (1) of the Copyright Act, 1957.

[275] N.S.Gopalakrishnan, "WIPO Copyright and Performers' and Phonogram Treaties", 21 Ac.L.R. 21-22(1997).

'sound recordings' might take into account any technology on which moving images or sound may be affixed or recorded there is no reference to the rights of diverse exploitation being digitally oriented. The rights also need to be digitally compatible. The analogue mode of delivery and market place is totally different from the market that a digital delivery has to grapple with.

A deficiency that threatens enterprise on the digital medium could be one regarding the liability of intermediaries or secondary contributors to infringements. For instance both the internet service operators and even the premise holders of public internet computer services are equally liable under the standards of the present law if unauthorized material is streamed and downloaded or used in any manner from the internet. Though the Indian juristic output is yet to see case law directly on this point nevertheless the case laws in other countries point out to varied rationale that the courts are guided in this regard. The Indian copyright law is still silent on the question and the traditional norms of liability on intermediaries could very well make it tough on them to disprove or prove their innocence. The attribution of intent and knowledge based on the facts and circumstances could very well impose a great burden on the intermediary Internet service provider so that the enterprise in this realm could be hazardous. This would have a detrimental impact on the administration and dissemination of performances as well. As under the huge deluge of works the intermediaries would not be able to know the infringing works from the others. Though under the aegis of the present WCT and the WPPT the countries are free to make exemptions from liabilities as regards the service providers.[276] The Indian position with respect to online intermediary liability does not find specific mention in the Copyright Act. One has to infer the possibilities of liability from the general provisions pertaining to the secondary contributors to infringements and attempt to avoid the liability in the infringement process. Knowledge and lack of it acts as a leniency-triggering factor in these circumstances. The only near comparison as a reference point in this issue in India could be the Information Technology Act, 2000.[277]

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[276] N.S.Gopalakrishnan, "WIPO Copyright and Performers' and Phonogram Treaties", 21 Ac.L.R. 21(1997).

[277] See O.P. Mittal, *Law of Information Technology (Cyber Law)*, Taxmann Allied Services Pvt. Limited, Delhi (1st edn. - 2000), p.160.

Section 79 of Information Technology Act, 2000, lays down the instances where in the Internet service provider can be considered as infringing the provisions of the Information Technology Act. While the liability is general in nature what is defined are those instances where in the Internet Service Provider is not considered liable. It cites two factors or criteria that are required to be fulfilled. either that he had no knowledge or that he had exercised all due diligence to prevent its occurrence. It should also be shown that all due means, proper sufficient or reasonable efforts were made and those could not prevent the commission of the offence. In such circumstances the network Service Provider could not be held liable. A defense is also provided if the Service Provider has taken in good faith, reasonable effective and appropriate Action to prevent access.[278] The plea of innocence is not merely enough if it is suggested but it has to be proved. This means the proof of the non-existence of such circumstance so as to raise suspicion or to lead an inference or belief about the commission of an offence or contravention. There has to be an absolute conviction as the level of knowledge. Knowledge cannot be considered to prevail even without exercise of reasonable care and diligence. It is important to prove that he had exercised all due diligence to prevent the commission of offence or contravention of the law. The only reference that comes nearest is the provision with respect to plate makers.[279] But it would take a lot of extended interpretation and construction if that should intend to include the Internet intermediaries or other file shares on the digital medium.

The jurisdictional question is a vexing one in all countries. Though it is a little less in the Indian context owing to the unitary model of judicial distribution nevertheless it is matter of concern. Varying intellectual property laws are not perceived across different states in India. Though territorial jurisdictional problems could be a problem. There is little convergence of thought when it comes to the question of private international law with respect to the Internet. With the participants being in different countries the exact identification of the *lex-fori* could be difficult. With performances being a pool of talent from different

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[278] *Id.*,p.161.

[279] Sections 65 and 66 of the Copyright Act, 1957.

countries and the Internet distribution being placed in different countries the need is for a unified vision on private international law.[280]

One of the most vexing problems of dealing over the Internet is that traditional ideas of licensing and transfer no longer have any application to the Internet. Therefore if one were to go by the traditional ideas or norms warranted by the Act then even accessing or reading from the screen would require a license fully conforming to the formalities under the Act. This ambiguity has not been plugged by the Copyright Act to be equal to the requirements of the Internet. The use of the Internet even innocently is therefore fraught with hazards that are commonly overlooked and is at loggerheads with set rules of the Act.

The performers' right also does not specifically mention the right of making available. However this point can be contradicted on the ground that if communication to the public encompasses the right of making available generally then communication to the public is found in the performers' right though it is confined to live performance alone. The only drawback in applying this provision would be that under 2(f) of the Copyright Act 'Communication to the Public' would be confined to works.[281] Because it specifically refers to works and a 'performance' is not included among the 'works'. Whether the definition of communication to the public in the Act takes into account the on demand – interactive situation at the time and place chosen by the consumer is itself debatable considering the clearer formulation of the same by international instruments.

The aforementioned analysis shows that providing opportunities for varied interpretations makes the area of performers' rights susceptible to unpredictability and further weakens the already vulnerable position of the performer. Ambiguities, contradictions, inadequate elaboration and incoherent arrangement of the statute obstruct a clear view of the object to be secured by the legislation. In the face of strides taken by international instruments and other national jurisdictions to protect the performer and tackle the digital challenges, it can be seen that the Indian law needs to incorporate a more secure performers' rights regime with digital specific provisions.

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[280] Rahul Mathan, *The Law Relating to Computer and the Internet*, Butterworths, London (2000), p. 40.

[281] N.S.Gopalakrishnan, "WIPO Copyright and Performers' and Phonogram Treaties", 21 Ac.L.R. 17(1997)

CHAPTER 8

THE STATUS OF THE PERFORMER IN THE AUDIOVISUAL INDUSTRY IN INDIA

Objective of the chapter: The chapter seeks to assess the status enjoyed by the performer in the audiovisual industry in India by tracing it from the time the industry began in India. An assessment of the state policy towards the film industry and the performer is attempted. An analysis is made of the entertainment industry within the context of the constitutional scheme in India. The protection afforded to the performer by prevalent statutes with the objective of securing labor and social security to the performer is scrutinised and the status of the performer assessed by analysing judical opinon. The chapter seeks to understand the possible changes to the practices and status of the performer in the context of changes sweeping the sector in the wake of it being declared as an industry and also in the wake of corporatisation and internationalization of the audiovisual industry.

The Beginning

The early films in India were heavily dependent on the world outside for the artistic as well as technological skills required for the film industry. Being an artistic form that was an offshoot of a scientific invention- the cinematograph, the film trade did not have any precedent to follow with respect to techniques as well as practices. The situation was the same in the rest of the world as well.[1] The first feature film 'Harishchandra' was made in the year 1913 with borrowed technology as well as by securing the services of foreign technical personnel. The early filmmakers found spotting talent and getting them to perform very difficult. There

[1] The studio system took over quiet early all over the world. The practices, which were followed, were not much different from that of the production practices in other sectors of trade. The artistes were employed on contractual terms on a monthly salary basis and treated as employees. These practices cast their shadow over India as well. The practices prevalent in the drama troupes where in the performers were attached to groups and traveled with it can be considered as having been followed in the cinema industry as well. It would be the same troupe that donned different roles in various productions.

was an acute shortage of acting talent during the silent era.[2] This scarcity was felt more acute for the feminine roles.[3] It was difficult to recruit ladies for roles requiring their presence as acting was not considered a respectable vocation and therefore Indian women were reluctant and hard to be persuaded to act. Thus in the early years it was either the male actors who donned the grease paint for the female roles or the Anglo Indians[4] whose social mores didn't view the profession in cinema with suspicion.[5] The performing artist's class was considered as those with loose morals and a stigmatic background there by occupying a low social position in the social ladder. Thus socially the performers were considered as not occupying a respectable position in the initial years of the film industry.[6] The cause can be attributed to film production being unstable as a trade, the income being meager and irregular. Even actors from commercial theatre companies were not attracted to films. In contrast the stage was still a popular and economically viable avenue for the actors.[7] There was an acute shortage of actors during the silent era. In other words performers in fixed audiovisuals had not yet emerged as a distinct artistic and professional class in the Indian film industry.

The Performing Artist in the Silent Era

The remuneration commanded by the artistes during the silent era varied with the standing of the artistes in the market.[8] In the large studios a permanent staff of

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[2] P.Rukmani, *The South in the Making of the Indian Film Industry -1913-1955*, (1987), p.41 (Doctoral research thesis submitted to the University of Madras by Ms. P.Rukmani in 1987, accessed from the Roja Muthiah Memorial Library, Chennai on 22-9-2003 by the Research Scholar). For example respected Dada Saheb Phalke had to make his son act because he could not get actors for the venture.

[3] *Id.*,p.71. There is nothing peculiar in this and is not characteristic of casting problems in the early Indian film industry .The social mores of the times looked at the performing arts with a stigmatic prejudice. Even in performing theater companies the men had to don female roles.

[4] For instance Ruby Myers alias Sulochana and Marien Hill. They were all either Anglo –Indians or Jews.

[5] Due to the need to play female characters impressively, the actors used to grow long hair in order to play the part of the female whenever required with the consequence that the society used to look down upon them for their non-conformist lifestyle.

[6] This was accentuated by the fact that the uncertain prospects of a fledgling industry could not promise any extraordinary remuneration that would beget economic and social respect.

[7] Theodore Bhaskaran, *Eye of the Serpent, An Introduction to Tamil Cinema*, East West Books, Madras (1st edn. - 1996), p.7. The resultant situation led to amusing instances of the technicians and even the family members being asked to don the grease paint. In fact even accountants had to don roles however some of them lasted well into the talkie era.

[8] Raja Sandow along with Devika Rani was one of the most highly paid actors; the latter can be considered the first heroine of the film screen.

actors was maintained whose income was on an average Rs. 30 per month. It ranged from Rs. 30 for an extra to Rs. 500 – 700 or Rs. 800 for a star.[9] Cinema to the artistes of the silent era was more a means of earning a living rather than a chosen way of life.[10] During the early stages of the silent era, the producer or the film company owner was in total control of the unit. Directors were hired only to train actors.[11] The artistes would not boastfully claim to be actors and actresses. They were mere employees of the film companies' and no more. The artistes were paid in the aforementioned rates till the forties on a monthly basis. After the forties the pattern of contractual engagement changed from six months to one year. It was considered more economical than the practice of monthly engagements. The artists were also sure about the duration of their contract with the production companies. However companies who had their studios did have the comedian and heroine on their payrolls. This was because these entities were important for the success of the film and having them would facilitate easier production of films.[12] Different companies wooed popular actors in order to have them on their payrolls. They can be considered as the first stars on the filmy firmament. The film companies engaged the artists and others on a contractual basis treating them as employees and they had not yet acquired any independent status. Though freelancing had not yet commenced nevertheless the masses had their favorite stars amongst the actors and the actresses.[13] It was not any acting ability that mattered but the physique and other body skills that mattered to win recognition and success at the box office.

It is of note that during the early years of the silent cinema the performers names were not mentioned on the credits. However by the beginning of the thirties, the performers began to be given credits on screen. It can be inferred that professional standards were being set and the market appears to have begun to

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[9] P. Rukmani, *op.cit.*,p.71.

[10] *Id.*, p.95.

[11] Rangavedi Velu, a stage actor was hired to train actors in the early films. In the year 1916 for the Indian film company 'Keechaka Vatham'-'Disrobing of Draupadi'. S. Theodore Bhaskaran, *op.cit.*,p.4.

[12] P. Rukmani, *op.cit.*,p.112. Gemini pictures were famous for these practices. They were hard task masters as well as good paymasters

[13] One of who was Sandow who was a crowd puller with his physique and so was *Hunterwali* Nadia, a lady who was popular with the masses because of her stunts and daredevilry in films.

respond to the star value.[14] Whether it was the first signs of principle of a moral right to attribution of ones name to ones performance or a response to market demand is unclear. But it appears that star names had begun to matter.

During the silent era the impetus was more on looks and the gait rather than any other talent. Therefore, acting as an art form that required flair and talent as one can gather today was nonexistent because of the limitations of the silent medium. Either a narrator or subtitles were used to narrate the story. The professional development was at its nascent stages and so was the infrastructure. At times live orchestra would accompany the films. There were no permanent theaters to screen the films but the projections were attached to either *melas* or public fairs.
A pan Indian trend in the production practices could have begun in the film industry because of the inter-sectoral dependence and mobility for infrastructure and technological availability as even the films in south India were shot in Bombay, Pune and Calcutta.[15] Importantly independent freelancing among artistes as one can witness today had not yet commenced in India during the silent era. It has to be noted that due credit has to be given to the early silent film maker as there was no peer for them to look upon or any settled industrial practice to assuage their apprehensions and make film production a suitable business proposition.

The Status of the Performer in Talkies Under the Studios

During this period the production houses began to produce films at their own studios by engaging in house personnel. The talkies did effect an escalation in the cost of production of the film in that there was a seventy five percent increase in the cost of production as compared to the cost incurred for producing a silent film.[16] From the aesthetic point of view most of the early talkies were just celluloid versions of the stage plays, the normal practice being to engage a

[14] Theodore Bhaskaran, *op.cit.*,p.8. The most sought for genre in the silent era were the stunt films that needed more by way of physical attributes from the actors rather than any acting talent. Therefore battling Mani and stunt Raghu were the leading actors of the times.
[15] P.Rukmani, op.cit.,p.119.
[16] I.K.Menon, *Genesis and History of the Motion Picture Industry in India* in *Hand Book of the Indian Film Industry*, 1949, MPSI Publication, Bombay, (1950), p.xix.

drama troupe, enact the play and shoot the performance on film.[17] The arrival of the talkie in the year 1931 resulted in the mass migration of artistes and technicians from the stage to the film industry. The same lack of organization among the artistes that was evident in the theatre realm continued in the event of this transition as well. A similar attitude of indifference from the employers continued even in the studio work environment.[18]

Though the monthly wage arrangement seems to have been discarded during this period nevertheless the artistes were on contract with particular studios, which expected them to act for them alone. Whether there was a detailed oral or a written agreement with the artistes is not ascertainable but there was an agreement with respect to call sheet timings. During these early times there are instances of the artists being sued by their companies for breach of contract.[19] They were not to engage in multiple engagements at the same time according to the norms of the times. It was the producer who commanded the production and the director had not yet reached the status being the architect that was attained later on. In other words during the early period of the talkie as well as the silent era the onus was solely on the investor who was the creative force behind the venture and acknowledged as the author. The studios loaned the stars who were on the rolls of the studios to outsiders who needed them for their projects. The right was exclusively that of the studios and there was no individual freedom of the stars in this regard. Thus the system was that of the labor being owned by the investor just like any other capital used in production.

The medium of the cinema produced a star hierarchy even within the studio system under which they worked.[20] Of relevance in this context is the fact that

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[17] Theodore Bhaskaran, *op.cit.*,p.13. It can be considered a photographed version of the drama.

[18] This was one vital disadvantage for the artistes in the Indian film industry, as they did not have a precedence to look behind in order to sow the seeds for an organizational movement. Theodore Bhaskaran, *Trade Unionism in South Indian Film Industry*, V.V. Giri National Labor Institute, Noida (1st edn. - 2002), p.11.

[19] The first talkie in India, 'Alam Ara', was marked by litigation with an actor being accused for breach of contract by the studio that had employed him on their rolls for acting in the film, <http://www.angelfire.com/movies/madhuri/alamara.htm. > as on 23-2-2004. Although Mehboob was scheduled to play the lead in 'Alam Ara', Master Vithal from Sharda Studios got the part. When Sharda sued Vithal for breach of contract, he was defended by M A Jinnah (the founder of Pakistan).

[20] For as early as 1937 one of the superstars of yesteryears Sri K.B Sunderambal commanded a price tag of Rs.1 lakh that was granted to her for the film 'Nandannar'. Artistes with a decent

there were no contractual arrangements that can be considered similar to that of recognition of intellectual property value by way of royalty payment agreements in the Indian film industry during this stage.[21]

It was with the advent of sound that the value accorded to the film medium as a creative enterprise increased way above the popularity and following enjoyed by the unfixed audiovisual media that includes drama troupes and the rest. By now the familiar the creative showman performer emerged with the opportunities created by the arrival of sound in the Indian film industry. All the prerequisites and traits identified with the performing arts on the stage had to be adapted and with little variance expressed in the cinema. The motion picture of the silent era was less demanding for the artistes by way of creative abilities, as the technical facilities were not sufficiently developed to exploit the same. The advent of the talkie in the year 1931 through 'Alam Ara'[22] in Hindi (also made in Tamil) effected a change in the professional fortunes of the performers. The environment was different from that of the silent film era. In fact the importance of voice and other attributes was important perhaps more than any other perquisites. Though the production methods were still crude and unsophisticated nevertheless the industry woke up quickly to the demands and potential of the cinematic medium.

The fusion of the audio element with the visual element of the silent film era gave the domestic filmmaker an edge over the foreign competition in silent films that he was facing since the advent of the industry.

The early screenplays were mere adaptations of the stage plays that were mostly based on mythological adaptations. Thus the artistes from the theatre found themselves in great demand on screen. Further, the tradition of theatre had always attached great importance to the need for music, dance and orchestration. With the inception of audio this advantage also could be exploited to cater to the tastes of an audience bred until then in folk and stage performances. The prevalent tastes necessitated and requisitioned the talent of

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standing could be recruited only upon the remuneration of Rs. 25000/- by the producer that included two chief artists of some standing that would total up to Rs.250000/-.

[21] Though initially the studios employed artistes on monthly salary basis with exclusive contracts with a particular studio. This system was abandoned as the pay of the artistes was pegged according to their market value. It is to be noted that this attribution of market value is also another way of recognizing the intellectual property value in the performance.

[22] One of the longest films ever made in Indian film history.

performers who could render dialogues as well as sing on stage. The latter technology arose as the technology of playback was yet to be invented. Thus there had to be an excellent expertise in music as the actress or actor would have to enact song and dance with a live orchestra on the sets with the camera recording the scheme. It is striking that several of the early films had singers who were loud enough for the galleries[23]. These mannerisms were carried over onto the microphone era as well[24]. This onset of play back singing brought out a decisive change in the prerequisites required to be a film artiste. This removed one of the prerequisites considered essential to be an actor[25].

In fact the glamorization of the actors as a pivotal aspect of the medium became unavoidable during the talkie era. The reason was obvious as the close-up of the actors, loud emotive dialogue deliveries, the garish costumes and their larger than life image on the screen was leaving an indelible impression on the minds of the Indian cinema aficionado. Characters started becoming synonymous with the actors and they became etched in the psyche of the audience.[26] Further the film magazines also sprouted with their gossip columns giving a closer glimpse of the artists' lives. This had a positive impact on the remuneration of the actors as this lead to a hierarchy of stars according to their popularity and there-by-the market value. Thus with the advent of the talkie the actors ceased to be mere acrobats - stunt performers and became nearer to the performers that they were in live theatre. It shows that the studios had begun to realize the fact that the actors were playing a determining role in the fortunes of the film unlike other raw materials that went into filmmaking.

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[23] This continued till the mechanism of playback arrived.

[24] The high decibels in which singers such as K.B. Sundarambal and P.U. Chinnappa sang are in stark contrast to how singers render their performances.

[25] Two celebrated artistes such as Ashok Kumar and Thyagaraja Bhagavathar in the thirties and forties were all singers.

[26] Theodore Bhaskaran, *Eye of the Serpent, An Introduction to Tamil Cinema*, East West Books, Madras (1st edn. - 1996), p.19. It is also worth mentioning that though theatre artists were most sought after with the advent of the talkies there was a reverse trend also during the mid thirties to try on amateurs. The reason was that they were cheaper and easier to handle than the stage actors. The exploration of the medium led to several attributes evolving as desirable traits for the film actor. The stylized acting went together with the realistic acting. Thus even actors with non-professional acting training entered the tinsel world.

A successful film could always lead to the actor hiking the rates for his performances.[27] The trend of calling an actor a star began with the forties if he or she acted in a box office film.[28] The star culture had begun to be rooted in the psyche of the people is clear from the down fall of several stars based on the rumors regarding their professional and private lives.[29] The star value and property value in the commercial sense of the term had begun to be recognized in the early talkie (pre-independence) period of the star culture.[30] During this period there are stray instances, which point out that the commercial value of the image, or the commercial potential in the personality as distinct from the mere market value of the performance had come to be recognized. The personality and image of Baby Saroja, a child actress and a favorite of the Tamil film viewer who acted in three films was exploited to sell household articles as well as toiletries. It was only by resort to legal measures that the same was restrained.[31] In spite of the absence of the residual payment system followed as a remunerative model, the industry was conversant with the personality and market value of the performer and both the producers as well as the artistes were aware of the same. The first signs of the need for an organization representing the concerns of film artistes also emerged in the late thirties, before the war shook up the studio system, but the initiative did not last long[32].

Music Industry and the Movies -Pre-Playback

An important instrument for recreation and entertainment that preceded the arrival of sound to the silent film era was the gramophone that had been

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[27] P. Rukmani, *op.cit.*,p.113.

[28] *Ibid.* The treatment of these stars only varied marginally between the north and the south of the country though the former did not hesitate to introduce new talent

[29] Thyagaraja Bhagavathar and N.S.Krishnan were charged with the murder of a journalist for having attempted to blackmail them. The former who was a superstar in his time never quiet recovered his fortunes after his acquittal.

[30] The prevalence of the star system has spawned various theories to the extent of connecting it with the idol worship and guru worship. See, Firoze Rangoonwala, *A Pictorial History of Indian Cinema,* Hamylyn, London (1979), p.70.

[31] See *History of Tamil Cinema*, Director of Information and Public Relations, Government of Tamilnadu, Madras (for International Film Festival of India, 1991), 1991, p.9. See <http://www.tamilentertainment.com/Memories/98/fna/fna2.htm > as on 3-1-1006.

[32]Theodore Bhaskaran, *Trade Unionism in South Indian Film Industry*, V.V. Giri National Labor Institute, Noida (1st edn. - 2002), p.12. In the year 1938, M.V.Mani was elected president and Thyagaraja Bhagavathar was the president of the Association of Actors.

commercially available since the year 1902. It had acted as an appendage both to company dramas as well as the films that succeeded it.[33] Songs came to occupy a pivotal place in the song and dance dramas of the companies and this trend continued into the films.[34] Cinema popularized music and the traditional barriers were broken as music was for the first time enjoyed by the masses and the classes alike. In the initial years the phenomenon of playback was non-existent as the technology had not developed in this regard therefore the artists had to sing and enact the roles themselves. The artists used to ask for a higher remuneration in order to sing for the discs separately. This was because at that time there was no play back technological possibility. Interestingly neither the studio owners nor the producers opposed the cutting of the songs contained in the film. But the technology had not been developed to take the song directly from the sound track. Artists when approached asked for double payment for specifically rendering these songs for the discs. Gramophone companies were not ready to make the payments other than royalties to the producers. Thus version recordings were made and sold, as the original artist could not protest, as it was all right if the producers received the royalty.[35] However different singers often sang for the gramophone records when the original star singers found the price offered uninteresting. For some time in the initial years even the permission of producers of films was not taken for these version recordings however the gramophone companies later on adhered to this.[36] The highlight of these transactions is that the artistes were aware of the need for extra remuneration for the exploitation by way of discs separate from the remuneration for rendering for the film. Thus despite the producer being the owner of the film, that did not vest in him the right of using the soundtrack for the gramophone as well. The artists had to be separately persuaded to do the same with additional remuneration.

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[33] Theodore Bhaskaran, *Eye of the Serpent, An Introduction to Tamil Cinema*, East West Books, Madras (1st edn. - 1996), p.38. In the company dramas even those who donned the role of clowns had to be singers.

[34] *Id.*, p.42. The fifty songs in the first Tamil film testify to the relevance of music and the skill required for rendering it.

[35] P. Rukmani, *op.cit.*,p.122.

[36] Theodore Bhaskaran, *Trade Unionism in South Indian Film Industry*, V.V. Giri National Labor Institute, Noida (1st edn. - 2002), p.47.

Status of Playback Singers Under the Studio System

The need for the actors to be trained in Karnatic music and be singers had to be discontinued with the start of prerecording facility. The ability to sing ceased to be the sine qua non for the actor. Artists began to be primarily chosen for their good looks and acting talent. Playback also brought in a distinct group of artists called play back singers.[37] It brought in a new class of contributors to the cinematic medium called the play back singers. In the early years the singers, songwriters and the dialogue writer others did not receive the credit for their performances.[38] They were paid much less than even the other workers and were rated low.[39]

The Extras in Talkies Under the Studio System

By the thirties there was sufficient distinction between the supporting artists and the main artists in the film industry. Under the studio system the extras were engaged on a daily wage rate. With the takeover of the industry by new entrepreneurs during the war and after the Second World War period there was immense exploitation of the labor in the industry. With the extras unable to have the same bargaining power as the main artists and popularity among the masses, they were a disgruntled lot. The extras were paid Rupees two as a daily wage by the employers. Once the war was over they advanced their claim to a higher wage rate at rupees 5 per day. One can note that in comparison to the monthly salary that the main artists and certain technicians were enjoying the extras who were also performing artists but relatively irrelevant and subdued to the major scheme of things were earning a daily salary.[40] The demand was realized from the studio owners and film producers by striking work. The first signs of class-consciousness were apparent in this episode.

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[37] *Id.*,p.45.

[38] By way of titles- credit.

[39] Theodore Bhaskaran, *Trade Unionism in South Indian Film Industry*, V.V. Giri National Labor Institute, Noida (1st edn. - 2002), p.11. Even the Indian Copyright Act, 1914 did not extend statutory protection to the cinema. There was little protection even after that for the other literary offences like plagiarism.

[40] Dr.Inturi Venkateswara Rau, *The Trade Union Movement in South Indian Filmdom*, in Hemachandran,(et.al), *Film Trade Union Movement, Southern Zone, A Flash Back*, Published By Film Employees Federation of South India (FEFSI). It was the 'extras ' (as they were called then) who first raised the question of raising the wages and struck work. It was at the Jaya Film Studio compound at Madras (now Chennai) that the struggle saw its culmination.

The Dubbing Artists

The dubbing artistes were also new additions to the film industry following the invention of sound recording and playback in the film. They were also paid on a daily wage basis just like the junior artistes. Thus in the initial years of the Indian film industry the western models of the studio system had influenced the relations in the studio system adopted in India. However the condition of the employees under the studios appears to have been better than that of the employees outside it.[41]

The Performer in the Era of Independent Production

The assembled factory line style of producing films by studios changed with the onset of the Second World War. The rise in the price of the raw materials together with the stringent economic policies of the state during the war and after plunged the film industry into a crisis. With escalating costs and an inflation-ridden economy there was little succor to the film industry and the studio system was hit hard by the times.[42] This turn of events had a lasting impact on the status of artistes in the film industry. Several of the studios and their artistes were out of assignments. This was despite the fact that the number of theatres had increased.

The black money hoarders-investors seized this despondency in the market as a safe platform to invest. The sequence of events though designed to avoid taxation by showing inflated expenditure on the films produced had an impact on the system through which the stars were remunerated. Till then the stars were on the payrolls of different studios for a particular period of time, they became blinded by the heavy sums offered by the independent producers and were enticed to part ways with the studios.[43] The artistes entered into independent

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[41] Theodore Bhaskaran, *Trade Unionism in South Indian Film Industry*, V.V. Giri National Labor Institute, Noida (1st edn. - 2002), p.14.

[42] Though there was increased demand for films, the economy had become inflation prone and costs had gone up. *Report of the Film Enquiry Committee, 1951*,printed in India by the Manager, Government of India Press, New Delhi (1951), p.14.

[43] *Ibid.*

contracts with the producers. The stars became the focal point of the film industry as inexperienced film producers with only with the lure of tax evasion or wanting to make an extra quick buck safely and easily.

The star system began to influence the decision making in the film industry. The stars decided several vital decisions such as who should do the script, as to who should co-act and even direct the film. The stars began to take up multiple engagements at the same time in order to cash in on the new opportunity that their star power commanded. The immediate fall out of the same was on the contractual practices and the legal consequences regarding the terms and conditions. There was no standard consistent practice followed. The pattern of practices was such that the commitments were drawn in any manner without specifics regarding the nature of the role and duration of engagement. It could be oral or written and the production schedule could vary from a few months to over five years, the script could either be written before the shooting commenced or would not be insisted upon depending on the credibility of the producer and the director. Even in these unpredictable chaotic circumstances there had to be certain unwritten rules but that varied according to the commanding power of the stars in the market. There was neither any security through collective bargaining practices nor was there any legislative cover for the artiste to provide him a secure labor cover. The artiste was treated like any other skilled laborer and paid for his services though not as a manual worker with respect to the fixation of his wages. One significant point to be noted is the cheap labor cost of the Indian film worker compared to that of western counterparts.[44] It is noteworthy that correspondingly during the same period in other parts of the world as a consequence of widespread exploitation, unions were demanding the imposition of the residual model of remuneration for the performing artists.

Organizational Efforts in the Industry and the Performing Artist

The first organizational efforts of the industry had already begun from the thirties onwards in Bombay. The Motion Picture Society of India (MPSI) was formed in

[44]P. Rukmani, *op.cit.*,p.449. This was a significant factor in reduced costs of film production in India.

the year 1932.[45] The period also saw the emergence of an organizational front of the producers in India representing the interests of the film industry. In the year 1936, the Bengal Motion Picture Producers Association was formed.[46] The Indian Motion Picture Producers Association was formed in the year 1937.[47] The South Indian Film Chamber in Madras came into existence in the year 1938 under the pioneering spirit of Sree Sathyamurthy. There does not seem to have been a precursor to this organization before that in the Indian film industry.[48] However the interests of the performing artist were not on the agenda of these organizations nor was it brought to their notice during this period[49]. Thus it could be said that adversities brought together the various organized entities to function in the south and the north Indian film industry but their interest's were to promote the industry and not for improving the lot of the artistes and the personnel involved. [50]

The first All India Motion Picture Congress was held in the year 1939 in Bombay by bringing together all allied unions and trade associations to discuss their problems.[51] From the records of the various conferences held during this period it can be said that Indian Motion Picture Society, The Motion Picture Producers Association, The Indian Motion Picture Distributors Association, Association of Cine Technicians, Amateur Cine Society and Visual Education Society of India, the Indian Film Exhibitors and The Cine Artists Association were in existence and active in India.[52] The artists too began to organize themselves as well as the technicians by the end of the first half of the century. The working conditions were on the agenda of both cine technicians as well as cine artists. For instance, while the former had demanded that salaries be disbursed by the fifteenth of every

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[45] The first motion picture trade journal was begun in the year 1935 by the Motion Picture Society see <http://www.meadev.nic.in/media/media.htm> accessed on 6-2-2003.

[46] <http://www.indiaheritage.com/perform/cinema/history/history.htm >as on 6-2-2003.

[47] *Ibid.* The Indian Motion Picture Distributors Association was formed in the year, 1938 at Bombay.

[48] The organization was formed by the exhibitors, distributors and the producers to act as a spokesperson or to represent their grievances before the Government Of India, the state governments as well as other interests in the industry.

[49] A futile attempt was made in the year 1938, though it cannot be categorized as a post studio development. Both the systems of film production were coexisting during this period.

[50] P. Rukmani, *op.cit.*,p.163 .

[51] < http://www.meadev.nic.in/media/media.htm >as on 6-2-2003.
See also< http://www.indiaheritage.com/perform/cinema/history/history.htm >as on 6-2-2003.

[52] In the western Indian film industry

month as well as that the equipment should be in a good condition, the Indian cine artists called for a regular schedule of working hours.[53] This shows that a slow consciousness of the need for order was being felt in uncertain times in which all were prone to exploitation in a disorderly industry. The end of the Second World War as well as the dawn of the independence brought forth a momentum to these organizational movements.

Pre- Independent Film Policy of the State and the Performer

Rangacharier Committee Report

The colonial rule that prevailed in India during the time of the advent of the film medium into the country made it essential for the administrators to evolve a policy towards this highly potent medium of communication. The regulatory initiatives towards the film sector in British India's began as early as in the year 1918 with the passage of the Cinematograph Act. By the 1920's the provincial government had begun to impose taxes on cinema as an imposition on entertainment revenue.[54] The British government did not pay any attention to the plight of the film workers in the Indian film industry.[55] The British government appointed a Film Enquiry Committee in the year 1927/28 in order to study the functioning of the industry in an elaborate manner. However the intent was to take stock of the sunrise industry and the problems connected there with and did not include any issues with regard to the personnel involved in production.[56] Though suggestions were made with regard to taxation and the need for professional training to be imparted to the technical and artistic personnel involved in the production no concrete proposal for the standardization of transactions and dealings or for the betterment of labor relations was made. Despite several recommendations of the Rangachariar committee with respect to finance, taxation and more efficient

[53]P. Rukmani, *op.cit.*,p.167. It is significant that this was a period before the dawn of independence.

[54] Uma. J.Nair, *Economic Aspects of Film Industry in Kerala*, C-DIT Series, Trivandrum (1st edn.- 1999), p.39.

[55] Theodore Bhaskaran, *Trade Unionism in South Indian Film Industry*, V.V. Giri National Labor Institute, Noida (1st edn. - 2002), p.7. In 1921 W. Evans who was sent to make a survey of the industry only made propositions with respect to censorship.

[56]*Ibid.* The exercise was a comprehensive and an elaborate one with the questionnaires being sent to different parts of the country and hearings held in different places.

functioning of the industry, the government kept the recommendations in the cold storage.

The Committee made a comprehensive study of all aspects of the film industry that included film production, distribution and exhibition, public and presses perception as well as the governmental monitoring of the film industry.[57] It took note of the need for a healthy capital infusion so that qualitatively better films were produced. They underlined the low quality of films produced was due to cheap investments and the lure of quick returns. In fact it noted that the trustworthy capitalists were shying away from the industry (mainly because of the stigma attached to the industry). The Committee recommended the setting up of a central organization to guide, assist and control the industry.[58] A huge responsibility was placed on the government to supervise this process that intended to cover activities from provision for finance to developing cinema halls.[59] However the government did not act on any of the propositions.[60]

If there was any thing that finally influenced government policy and activated it towards the film industry was their concern about the message borne by the potent medium. Therefore their primary concern was with censorship of the cinematic medium and guidelines to be formulated in respect of censoring the film media and the identification of the medium as a potential source of revenue. This was understandable since the film folk had many a nationalist within its fold the British government had to be wary about the message borne by the films.[61]

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[57] *Report of the Indian Cinematograph Committee –1927 –28-Rangachari Report, 1928*,Madras, Printed by the Supt., Government Press and Published by the Government of India, Central Publication Branch, Calcutta, pp.xi –xii. The terms of reference included the need to examine the organization and the principles and methods of the censorship of cinematograph films in India and to survey the organization of the exhibition of cinematograph films and the film producing industry in India.

[58] *Id.*,p.140.

[59] Uma. J.Nair, *Economic Aspects of Film Industry in Kerala*, C-DIT Series, Trivandrum (1st edn.-1999), p.186.

[60] This was mainly because of the dissenting note by the three European members of the commission. See I.K.Menon, *Genesis and History of the Motion Picture Industry in India* in *Hand Book of the Indian Film Industry*, 1949, MPSI Publication, Bombay (1950), p. XVII. One of the earliest accounts published around the fifties.

[61] Theodore Bhaskaran, *Trade Unionism in the South Indian Film Industry*, V.V. Giri National Labor Institute, Noida (1st edn. -2001), p.10. In fact leading stars in the film industry like K.B. Sundrambal campaigned for the Congress during the 1937 elections.

One Rule Contrasting Attitudes

The attitude of the British government displayed contrasting dispensation to what was reflected in the British policy towards the film industry and the performer in particular in Great Britain. While protective legislative measures and an atmosphere conducive for the growth of the trade unions were created, the same could not be discerned in the Indian terrain[62]. It is interesting to note that prior to the first film enquiry committee report the British parliament had enacted the Dramatic and Artistic Performances Act, 1925 in Great Britain for performers' protection that seems to have had no impact on the Indian performer.[63] By the dawn of independence there must have been at least three revisions to the 1925 enactments but the same does not seem to have had any impact on the performer or the legislators in India nor are there any references about the same in the Enquiry Committee report or in any subsequent initiatives prior to the independence. The lackadaisical attitude was not exuded by the British government alone rather even the popular Congress governments in the provinces chose to ignore the film industry. The Labor Commissioner did not have the cinema within his purview.[64] However the Payment of Wages Act 1938 covered the studios within it and the Factories Act of 1914 covered the studio unskilled workers but it was not to cover writers, music directors and sound engineers[65]. As litigation concerning performing artists has not been reported at all and as from what has been stated creative personnel seem outside the purview of the Factories Act, performing artists do not appear to have a foothold in the enactment.

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[62] *Id.*, p.8.

[63] The reason can be explained by the historical absence of the trade union or any organizational effort I among the Indian performers traditionally in non-affixed media like the drama companies. In contrast there was a vibrant union culture in the theatre field at the time of the advent of the cinema. *Id.*,p.9

[64] Theodore Bhaskaran, *Trade Unionism in the South Indian Film Industry*, V.V.Giri Institute of Labour, Noida (1st edn.-2002), p.7.

[65] *Report of the Film Enquiry Committee, 1951,*Printed in India by the Manager, Government of India Press, New Delhi (1951), pp.81-82.

The South Indian Film Chamber of Commerce[66] did interact with the Government Of India from the time of its inception by way of petitions and representations to look into the problems faced by the film industry particularly with regard to taxation, raw materials, stock and institutional finance. It is important to note that the Indian performer during this period in the non-fixed medium had also never organized themselves unlike English counterparts and so the organizational culture might not have been passed over into the new media[67]. It could be said that the lack of an organized precedent could have slowed the organizational resolve and momentum of the Indian performer.

After the 1927-28 Film Enquiry Committee report the next noteworthy endeavor on the part of the state was the constitution of the Film Advisory Committee that was constituted in 1944 with representatives of the trade to stabilize the industry. The result of this endeavor was that in August 1944, the government agreed to provide royalty of one rupee for every song played on the All India Radio. This was to be administered through the Film Chamber from the 15th of December 1943.[68] Agreements of this kind were signed with the Governments of Travancore as well as Ceylon as there was tremendous appeal towards the cinematic medium. It is unclear whether any part of the royalty from this exploitation went to the performer. In the absence of any cited instances it can be surmised that there was no such practice other than from the sales of records during this period.[69] Thus despite the striking observations regarding the potential of the industry by the Rangacharier Committee and the growing stature of the film industry there was a general apathy toward the issues facing the film industry.

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[66] That represented the film industry in the south formed in the year 1939.

[67] Theodore Bhaskaran, *Trade Unionism in the South Indian Film Industry*, V.V.Giri National Labour Institute, Noida (1st edn.-2002), p.8.

[68] The major issue was the burgeoning price of the raw film stock and the tax imposed on the same. See I.K.Menon, *op.cit.*, p.xxiv.

[69] Even cinematography as a distinct course of study was commenced in the Travancore state with the launch of the visual education scheme. P. Rukmani, *op.cit.*,p.173.

Post-Independent film Policy and the Performer

Committees on Film Industry in the Post Independence Period

The constitution of the S.K Patil Committee in the year 1951 and its submission of a report on the film industry in the year 1953 exhibited the first stern resolve of the Government of India to streamline the functioning of the industry. The Committee had wide terms of reference.[70] The most striking proposition made by the committee was the formation of a central body to take decisions with regard to the film sector.[71] The body was to be called the Film Council that would have representation within it from all quarters.[72] The artists were also recognized as entities worthy of representation in the Film Council together with the workers and other technical and financial personnel including producers, distributors and exhibitors together with the State and the Central Government representatives.[73]
A firm indication of the need to cultivate a firm infrastructure for the seeding and the growth of the guilds was made in the S.K Patil Committee Report. The committee had envisaged a film directorate consisting of members' of whom 1/3rd are to be elected from the trade circles and other one third nominated by the central government in consultation with the state governments. It was to report to the government about developments in the industry and recommend legislations in areas relating to guilds. It was also intended to establish a film academy. The expenditure to be incurred was to be allocated between general purposes loan fund, producers loan fund, development fund and pension fund. The basis of the scheme would be the various guilds representing various departments. All the guilds together were to form the Federation of Guilds. It would make and reinforce regulation for the conduct of persons engaged in each guild. It would be

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[70] *Report of the Film Enquiry Committee, 1951,*Printed in India by the Manager, Government of India Press, New Delhi (1951), p.1. The terms of reference were to enquire into the growth and the organization of the film industry in India and to indicate the lines on which further development should be directed, (2) to examine what measures should be adopted to enable films in India to develop into an effective instrument for the promotion of national culture, education and healthy entertainment (3) and to enquire into the manufacture o0f raw film. ...and for floatation of new companies.
[71] *The Bulletin of the South Indian Film Chamber of Commerce,* Madras, 1954, p.15.
[72] *Report of the Film Enquiry Committee, 1951,*Printed in India by the Manager, Government of India Press, New Delhi (1951), p.187.
[73] *Id.,* p.188.

from the Federation of Guilds that one by third of the personnel would be added to the film directorate.

The S.K. Patil Committee report made certain observations that sums up the state of performing artists in the film industry in its enquiry and urged them to form an association.[74] The actors and actresses complained about their inability to negotiate as group with the employers.[75] This has restricted them from attempting a standard form contract and in checking practices not in the best interests of the industry. In completion of films even within a period of one year was cited as a reason for the multiplicity of assignments taken up by the artistes. Unhealthy practices resulting lack of standard contractual practices include displacement from the role at the discretion of the producer. The script is never finalized prior to shooting, the schedule is not planned, the stars do not know their part, and there is no advanced rehearsals or coaching to prepare them for the role.[76] It is significant that the committee had noted the trends of organization among actor in the U.S.A.[77] The non-application of labor laws to the film industry including the Industrial Disputes Act and the Factories Act was noted by the Committee.[78] The inappropriateness of the application to the technicians and others indiscriminately was also stressed.[79] It is important to note that they were grappling with issues that would give them minimal security and therefore notions such as copyright or royalties had not been made part of the industry vocabulary.

A characteristic of the report is that even though it compares and looks for guidance to the model of production code in the United States of America for cure for ills plaguing the Indian film industry[80], at no point is a reference made to the residual remuneration through collective bargaining that is practiced in the United States.

Some of the other important suggestions and observations of the committee were that the collective organization in the form of associations and guilds had to be on

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[74] *Id.*,p.71.
[75] *Ibid.*
[76] *Id.*, p.87.
[77] *Id.*,p.71.
[78] *Id.*, p.81.
[79] *Id.*, p.82.
[80] This includes high cost of production and undisciplined functioning of the film industry.

a national scale for better coordination.[81] Another from the artists' perspective was the establishment of a casting bureau that would act as a clearinghouse by observing healthy contractual practices.[82] During the course of the enquiry at no point have the artists touched any issue resembling those from the copyright realm or with regard to the extent of exploitation or regarding the credit or attribution and control over the performances. Their concern was limited to contractual standardization and a disciplined work environment.

The question of the Film Council did arise in the parliament from time to time even after the S.K.Patil Committee Report in 1952. In the year 1962 [83], the Estimates Committee made recommendations to the Government of India that the film industry has come to occupy an important position in the countries economy and India being the largest producer of films, the committee was of the view that the film industry had come of age and should be able to play a constructive role in revising its standards by constituting a film council. The committee noted that at present there was a tendency to put profits above artistic excellence. The states attempted a lot of measures in the sixties to understand the film industry better. In the year 1963 a Film Consultative Committee was set up and later the Film Finance Corporation.[84] The Government of India also endeavored to conduct a survey on the film industry in order to collect authentic data that would be helpful in assessing the problems of the film industry by means of questionnaires.[85]

Fledgling Consciousness of Artistes Welfare

In the year 1964[86] an annuity scheme was mooted for the artistes by the Finance Minister in his budget speech. A trust was proposed to be set up. However this

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[81] *Id* .,p. 186.
[82] *Id.*,p.191.
[83] *Journal of the South Indian Film Chamber of Commerce*, Madras, July 1962 –63, p.2. Perhaps Sri I.K.Gujral was later to be influenced by the same.
[84] *Journal of the South Indian Film Chamber of Commerce*, Madras, June, 1963, p.6.

[85] *Journal of the South Indian Film Chamber of Commerce*, Madras, Feb, 1964,p.5.

[86] *Journal of the South Indian Film Chamber of Commerce*, Madras, April, 1964, p.2.

was to be through contributions from the artistic community and other members of the film industry that might be utilized for the development of the industry. The film artists were to freely contribute to the trust out of which some kind of annuity was to be given for the benefit of the artists and to the contributors as old age pension.[87]

It is significant to note that during this period a consciousness had come about with respect to the perilous life of the artiste. Perhaps within the film industry and the state had matured to understand the disadvantages of being in the limelight. It had begun to be realized that the artistes' career graph was a fluctuating one, which was fleeting in character. Though there could be exceptions to this among the stars[88]. The consciousness about the need for a special security scheme in the form of a benevolent fund to benefit not only the fortunate among them but also to help others when they retired from the field was beginning to be felt. The government was disposed to help the artists when the project took shape. It can be observed that though the state encouraged the proposition of artists social and economic security it would not embark to foot the bill all by itself nor through any stern regulatory bill been envisaged to create a stable social security platform. It is clear that the government was only echoing the sentiments of the artist community[89]. The state governments like Maharashtra were considering including the film industry in the fourth five-year plan. A board for the film industry was set up in the year 1966.[90] Besides the wage board there was to be a regulation for employment in the film industry and a tripartite panel was set up for the purpose of legislation.[91]

The attitude of the industry interests was one of stiff resistance to the idea of legislation for cine employees. The tripartite committee set up for the purpose discussed this. Several features were asked to be dropped and the rigor of the legislation to be diluted. The word 'worker' was to be cleverly defined to mean

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[87] Raj Bahadur, Minister of Information and Broadcasting, Madras, 25th May 1966.

[88] *Journal of the South Indian Film Chamber of Commerce*, Madras, June 1966, p.10.

[89] Mr. Varadajannar voiced this during the opening of the premises of south Indian artists association building. *Journal of the South Indian Film Chamber of Commerce,* October, 1964, p.5.

[90] *Journal of the South Indian Film Chamber of Commerce*, Feb. 1966, p.9.

[91] *Journal of the South Indian Film Chamber of Commerce*, March, 1966,p.1.

only the unskilled worker[92]. The ambit was to be considerably reduced and the stringent character to be softened. Though the Government of India and its ministers defended the same[93]. It was in the late sixties that the quest for government intervention once again gained momentum[94].

Sri I.K Gujral, the then Minister of Information and Broadcasting, was emphatic about the creation of the Film Council to resolve the problems in the industry. His was a striking about turn from the total abnegation or disavowal of the same that was witnessed around twenty years before when Sri S.K.Patil had proposed but the government was disposed in favor of voluntary groups rather than the state instituted film councils. The reason touted was to save the industry from the crisis that it was facing.

The trade bodies as always were not in favor of the same and were content to have the self- regulatory initiatives that they were always beginning to implement once there is any mention of the Film Council. It was derided as unrealistic and unnecessary. The reason being adduced was the censorship guidelines that came with the film policy. Thus popular ill will towards the censoring regulations was exploited to ignore the regulatory initiative of the film industry in total. The government submitted the same to the film industry for its responses.[95] The trade bodies voiced the following reservation on the proposals. The producers allied with the chamber felt that the representation for the industry should be revised. There would be a central as well as a regional council. The council would also give representation to the artistes –three proposed by the chamber. However the film industry would not contribute to sustaining the same.

The state was supporting its cause now based on the preceding initiative of the S.K.Patil committee reports. The film council was proposed to have the general authority to superintendent and regulate the affairs of the industry and to act as

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[92] *Journal of the South Indian Film Chamber of Commerce*, October 1967, p.11.

[93] Shah defended the government stand; the trade bodies were of the opinion that the Film Council was not the remedy. *Journal of the South Indian Film Chamber of Commerce*, October; 1968, p.5.

[94] Though it is not clear whether it was the influence of nationalistic economic policies. But the resolve coming from the offices of the information and broadcasting ministry had a ring of sincerity about it.

[95] *Journal of the South Indian Film Chamber of Commerce*, Madras, August 1970, p.9.

its guide, friend philosopher and to advise the central and state governments in regard to various matters connected with the production, distribution and exhibition of films. It was recollected that the Patil committee had reached this conclusion after being aware of the deterioration in films, existence of conditions of financial insecurity and the need for establishing professional norms and principles. During this period the parliament too expressed grave concern over the situation. In particular, the crisis in the film industry, financial insecurity and dislocation between the different wings were cited as instances[96]. In such circumstances a multi functional apex body was found essential. Interestingly after the first round of consultations all the important interests in the industry seemed inclined to the idea but they expressed their reservation to set up a statutory organization to regulate the film industry. The state ministers too had endorsed the idea of the film council being a feasible entity.

Importantly the film council was envisaged, as the principle advisory body .it would act as an apex body to be consulted to bring about the rationalization of the working class conditions in the film industry. It would act as the central authority to demand the licensing of production enterprises so that the units employing cine employees and producing films would be organized on a sound basis on economic and professional lines. It would act as the highest forum to guide the film industry in the matter of professional norms and relationships between the three sectors of the film industry with a view to sub serve quality.
However there was opposition to the concept of film council on the basis of the past experience by the representatives of the trade. There was also greater demand for greater representation of the technicians on the film council. Though the government reemphasized that it would not interfere with the creative freedom of the industry.
The biggest reservation of the Federation was with regard to the composition of the film council it was felt that the filmmaker being the most important factor in the film enterprise should have a simple majority in the matter of representation in the

[96] *Id.*,p.10.

film council. Similarly it was felt that other film interests must overall have majority in the film council as the body is concerned with the industry.

It is important to note that the film artiste is only provided a single seat on the panel representing the film council directorate. The qualification of the artiste would be that he has to be outstanding-one who has worked as major artiste and has maintained a good public image and popularity. While the aims of the industry do encompass the workers whether the same brings within the ambit the artiste is a question mark. The functions pf the film council included the regulation and development of the film industry. It would frame regulations and initiate legislation with a view to ensure coordination of the different sections for the coordination modernization and rehabilitation of the motion picture industry. It would strive to avail recognized sources of finance. The film council was to be consulted with regard to any legislative bills proposed for the industry.[97] It is important to note that the Film Council would discuss ways and means to promote the welfare of the workers and the displaced disabled members of the film industry. Significantly it had been envisaged to devise means for the licensing of producers by fixing minimum qualifications to this end. Importantly within the envisaged limits of the film council it has been planned to devise methods of fixing business norms based on equity and fairness and to fix work patterns and contracts of work in respect of artistes, technicians, craftsman who are engaged for work.

In the context of the film council the only mention of intellectual property comes with respect to copyright of films. Particularly to protect the copyright of producers on titles, music and other content on the motion pictures. Besides the workers welfare mentioned priority, it was intended to devise ways and means to bring about standardization of agreements and contracts entered into between different sections and branches engaged in the film industry. The last of the objectives would have gone a long way to remedy a major lacuna in the practice of the film industry.[98]

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[97] *Journal of the South Indian Film Chamber of Commerce*, Madras, Sept. 1970, p.9.
[98] *Journal of the South Indian Film Chamber of Commerce*, Madras, Sept. 1970, p. 9.

However despite these parleys between the state and the trade bodies the trade bodies were not inclined to the idea of setting up a film council and considered the self regulatory bodies to be adequate for the same. The recommendation to set up a film council was considered as unrealistic and unessential. Therefore, it can be said that the film federation had already made up its mind to the cause - in short there was no need to set up the film council and self-regulation would be the best recourse[99]. The representatives of the film industry had already voiced strong objections to the regulations envisaged as draft regulation for the film industry upon which the tripartite committee submitted its report.[100] Though no body would deny the need for setting order into the practices in the industry they were only willing allow themselves the need for self regulation.

From the artistes viewpoint it can be inferred that while no worthwhile proposition regarding practices seems to have gone to the government with regard to the working conditions and contractual standardization, the state had been endeavoring to formulate its schemes with respect to it. There were other recourses through self-regulation since 1971. Other than what was begun in the mid sixties. But these were regulations for the better conduct of the trade rather than for the welfare of the artistes[101]. With meek measures such as not to book artistes with more than nine assignments and not to book supporting artistes with 15 or more assignments, they remained mere cosmetic attempts.

It can be perceived that even during the discussions and consideration of the idea of the film council, the film industry had not been included within the five-year plans. The bottom line was that the government still intended the film council to finance its own regulation in a self-sustaining manner by recourse to the state coffers if essential rather than spend a penny from the central government finances. While there was some initiative in the parliament there were isolated initiatives from certain states where in a robust film industry flourished. The

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[99] *Journal of the South Indian Film Chamber of Commerce*, Madras, Feb 1970, p.18.

[100] *Journal of the South Indian Film Chamber of Commerce*, March 1970, p.12.

[101] It is dealt with the collective efforts to self regulate. Journal of the south Indian film chamber of commerce, January 1971, p.8.

parliament witnessed the introduction of non-official bills in order to secure workers interests they had to rest with an assurance and nothing more.[102]

There were a handful of initiatives from the central government and certain states to go into these issues but all the reports gathered dust with no follow up[103]. The Shiva Karanth Committee that was called the Working Group on the National Film Policy went into the question in detail in the year 1980.[104] They noted that the 3.5-lakh workers in the film industry were without any benefit of security of employment, pension or any other social security. The plea was for a special labor legislation taking into account the fact that being casual workers they were not getting the benefit of the labor laws, even those with regular employees do not reveal the exact numbers and the film producer cannot be equated with any other employer. For the first time from the perspective of workers an official commission body asked for the declaration of the film business as an industry as that would cover the workers under the Industrial Disputes Act as well as the Minimum Wages Act. Significantly one of the observations of the committee was that the lack of well-organized association's in the Indian film industry has contributed to the indifference and the knee jerk reaction from the state.[105] There appears to have been no mention particularly about the performer as either they had been impliedly assimilated into the class of the cine worker or it was the understanding that the performer are better off compared to the others. It is also significant to note that if the mass of workers could not be protected due to differences among the sectors or due to state inertia then seeking any protection for the minority of actors would be an uphill task. However, based on the recommendations of the committee three bills were passed within the next three years by the Parliament which were the Cinema Workers and Cinema Theatre

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[102] Theodore Bhaskaran, *Trade Unionism in the South Indian Film Industry*, V.V.Giri National Labor Institute, Noida, (1st edn. -2002), p.20.

[103] The central government also set up a standing committee to go into the issues and this was placed before the standing labor committee consisting of the producers' workers and the government. The kher Committee documented the state of the industry in Maharashtra. The Government of West Bengal too initiated such moves but did not come up with any concrete action.

[104] *Id.*, p.21. Also *Report on the Working Group on National Film Policy*, Ministry of Information and Broadcasting, Government of India, N.Delhi,May(1980).

[105] *Id.*,p.22.

Workers Regulation and Employment Act, (1981), The Cinema Workers Welfare Funds Act (1981) and The Cine Workers Welfare Cess Act (1981).

The aforementioned analysis points to the wide distance between the state and the film industry. It also reveals the predisposition of the industry interests for self-regulation rather than state regulation. From the intellectual property standpoint the only indulgence has been towards the issues relating to copyright of films. It points out to the need for the infusion of funds from healthy financial sources in order to have transparent transactions and standardized contractual deals in the film industry. The need for organizational structures as well as the welfare funds. The difficulties in canalizing the funds in this respect are also revealed as the state is looking upon the artistes to draw up the corpus. The need for greater participation by the workers and other sectors like the artists have been stressed but government intrusion has been discouraged. It is noteworthy that while the committees have desired for the workers amelioration programs, no recourse to the idea of royalty model or an intellectual property paradigm has been mooted by them nor suggested to them.

The Constitutional Framework and the Film Industry

The constitutional framework within which the film industry is positioned provides valuable insight into the way matters with regard to the film industry have been administered in the past, presently and can be managed in the future. It would also be instructive to see the lay out of legislative and administrative powers as it would have an impact on the administration of performers rights if ever it is extended to the performer in the audio visuals. The regulatory power over the film industry is divided (neither equally nor conveniently) between the center and the states. This has been so ever since the early part of the century when the British government devolved the power to tax entertainment to the provinces.[106] The Union Government has the power to legislate with respect to

[106] Under the Devolution of Powers Act, 1920.

sanctioning cinematograph films for exhibition.[107] This is the only direct power that can be ascribed to the Union Government with respect to cinema.[108] The rest of what has been assumed is based on List three that is the concurrent list in which both the Union and the States can legislate. Though not directly pertaining to films the central government is empowered to legislate with respect to all forms of communication that includes posts and telegraphs, telephones, wireless, broadcasting and like forms of communication. The residuary powers of legislation outside of List 1, 2 and 3 remain with the central government.[109] Thus anything outside the purview of List 2 and 3 can be legislated upon by the central government. The states are endowed under list 2 to regulate theatres, dramatic performances and cinemas subject to the entry 60 of list 1.[110] Thus this is a grant of unqualified and very wide powers to the state government. It is a matter of conjecture whether cinemas mentioned herein covers the exhibition alone or whether it covers the entire process of film production beginning with shooting, through distribution and exhibition.

The state government is most critically aided in harnessing the massive revenue from the power to levy taxes on luxuries, including taxes on entertainment, amusements, betting and gambling.[111] Thus the entire segment of entertainment tax is a state government prerogative. Therefore it is a safe inference to say that it is the state government that benefits most from the film business even though it is only from the exhibition stage that the tax is levied. From the perspective of social and economic security of the labor involved in the film industry concerned or the personnel involved in the film production it is the powers listed in the Concurrent List that is List 3 of the Seventh Schedule that governs them. Though both the center and the states have the powers to legislate concurrently the exercise of prerogative by the center would exclude any further initiative of the state in this regard. The area covers trade union, industrial and labor disputes,[112]

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[107] The supervision and administration was confined to censoring films, as that was considered pivotal to the state interests particularly in a colonial rule. However the same spirit was sustained in the aftermath of independence as well.

[108] Seventh Schedule- List-I, Entry 60, Constitution of India.

[109] Seventh Schedule- List I, Entry 97, Constitution of India.

[110] Seventh Schedule- List II, Entry 33, Constitution of India.

[111] Entry 62, List II, Constitution of India.

[112] Entry 22 List III, Constitution of India.

social security and social insurance, employment and unemployment[113], including conditions of work, welfare of labor, provident funds, employees' liability, workmen's compensation, invalidity and old age pension and maternity benefits.[114] Thus labor welfare initiatives can either be partaken or the center can initiate the same to the exclusion of the state government.

The need for a cohesive development of the industry makes the present arrangement of distribution of powers and revenue questionable. The center gets only the revenue by way of excise duties and customs duties on import of film and the money deposited by the producer for the censor board certification of the film. Even if copyright (intellectual property rights) falls within the central list, the item needs to be seen in the backdrop of the film industry and budgetary realities that inadvertently fall into state governments favor and ambit[115]. With the declaration of the film trade officially as an industry already prepositions to bring cinema and entertainment into the concurrent list have been mooted[116] as this would perhaps result in homogeneity of vision in the administration and legal supervision of this sector. Both the need for rationalization of tax in all states as well as the lax measures to counter video piracy has given impetus to this thought[117]. But significantly the entire train of thought has been impelled by the declaration of the film trade as an industry by the central government.[118]

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[113] Entry 23 List III, Constitution of India.

[114] Entry 24-List III, Constitution of India.

[115] The rampant video piracy and the bifurcation of the responsibilities in this regard between the Ministry of Human Resource Development and the state governments who are in charge of law and order has already set the government thinking about alternatives. The same reliance on state governments execution would be required if the performer is also endowed with rights.

[116] The center has written to the states seeking their opinion in this regard. However the concern that impelled this move is more of a tax based reason rather than the centers desire for greater participation. However video piracy has also promoted thoughts in this direction. "Center, States to Meet on September 1 to Ponder Cinema's Industry Status", UNI, 27th July, 1998, <http://www.rediff.com/business/1998/jul/27movie.htm >as on 1st February, 2003.

[117] Though there are other theories doing the rounds that explain this move like bestowing the center with a more powerful control over freedom of expression in films. Gautaman Bhaskaran, Leave Cinema Alone, web published version of the editorial that appeared in the Hindu on 6th April, < http://www.gautamanbhaskaran.com/gb/lca.html >as on 1st February 2003.

[118] The same problem with respect to checking illicit money financing films is also beset with the problem that even if the central government has declared film trade as an industry nevertheless the law and order is a state subject. Smt. Sushma Swaraj, Minister of Information and Broadcasting, made this statement in the Rajya Sabha. "No Foreign Investment in Print Media", Tribune India, New Delhi, March 13th, 2001,<http://www.tribuneindia.com/2001/20010313/nation.htm>, as on 1st February 2003.

However recent technological changes do have profound implications in this regard of revenue sharing as well as the power of superintendence. The digital influence in filmmaking could alter the revenue potential of the central and the state governments. This is despite the fact that no direct relationship exists between the tax collected and the object of expenditure that is no quid pro quo principle need be expected. The digital filmmaking takes the away the need for import of film and this lack of demand could very well hit the central government as it gains considerably from the excise duty imposed on the raw film. The arrival of the Direct to Home (DTH) television could make way for the oblivion of the cable networks and therefore the service tax there from could be dented. Though alternative sources of taxation would-be found like imposition of license fees for procurement of television and audiovisual equipment these changes could very well change the revenue distribution from these sectors particularly if the governments were to take up further responsibilities. Seen in this perspective the administration of intellectual property in the audio visual medium both administrative as well as deterrent would require a strategic overhauling of the division of constitutional powers of legislation, revenue collection and responsibilities in administration.

Legislative Initiatives by the State

The Cine Workers and Cinema Theatre Workers (R&E) Act, 1981[119]

This Act provides a cloak of security to the employment conditions of the low paid artists and others in the film industry in India. The rationale of the Act is that the existing labor laws don't provide necessary safeguards to low paid artists and technicians engaged in the production of feature films with regard to their terms and conditions of employment, payment of wages and provision of other amenities and benefits. The eligibility to protection has been extended to a cine worker who is employed directly or through any contractor or other person, in or with the production of a feature film to work as an artiste (including actor, musician or dancer) or to do any work, skilled, unskilled, manual, supervisory,

[119] Received the assent of the President of India on December 24, 1981 and published in the Gazette of India, Extra, Part II, Section 1, dated 24th December, 1981, pp. 361-71.

technical, artistic or otherwise. Further, it has been specified that the remuneration in connection with the employment should not exceed a particular ceiling either by way of monthly[120] wages or by way of a lump sum amount per year.[121]

Under the statute is not to all the film workers but only to those who fall in the particular income bracket.[122] Cine workers whose earnings are not above 1600 as monthly wages or rupees 15000 in lump sum fall within the term 'cine worker'. Thus those above this categorization do not come within the protective ambit of the Act[123]. The act expresses a negative order of words imposing a prohibition to employ or the producer or the contractor without subscribing to the following formalities with regard to engagement of cine workers in the production of feature films[124]. The definition does cater to those cine workers who have been directly recruited or engaged and even indirect contracting has been covered[125]. This is a positive feature as much of the engagements in the lower wage category in the film industry are owing to indirect engagements. The definition of the contractor also includes a sub contractor or an agent.

It is significant that under the garb of companies, the contractors or the employers cannot escape, as the person who was in charge of the company is held accountable for the same[126]. However if the same had been rendered without his knowledge then the liability ceases. It is important to note that the cine worker is one who works in a feature film. This might exclude those working in television or other audiovisuals. The definition explicitly excludes advertisement films. It is a matter of concern whether documentaries and other versions are also excluded from the ambit.

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[120] Rs 1600 per month.

[121] Rs 15000 per year. This has been revised.

[122] Vijay Malik, *Law for Cinemas and Videos*, Eastern Book Company, (4th edn. -1985), p.71.

[123] The upper limit used for this distinction has been revised upwards once in 1 987 and in 200 0 an amendment bill to endow on the government central to revise it from time to time was placed in the Loksabha. The Cine Workers Welfare Fund Amendment Bill, 2000, <http://indiacode.nic.in/incodis/whatsnew/Cineworkers.htm >as on 1st January 2004.

[124] Section 3. Vijay Mallik, *op.cit.*,p.74.

[125] *Id.*,p.73.

[126] Section 18 of the Act. The term company includes a body corporate and includes a firm or other association of individuals and a director includes a partner in a firm. Vijay Malik, *op.cit.*,p.79.

A producer has been defined as a person who makes the arrangements essential for the making of such film (including the raising of finances and engaging cine workers for the making of such film). This is an interesting definition considering the fact that the copyright definition of the producer in India is different from this and the definition in the Cine Worker's Act has more resemblance to the definition in the Copyright Act in Great Britain. It is much more of a functional definition.

The provision begins with a negative stipulation that no person shall be employed as a cine worker in or in connection with the production of any feature film unless the agreement is in writing. This stipulation is rigorous and requires adherence even if the engagement is directly made with the producer or through a contractor. The written agreement needs to be registered before the prescribed authority as well. The provisions of the written agreement are guide lined on a prescribed model form.[127] A copy of the same would have to be forwarded by the producer to the Regional Provident Commissioner. The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 is also applicable to an eligible cine worker who has acted in a minimum of 3 films.[128]

The Act makes provisions for appointment of Conciliation Officers to mediate in instances of disputes with the further power to refer the matter to the Central Government in case the issue is not resolved. In case of both a settlement as well as a non-settlement, the conciliation officer has to send a report to the central government with a memorandum of settlement and the signature of the parties. The settlement is final and to be enforced by the competent authority and the same cannot be agitated before any court of law. The Central Government can decide upon the report whether to refer the matter to the tribunal or not. Most importantly the Act is well equipped for a speedy resolution or adjudication of disputes with the constitution of the Tribunals that are called the Cine Workers Tribunal[129]. The Tribunal is conceived to be manned by a person of authority with not less than the person qualified to be a judge of the High Court or been a district judge or has held the post of a presiding officer of a Industrial Disputes

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[127] *Id.*,p.74 .Section 3.
[128] *Id.*, p.75.
[129] *Id.*,p.75.

Court. The Tribunal has the powers of a civil court in several respects[130]. The High Court exercises the powers of revision over the Tribunal.[131] The structure of dispute resolution and the end for which it has been set up is indicative of the existence of models for this sector. This sows the seeds for the further models to adjudicate on disputes involving all categories and sectors in the audiovisual industry engaging artists to workers.

The Cine Workers and Cinema Theatre Workers (R and E) Rules

The agreement that has to be signed under this enactment for the protection of the low paid cine workers who include the actors and others, both performing and technical, have several safeguard clauses.[132] The agreement has to be in writing. It is specifically mentioned that the terms 'producer' and 'cine artist' brings within its fold their heirs, successors, administrators and legal representatives. (There is no mention whether the assignees of the producer are also liable).[133] It is noteworthy that the agreement has to mention the date, the production number and the tentative title of the film and the language in which the same is produced, the technical specifications and the mode of photography whether it is in color or not. The duration of the agreement has been placed from the date mentioned to the completion of the film and this period shall not exceed consecutive months.
The latter statement is extremely important in the sense that the shooting for a particular film in the usual parlance would last months and is often erratic[134].
The above statement means that a new agreement would be required if there has been a discontinuity. If the artist has to attend at the studio, location or work it requires the written intimation of the produce.[135] The amount of money to be received by the artist has to be specified and the advance has to be stated and paid and the balance to be paid in equal installments. In case the film is not over in the stipulated period then the producer has to pay the actor additional

[130] *Id.*,p.76. Section 12.
[131] *Id.*,p.78. Section 15.
[132] Form A, Section 3. *Id.*, p.86.
[133] This is absent in the model agreement that has been recommended as a guideline by the Joint Action Committee; See agreements by trade union collective bargaining entered into by the various organizers under the aegis of the South Indian Film Chamber of Commerce.
[134] *Id.*, p.87.
[135] *Ibid.* Provision 2.

remuneration. The payment shall be on a pro-rata basis as mentioned earlier till the completion of the film.[136]

If the assignment of the cine worker is completed before the stipulated period in the contract then the producer will settle the account and pay the remaining balance of the agreement in full before the commencement of the rerecording work/censor of the film whichever is earlier[137]. The trend of paying the rest of the installments before the film leaves the lab is reflected in this clause.

The term 'call sheet' is eschewed rather the term 'working day' is used and this shall comprise of eight hours that would include one-hour rest for food and refreshments. A working week shall be a six-day week and Sundays and national holidays are not to be workdays and the cine worker cannot be compelled to work during those days. This means that it is a waivable option and that they can cooperate and work even on these days.[138] A break shall be given to them every five consecutive hours. And the next succeeding call sheet shall be activated only upon the elapse of twelve consecutive working hours. Extra wages would have to be paid to the artiste if he needs to do preparatory work on the basis of per hour payments[139]. If the work goes beyond the working day hours the artist would have to be paid by the producer at the rate of per hour basis with refreshments and transport facilities. The food and traveling allowance to be enjoyed by the cine worker shall be met by means of the bilateral arrangement between the producer and the cine workers representative organization.

Most importantly there is a clause that mandates the need for insuring the cinema worker[140]. The responsibility for it is on the producer. The producer shall get the cine worker to be insured for any injury or damage to his or her person including death caused by accident arising out of or in course of his /her employment and during the period of his assignment under this agreement.

In case of any cause beyond the control of the producer like fire, riot, natural calamity, order of the public authority or any other reason, the artiste is entitled to suspend the operation of this agreement during the period of suspension of

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[136] *Ibid.* Provision 3.
[137] *Ibid.* Provision 5.
[138] *Ibid.* Provision 6.
[139] *Ibid.* Provision 7.
[140] *Ibid.* Provision 10.

production[141]. The producer has to serve a notice in writing with respect to this suspension on the cine worker and all dues up to the service of this notice shall be paid. The same terms as originally set down shall revive when the film is revived.

Most importantly in case the services of the artiste is terminated due to reasons that is not owing to the misconduct of the artiste or unwillingness of the artiste to perform then the producer would have to make all the remaining payments due to the artiste as stipulated in the agreement[142]. The producer can attempt any replacement only after meeting this requirement. This clause goes a long way to protect the performer from the whims and arbitrariness of the producer. If in case the termination is owing to the misconduct or unwillingness on the part of the artiste concerned as required under the agreement the payment shall be provided to the artiste taking into consideration the cine workers total work in the film and the work she has completed in the full till the date of termination of the agreement.

Very importantly, the charges of the producer would have to be proved before a forum comprising equal number of representatives of the producers' organizations, cine workers organizations to which the producer and the artist may belong. The decision of the forum shall be binding on the parties.[143] The producer can engage the services of another performer only after the forum has given a decision in favor of such termination and the cine worker has been paid all his dues. Strikingly there is no mention of the compensation to be paid by the artist to the producer in case it is because of his misdemeanor.

Once the service of the artiste is terminated, the discretion whether the work of the artiste has to be retained in the film is left to the producer. The artist shall be at liberty to decide whether the credit lines should have his credentials in such circumstances.[144]

Importantly, the total right to decide on the manner of representing the performers appearance on the screen is given to the producer including her clothes, makeup

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[141] *Ibid.*
Provision 11.
[142] Provision 12. *Id.*,p.88.
[143] *Ibid.* Provision 13.
[144] *Ibid.* Provision 14.

and hair style and it is for the cine worker to comply provided that the requirements of the producer are communicated and accepted by her. No formality that the script should be given or that the undertaking should be in writing is given. Though prior intimation ought to be there.[145]The artiste has to comply with all the reasonable directions either by the producer or b y the director. It is important to note the words reasonable connote subjectivity.

Importantly the producer cannot transfer or assign the benefit arising out of this agreement without the consent in writing of the artiste[146]. This secures the position of the performer *vis-a-vis* the middlemen and other means of circumvention by contracting out. The exact ambit of the term benefit needs to be understood in this regard. Another equally potent feature of the model agreement is that the producer cannot use the performance in any other film without the prior permission of the cine worker.[147] It is not mentioned if there are any remunerative possibilities if these are used with the permission of the artiste. Adding more economic security to the performer, the cine worker is entitled to Provident Fund as the agreement makes the application of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, mandatory under the Act. It is for the producer to contribute to the Provident Fund Scheme[148].

The Cine Workers Welfare Cess Act, 1981

The Act was passed with the intent of imposing levy and collection of cess on feature films for financing the activities to promote the welfare of a certain category of cine workers and for matters connected there with or incidental to it.[149] It is the duty of excise collected at the rate of Rupees one thousand on every feature film.[150] This is in addition to any other cess or duty leviable on

[145] *Ibid.* Provision 15.
[146] *Ibid.* Provision 18.
[147] *Ibid.* Provision 20.
[148] *Ibid.* Provision 19.
[149] ACT NO. 30 OF 1981, [11th September, 1981.]

[150] By amendment the limit has been raised to 20000/- in the year 1992. "Feature film" means a full length cinematograph film produced wholly or partly in India with a format and a story

cinematograph films under any other law or scheme. Every application for the certificate under Section 4 of the Cinematograph Act, 1952 shall be accompanied by a crossed demand draft drawn in favor of the Chairman, Central Board of Film Certification. The duty so collected would be credited to the Consolidated Fund of India[151]. The duty is to be paid to the central government by the producer of such film on or before the date on which he makes an application for certificate in respect of such film under section 4 of the cinematograph act, 1952. The only instance of exception is when an order granting a certificate is refused.[152] The central government can exempt the film from the imposition on account of the contempt, technical quality and other factors.[153] Any contravention of the payment of duty is met by a penalty of fifty rupees for every month during which the duty is in arrears[154]. However the producer shall be given a sufficient opportunity to explain the default and if the default were for a good and sufficient reason, the penalty would not be imposed[155]. Any amount due under the act including the penalty if any payable would be recovered from any producer in the same manner as an arrear of land revenue by the central government[156]. It is important to note that the definition of feature films excludes a lot of films produced in India that would fall into the genres of animation, documentaries, and cartoons. This leaves out a large chunk of producers from the responsibility to contribute to the welfare of workers engaged by them. Particularly since these segments do produce a lot of software and has immense demand in a globalised audiovisual economy.

Woven around a number of characters where the plot is revealed mainly through dialogues and not wholly through narration, animation or cartoon depiction and does not include and advertisement film.

[151] Section 5 of the Cine Workers Welfare Cess Act, 1981.
[152] Read with section 5-(a) of the Cinematograph Act.

[153] It should be notified in the Government Gazette. Section 6 of the Cine Workers Welfare Cess Act, 1981.

[154] Section 7 of the Cine Workers Welfare Cess Act, 1981.
[155] *Ibid.* Proviso.
[156] Section 8 of the Cine Workers Welfare Cess Act, 1981.

The Cine Workers Welfare Fund Act, 1981

Though no mention is made of the manner of application of the money collected in the Cess Act other than the objective that the former Act is to be applied with the aim of aiding the artiste. But this is clarified in the welfare fund enactment where in, it is mentioned that the proceeds of the Cess Act may after due appropriation made by the parliament in this regard by law after deducting the cost of collection as determined by the central government. Thus there is no compulsion that all the proceeds of the Cess Act shall pour into the Welfare Fund Act. However it has been identified as one of the sources by which the welfare fund would be activated. Other sources prescribed include any grants from the central government; any money received as donations for the purposes of this Act and any income from investment of the amounts in the fund.

The Cine Workers Welfare Fund Act was set with the objective of promoting the welfare of certain cine workers. Thus the restrictive application of its benefits is evident.[157] The cine worker has been defined as one who has been employed either directly, indirectly or through a contractor or in any other manner, in or in connection with the production of not less than five feature films to work as an artiste (including actor, musician or dancer) or to do any work, skilled, unskilled, manual, supervisory, technical, artistic or otherwise; and (ii) whose remuneration with respect to such employment in or in connection with the production of each of any five feature films, has not exceeded, where such remuneration has been by way of monthly wages, a sum of one thousand and six hundred rupees per month(this has been upgraded to a higher amount), and where such remuneration has been by way of a lump sum, a sum of eight thousand rupees(this has been upwardly revised)[158]. The same restrictive application of the Cess Act is continued with respect to the definition of the "feature film" means a full length cinematograph film produced wholly or partly in India with a format and a story woven around a number of characters where the plot is revealed mainly through dialogues and not wholly through narration, animation or cartoon

[157] The Cine Workers Welfare Fund Act, 1981, Act No.33 of 1981 (17th September, 1981). Section 1.

[158] *Ibid.* Section 2 (b).

depiction and does not include an advertisement film.[159] This definition therefore impacts the actors and others in the television industry as well as they might not fall within the terms of the definition. Particularly since the Cinematograph Act and the Censor Board play a part in collecting the amount.

The fund would be applied by the Central Government to meet the expenditure incurred in connection with measures and facilities which in the opinion of the government are necessary or expedient to promote the welfare of cine workers and in particular to defray the cost of such welfare measures or facilities for the benefit of cine workers[160]. The fund would be used to provide loans and grants to indigent cine workers, to sanction any money in aid of any scheme for the welfare of the cine workers that is approved by the central government, to meet the salary of those in the advisory committees and any other expenditure from the fund that the central government may direct to be defrayed from the fund.

In order to facilitate the functioning of the fund it is proposed under the Act to set up advisory committees to advise the central government with respect to the administration of the Act and to the application of the fund.[161] Each Advisory Committee is proposed to have an equal number of central government representatives, the cine workers and the producers. The Chairman would be appointed by the Central Government. A Central Advisory Committee consisting of eleven members will coordinate the work of the advisory committees and to advise the government. This shall be composed of the members of the central government and shall include at least three representatives of the government, cine workers and the producers. The chairman shall be appointed by the central government.

The Act envisages the appointment of Welfare Commissioners by the Central Government for the purposes of the Act and the Cine Workers Welfare Cess Act, 1981.[162] The Welfare Commissioner may with the assistance, if needed, enter at any reasonable time any place that he considers necessary to enter for carrying out the purposes of this Act and the Cine Welfare Cess Act. An annual report of the activities and a statement of accounts would have to be published in the

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[159] *Ibid.* Section 2(c).
[160] *Ibid.* Section 4.
[161] *Ibid.* Section 5.
[162] *Ibid.* Section 8.

gazette every financial year. The central government has been granted the power to call for such information from the producers as it finds essential.[163] The Central Government has the right to make rules in order to carry out the Welfare Fund Act.[164]

The Central and The State Government Welfare Program Initiatives

The National Film Development Corporation (NFDC) has formulated a list of schemes for the welfare of the cine artist in financial distress. The fund called the Cine Artists Welfare Fund of India is for extending financial assistance to cine artists who have fallen on bad days or require financial assistance in order to remove poverty.[165] (During 2001 –2002 the corporation fund has distributed over 35 lakhs to those found eligible for the pension assistance.)[166] Under the rules of eligibility the cine artist has been defined as any person who has performed in any capacity and appeared on the screen in any cinema and such cinema was produced and shown to the public at large. In order to eligible he has to complete at least 5 films and be earning less than 24000 rupees per year. Under this scheme financial assistance of Rs. 750/- per month will be extended to Cine Artistes who have fallen on bad days due to unemployment or due to any other reason. To be eligible for such help, a Cine Artiste should be above the age of 50 and should have acted or performed at least in five films or spent not less than five years in the trade[167]. Such applications should be duly recommended by the Union/Association to which the Cine Artiste is/has been affiliated. Financial assistance is also extended to widow of cine artist for a period of 1 year. Assistance to the extent of Rs.750 p.m. can be given for such period as the Trust may decide. The trust is endowed with the discretion to select the recipients as well as the period of assistance if it has been provided to the recipient or beneficiary. A significant characteristic of this governmental initiative has been the underlying necessity of a recommendation sanctifying the particulars of the

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[163] *Ibid.* Section 10.
[164] *Ibid.* Section 11.
[165] <http://www.nfdcindia.com/cawfi.html >as on 1st January 2004.
[166] The Cine Artists' Welfare Fund of India, set up by NFDC, is the biggest ever trust in the Indian Film Industry with a corpus of Rs.4.16 Crore. During 2000-2001 (up to November), an amount of Rs.35 lakh was disbursed as pension to cine artists. This was from the corpus fund set up from the proceeds of the film Gandhi. Even this gesture had to come from a foreigner and a legend Richard Attenborough.
[167] For rules <http://www.nfdcindia.com/cawfi.html> as on 1st January 2004.

details provided by the applicant. It has to be attested by the association or the trade union of which the cine artist is a member. Therefore in order to avail of the scheme one ought to be a member or be duly recommended by cine artistes association. It is to be noted that there is no distinction drawn between the principal artiste or the background or the junior artiste or the stunt performer or any other category. They are all eligible for the benefit under the fund provided that they fulfill the criteria of economic deprivation. An artist availing the assistance from one source has to specifically state the status in that particular regard and cannot apply further.

The Cine Artists' Welfare Fund of India also has a schooling assistance program for the children of the cine artist.[168] In addition to this scholarships are also offered for meritorious students. The significant highlight is the need for an attestation or recommendation validating the details furnished by the applicant by the trade union or other representative body of the artists recognized by the state. As this recommendation is mandatory, it is clear that the government accords great credence to the existence of trade unions in administering welfare measures to the performing artists. However the nonmembers of unions would be at a disadvantage in this regard. These are likely reasons for more active participation in collective organizations in the audiovisual industry. Another pertinent point is the extension of the scheme to the television artists or other audiovisual artists. This does not seem to have been the intent as the cine artists in the film medium is specifically stressed in the rules. Further this idea to create a corpus fund was at a time when the television industry had not yet attained the proportions that it has today.

Some of the salient aspects of the NFDC initiative reveal the limitations of the said scheme. For one the assistance in whatever form can only be availed once by the beneficiary. Secondly, the assistance is completely at the discretion of the trust body. No body can claim the same as a matter of right. It is dependent on a host of other factors such as the corpus amount available for allocation besides

[168] An amount of rupees 800 for classes up to 12th and an amount of rupees 1200 per annum for classes up to graduation.

the artist full filling the criteria[169]. Even with respect to emergency financial assistance the trustee is vested with enormous discretionary power to allocate the amount and the duration of its sustenance.[170] The trustees would decide the extent of the assistance. The most debilitating consideration to be fulfilled is that the beneficiary should have at least completed five films and his annual income should have fallen below 24000 rupees. This means that the monthly income earner above rupees 2000 would not be eligible for the assistance under the welfare fund. This would leave out a large chunk of the eligible yet deprived category if one takes into account the inflationary pressures and the hospital expenses etc[171]. The decisions are made by the regional subcommittees of the trust as applications are also received by the trust at these regional centers were the applicant is residing in the particular zone.

State Government Initiatives

Several state governments that have a vibrant regional language film industry have formulated welfare measures for the performing artist and others connected with the film industry. Some of the most vibrant industries in Maharashtra, West Bengal, Andhra Pradesh, Kerala and Tamilnadu have benefited from the sparse but important measures taken by their state governments. An analysis of the schemes initiated in kerala would be instructive both as to its relevance and with respect to their short falls.

The Government of Kerala has initiated certain welfare programs towards the welfare of the cine artists. This has been achieved through the National Film Development Corporation at the national level and the Kerala State Chalachitra Academy at the state level. A pension for distressed film artists was commenced

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[169] It is expressly provided in the rules as follows. - Grant of financial assistance from the trust fund to any cine artiste is not as a matter of right. Assistance would be extended depending on the applicant satisfying the eligibility and also keeping in view the financial allocation available for the purpose. The trust reserves the right to reject or accept any application without assigning any reason thereof.

[170] In cases of emergency pertaining to compensation in case of death or other similar emergencies which warrant immediate financial assistance, the Chairman or the Managing Trustee is competent individually to grant the financial assistance up to a limit as may be decided by the Trustees.

[171] There are moves to raise the ceiling and bring down the number of films needed to qualify.

in the year 1981 by the state government and financial assistance through the Academy was commenced in the year 2003. To date 246 pensioners and 35 deceased have availed of the pension. Since the commencement of the scheme around 300 applications are received from the eligible categories. Thirty applications are received every year. 215 receive the favor at a time[172]. The pension scheme and the financial assistance scheme are funded by the State of kerala.

The corpus fund is formed by the service charges collected in the cinema theatres. There is a 1/0.50 Paise service charge for each ticket sold in a theatre and the fixed amount is paid by the theater as per a slab system to the academy. The artists need to apply in a prescribed form. A revenue officer should attest the same not less than the rank of the Thahsildar or district information officer or a non-governmental but noted organization like the Malayalam Chalachitra Parishad. An income certificate has to be produced. Applications are received at any time. Applicants should be less than 50 years of age and the annual family income should not exceed 12000/-. There are a number of stipulated categories of artists. In order to verify the income certificate a private inquiry is also done before being sanctioned by a committee that consists of two members consisting of the chairman and the secretary. According to the data 108 women out of the total of 246 pensioners have received the pension.

The Government of Kerala has been endeavoring to administer social and economic security benefits to the artists since the year 1981. The same has been revised from 1981 through 1985 to 1986 and finally in the year 1992.[173] The supportive organizations that have found mention as being an aid to the implementation of the scheme are the Malayala Chalachitra Parishad, Film Chamber Of Commerce and the Kerala State film Development Corporation (KSFDC). The scheme is for providing support to the disabled performing artists in films as well as technicians and their dependents. The rules govern provision

[172] Data provided by Kerala State Chalachitra Academy, Trivandrum, Deputy Director Shibu. S. Kottaram and Program Officer Louis Mathew, July 21st 2004.

[173] The last of which was published in the Gazette number: 58/92/ by the public relations department Government of Kerala.

of financial help to performing artists and cinema technician and their dependents in distress.

These rules are applicable to Keralites who are performing film artists and technicians in the film industry and their dependents.[174] The following categories of performers are eligible for the financial help- actor/actress, dancer and singers in the film field. Among the technicians the following are included; Camera, film editor, film director, art director, screen play Writer, dance director, Makeup man, sound recorders. The criteria that have to be fulfilled include that a person who receives an annual salary above Rs. 12000 would not be eligible for the benefit .The remunerative capacity of member of the family of the applicant would also be taken into account in this regard in order to consider the eligibility. The following members would be considered as part of the family-.a Widow, Widower, father, mother, unmarried daughter and son who has not attained the age of majority.

The pension is for a sum of Rs. 500 per men sum and is for the life of the beneficiary. Every two years the beneficiary must produce a certificate of income from the local authority within the state or from the Malayala Chalachitra Paridshad in Tamilnadu. The eligibility shall be based on the following basis of priority in the following order of precedence from among the beneficiaries. The beneficiaries are divided into those who are unemployed or disabled owing to physical incapacity and those who are unemployed due to being over aged and are therefore unemployed. The precedence shall be accorded in the following order- Widow, widower, father, mother, unmarried daughter, son who has not attained the age of majority. The help will be provided to only one person at a time. The pension shall cease upon the remarriage of the widow or the widower, when the unmarried daughter gets married, and when three years elapse from the date of the son-attaining majority. These facts need to be testified every two years by the beneficiary from the respective local authorities. The applications for the availing the pension shall be subject to inquiry and vetting and to this end the services of K.S.F.D.C shall be elicited. On the basis of the aforesaid rules the government shall consider the applications and pass appropriate orders

[174] By the term Keralite is meant a person who is a *Malayaly* without reference to his or her place of habitation or any person who is living within the borders of Kerala.

accordingly. The public relations director is endowed with the power to stall the pension scheme without assigning any reason whatsoever.

One can notice this pan Indian trend in the welfare initiatives with similar drawbacks for these schemes particularly since the Welfare Fund Act and its administration is a uniformly applied scheme all over India with the regional units working in tandem with the organizations representing the performers. Thus other than these half hearted legislative exercises granting certain minimum rights and uneven distribution of unemployment security doles there exists no other stable source of economic security for the performer or the worker in the audio visual. While the former enactment seeks to set minimum standards for the regulation of employment, the latter two acts specify the means to collect the financial resources to cater to the welfare of the workers of which the performer too falls part thereof. Other than provide minimum guarantees, it does not provide the artiste or the performer any way of begetting equal and certain returns in tune with the exploitation in the market through regulation that would safeguard against such exploitations. Further the burden of all these welfare measures falls on the producer of the film as it is collected on its way to censor certification. One of the striking drawbacks of these statutory welfare measures is the limited amount, the restricted criteria of income limit, the lack of certainty in continuingly availing the benefit, the discretionary power to choose the beneficiary and the time taken to avail of the benefit. This exposes the need for an alternative remuneration possibility not based on welfare or charity.

The Performing Artist and 'Industry' Status for the Indian Film Industry

After striving and representing for nearly a century to the government, the film trade was granted and 'industry' status for all legal and administrative purposes by the Government of India in the year 2000. In exercise of the powers conferred by Section 2 (C) xvii Industrial Development Bank of India Act, 1964, the Central Government notified the entertainment industry including films as approved activity under industrial concern.[175] The declaration is supposed to trigger an

[175] The Gazette of India Extraordinary part 11, Sec. 3, Sub Section 11, Ministry of Finance (Department Of Economic Affairs), Banking Division Notification Dated 16-10-2000. Journal of South Indian Chamber of Commerce, November 2000, p.16.

attitudinal change in the Indian banking sector towards the lending possibilities in the film industry. The declaration should be taken as an opportunity for the film trade and it should respond by confidence boosting gestures by being more transparent and professional in its operations. (Though this might not beget for the artist any new found respect nevertheless the standardization in contractual matters that this would effect would result in the artist being paid the promised sum, being insured and perhaps being protected by new social security instruments rather than the informal, most often unwritten and broad based understandings upon which the deals in the film industry are based today.

But whether the status granted would have the same repercussions on the human resource employed particularly the artists as in resourcing the liquid capital into the trade is a question mark. This is not baseless considering the fact that there have been representations from the capital investors to the state to exempt the labor from the benefits of the declaration of film trade as an industry. That the industry must be kept out of the industrial disputes act as the institutional finance may come with various strings attached.[176] However ever since the declaration the government has been reassuring the employees that the labor laws would remain applicable to the industry. This assurance was given to a clarification from the All India Film Employees' Federation representing the craft unions that includes the artists to the Hon. Minister Sri Sushma Swaraj.[177] The declaration and the grant of the industry status have effected significant developments in the film industry. As had been forecast pursuant to this new status, banks are allowed to finance against the 'under production' film as a collateral. However, to receive institutional finance, the film industry will need to indoctrinate and practice accountability. This would indirectly dry out the influence of unaccounted money in the industry that had led to all shady transactions. Additionally, the industry status also allows entry for insurance companies to participate in the film industry. Producers seeking an insurance cover for the completion of film would have to execute a completion bond. With more formal sources of finance being available, movies will be produced within an assured

[176] *Journal of The South Indian Film Chamber of Commerce*, December 1999, p.22.
[177] *Journal of The South Indian Film Chamber of Commerce*, January 2001, p.16.

time frame thereby reducing the costs and indirect burden on the producer. This should improve the structure of the industry and initiate corporatization. The Initial Public Offer market in the year 2000 was media-dominated.[178] Mukta Arts, G.V. Films, Pentamedia Graphics, Crest Coommunications and Cinevista, went public indicating the trend towards corporatization and involvement of public money in filmmaking. Other media companies including Adlab Films, Balaji Telefilms, Padmalaya Telefilms, and Shri Adhikari Brothers have followed suit[179]. These trends augur well for the performing artists as well as any legal framework that should secure better protection for him.

Two significant changes in the Indian film industry landscape is bound to have its repercussions in the expectations that the performing artists in India can have about their future economic and social security. The change is in the status of industry that has been given to films and the climate of internationalization that has set in owing to the pro-active policies of the Government of India. This process has gained speed since the year 2000 particularly since the grant of the industry status to films[180]. Both these processes are sure to bring about changes to the contractual practices with respect to the performing artists and this in turn could facilitate a necessary change over to residual paradigm based on collective bargaining and collective administration in due course of time.

The grant of the industry status by the Government of India has been accompanied by several concomitant measures that has made investment in the

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[178] *Indian Entertainment Industry: Envisioning for Tomorrow*, FICCI- Arthur Anderson, New Delhi (2001), p.16.

[179] Parminder Vir, John Woodward, Neil Watson, *The Indian Media and Entertainment Industry*, A Report Based on a U.K Film Council Fact Finding Visit to India, 8-17 March 2002, submitted on April 2002. See <http://www.ukfilmcouncil.org.uk/filmindustry/india/> as on 1st January, 2004.

[180] The announcement that the government intended to grant industry recognition to films production was made by the union minister for information and broadcasting made at an event 'challenges before the Indian cinema' co-organized by the federation of Indian chambers of commerce and industry (FICCI) and the film federation of India in May 1998. See "Bollywood's Woes to Get a Hearing, Finally," *Indian Express*, 9th May 1998, <http://www.expressindia.com/ie/daily/19980509/12950624.html> as on 1st January 2005.

Indian entertainment industry particularly the film industry an interesting proposition not only for those with foreign capital but also those with in the country[181]. The Government in India is removing barriers to foreign investment, fast tracking procedures and introducing legislation to control piracy and under-declaration. It has granted the film sector 'industry' status and has introduced 'clean money' through state controlled banks. In addition, the Government has started to use regional and national tax incentives for improving and building the production and exhibition infrastructure and to improve investment in content creation and human capital. The Government is also moving towards signing a number of co-production treaties to provide a framework within which private and public partnerships can flourish. Besides the fact that the grant of the industry status leads to access to clean money from the banks for the investors, it would also facilitate transparency for the operations down the chain of production, distribution and exhibition much of which in the traditional manner of operations was unsystematic and haphazard.

Around the time of the declaration of the film business as an industry one cannot but notice the positive performance by the sector in both investment and growth rate recorded. The entertainment industry registered a growth rate of more than thirty percent during this period and exports of films also showed substantial increase.[182] The declaration of the trade as an industry has had its most conspicuous and refreshing impact in the modus of financing film production through banks and other accountable financial houses. Because the

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[181] Parminder Vir, John Woodward, Neil Watson, *The Indian Media and Entertainment Industry*, A Report Based on a U.K Film Council Fact Finding Visit to India, 8-17 March 2002, submitted on April 2002. See <http://www.ukfilmcouncil.org.uk/filmindustry/india/> as on 1st January 2004.

[182] The Indian media and entertainment industry consists of film, music, television, radio and live entertainment. According to a report produced by FICCI, the entertainment industry outperformed the economy and was one of the fastest growing sectors in 2001. The industry experienced growth of more than 30% in 2001 with a combined turnover of 130bn rupees compared to 100 billion rupees in 2000. Key growth drivers were advertising spending and ticket sales. Exports of video films and software increased by 65% from 7.25 billion rupees in 1999/2000 to 12 billion rupees in 2000/2001.

transparency and practices that would need to be maintained to this end. With the sector being eligible for conventional and recognized sources of bank finance leading financial institutions in the public and the private sector have begun to open up to this sector. The Industrial Development Bank of India (IDBI) set up the country's first film fund worth 100 crores (£14.5 million). The Government fixed a ceiling of 60% on entertainment tax. A cooperative endeavor involving the state, the film and cable industries have been launched to curb the curb piracy of films. Radio was privatized with 37 fm radio franchises awarded. There are opportunities for foreign capital investment in projects, production houses, film and television studios and film facilities, especially post-production, distribution and exhibition. The Indian Government has made constructive policy decisions including those in which the foreign investors will no longer have to seek clearances from the Foreign Investment Promotion Board or permission from the Reserve Bank of India. This has elicited positive responses from large international agglomerates such as Rupert Murdoch's News International, Universal and Sony. This is a pointer to the large-scale changes in this sector in the past few years.

From the point of view of performers rights this creates a very conducive atmosphere for building up a structure to apply the models of remuneration in other countries. The umpteen number of means by which the performance can be exploited has doubled in terms of exploitation and has also proven itself in terms of revenue generated. The new revenue streams such as cable and satellite rights are immense sources of revenue, in fact revenue from the cable industry surpasses even the earnings from the film industry[183]. Though from the films alone, the distributions of revenue shows that the theatrical rights still claim the highest share. Even though this might have dwindled down following inroads by the other sectors.[184]

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[183] Cable television is the largest revenue earner with television broadcasting in second place and film third, followed closely by television production.

[184] The film industry draws its revenues from: domestic theatrical sales (2001: 36 billion rupees); overseas rights (2001: 5.25 billion rupees); music rights (2001: 1.5 billion rupees); television and

New Forms of Bank Finance and Performers' Contracts

One of the delectable changes to strike the film business or entrepreneurship during the post industry status granted to it was the availability of finance from traditionally recognized sources of the Government of India namely the nationalized banks. While several banks have come forward with schemes to support film industrial ventures, one of the first to set up a corpus amount of rupees 100 crores towards the purpose was the Industrial Development Bank of India. This marked a changeover for legitimate funding of film ventures from regulated sources of finance to be opened up. Priorly, the recognized nationalized banks and credit worthy private sector banks found the sector abhorrent to the risk that inhered in it.[185] But with the governmental policy having undergone a change complemented by changed communications entertainment possibilities in the satellite era and digital era, the institutions have recognized this as a sector with potentially safe returns. They have tailored the schemes in such a manner so as to be safe and secure in the portfolios undertaken in this sector that is potentially high risk. From the performers perspective the advent of nationalized banks into the sector ushers in an era of standardized and transparent transactions.

The Industrial Development Bank Of India has been the recognized agency for the disbursement of finance for financing of films in the country from among the traditional lending agencies. The fact that IDBI has not pulled out nor has the Government Of India developed any cold feet on the last three or four years is indicative that the idea has borne fruit or that it has not been disappointing.[186] The IDBI criterion that has to be adhered to in order to be eligible for the loans to

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video rights (2001: 2 billion rupees); corporate sponsorship and merchandising (2001: 0.01 billion rupees). The total revenues of the industry from these sources are estimated at 45 billion rupees.

[185] A few banks like the Canara Bank and the Indian bank that used to extend loans for film production incurred huge losses.

[186] "IDBI outlines norms for film-financing," *The Financial Express*, 31st March 2001, <http://www.financialexpress.com/fe/daily/20010331/fco31005.html? > as on September 2004.

produce films brings to the fore very important consequences for the performing artist.[187]

The criterion to be fulfilled requires adequate proof of the individual creditworthiness of the applicant.[188] Besides other requirements to be furnished ,most importantly the questionnaire demands the details of those whose work goes into the actual creation of the film. The creditworthiness of the producer of the film is to be verified by the need to state his income tax position during the last five years. This is a pointer to the credibility of the film producer. A leading query in this regard is the fact whether the producer is a member of any association connected with the film industry. The producer has to divulge whether the association has blacklisted the producer. The producer has also to furnish details with respect to any pending court case[189].

The most significant feature from the standpoint of the performer has been the fact that the much importance has been emphasized to agreements relating to or involving personnel that go into the making of the film. This includes both the production managerial department as well as the creative personnel. Besides the title registration, the language, the name of the film producer, the co producer, the names of the dance director, the music director has to be furnished. With respect to the performing artiste the producer to furnish the status of the contract along with the name of the principal cast that includes the lead stars, male and female and also the supporting cast[190]. Importantly the factual position with respect to any pending dispute with the main artists actresses or any other talent in earlier /prior ventures needs to be spelt out[191].

The application solicits information about the intellectual property acquisition and contracts with respect to it. The questionnaire with respect to this begins with the canniest detail. Details with respect to the author of the story idea, the synopsis of the script and most significantly a copy of the agreement with the author/

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[187] <http://www.IDBI.com/doc/appforfilm.doc> as on September 2004.

[188] <http://www.IDBI.com/forms.html> as on September 2004.

[189] Clause 10 (c) of the application form.

[190] *Ibid.*

[191] *Ibid.*

owner for the right of use (ostensibly in the film). The name and background of the author is essential. The name of the copyright /intellectual property right owner has been solicited from the applicant. The agreement entered into with the owner for the right of use has to be furnished. The period of the right of adaptation and use has to be declared. The bank also solicits information about the use of the name or likeness of any living or dead person and whether the same is fictional or a true portrayal. It has also to be elicited whether the production is based on another work and the nature of the connection. Whether the production is based on another work or works and the nature of the connection. Significantly besides the need to show the status of contract with the main actors and actresses the agreements with other actors too has to be shown.

The agreement should indicate the schedule and the date commitments for shooting the film. The core production team has to be laid down along with copies of agreements with them. Similarly the agreements with the director, cinematographer, choreographer and action director has to be revealed. Specifications of the contract with respect to the dialogue writer have to be furnished. Sirnilarly separate agreements for owning the performing; recording and synchronization rights have to be shown.

However in respect of the music composition besides the details of the composer and their backgrounds, copyright and intellectual property rights ownership, the singer and his status and contract is not required to be listed. Rather only the details or particulars of the music director is requisitioned. Technical information has been solicited from the applicant and that includes details about cinematography, art direction, costume design, studio facilities, sound recording and dubbing. Though the need for information (contractual) regarding the engagement of technicians in the sound dubbing activities is warranted, there is no mention about the dubbing artists directly in name. The applicant has to furnish details regarding animation/ computer graphics and special effects, editing and editing studios. In the category with regard to production and execution arrangements, it is essential to furnish copies of contracts with various artists including foreign artists and singers, music arrangers and others. (This is

the only section were in the singers are mentioned and the information pertaining to their contracts is requested). The latter becomes sine qua non in the finance process. Female and those of the supporting cast. Similarly the name and the status of contract of the cameraman, composer /music director and art director needs to be produced[192].

The schedule within which the shooting has to be completed from pre-production to release has to be stated in the application .A separate categorization for songs, shooting, editing and post-production and release has to be mentioned separately. This would go a long way to assure the artiste as well as the producer that the dates promised would be kept

The most conspicuous part of the IDBI scheme has been the issue of collaterals for the release of the loan. The list of securities includes a letter from the processing laboratory conveying rights on the negatives of the film in favor of IDBI. An assignment of all agreements and intellectual property rights in favor of IDBI. The creation of a Trust and retention account and a first hypothecation charge in favor of IDBI. Assignment of existing rights like music, video, Internet, VCD, DVD rights, library of old films or any other collateral has to be transferred to the IDBI. There is the need to produce a completion bond guarantee and status of government consents with regard to the film production. Conspicuously, the total budget of the film needs to be clearly laid down under separate heads and that would include the costs paid to the main artists as well as others. Another very important requirement is the production of insurance details of cast taken or proposed to be taken[193].

The agreement also demands the production of contracts and names of the main and supporting stars and that secure their position as regards economic and social security. Further the exact price paid for their services should also be mentioned. The insurance cover should also be pointed out and this secures

[192] Clause 10.

[193] In short in order to solicit funding from the IDBI there is still the necessity of collaterals, but IDBI is demanding only derivatives of value from the film itself unlike other collaterals traditionally sought for by the banks in the like of land and other instruments of value. This considerably eases the pressure on the applicant to produce valuable external security.

them against all hazards. Further the need to clearly specify the shooting schedule and other arrangements secures the performer from undue exploitation, as these would be prepared in advance. With respect to music compositions the diverse patterns of intended exploitation needs to be mentioned and contracts in respect of these should be produced. But the application does not demand detailed information with respect to the singer.

The IDBI insistence on these provisions is a pointer to the fact that when the performing artist in the audio visual is provided with the statutory performing right in the audio visual then more detailed agreements would have to be produced before this lending agency. For once documentation would turn out to be important and the performing artist cannot or need not worry about the presumptive transfer of his rights in the absence of proper documentation as the latter becomes sine qua non in the finance procurement process.

Corporatisation of the Indian Film Industry and the Likely Impact on the Performing Artists

For long the Indian film industry has been disorganized. But with the traditional model no longer paying the dividends winds of change has begun to brew into the film production landscape. Today corporate's are, making a beeline to the Indian film sector to invest in ventures[194] with a fresh blue print and redone arithmetic. Over Rs.1000 Crore is being invested in the film industry by these authentic corporate houses.[195] The enthusiasm of the industry is reflected in the beeline before the SEBI office for incorporating film production houses[196]. They are willing to invest in production distribution and exhibition as well. The well known brands include, Pantaloon, Dainik Jagran, Tata Info Media, and Bankers like SSKI. The array of new investors are an optimistic sign particularly since the statistics speak of a mere 10- 15% profits and a 50% break-even from the picture. Even the films that began tall with the superstars touching the skylines in

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[194] Vanitha kohli, "Agony", *Business World*, 9th September 2002, p.32.
[195] *Id.*,p.32.
[196] <http://www.screenindia.com/apr28/debate.htm?38,12> interview with personalities on the question by M.S.M Desai.

posters have not got back its investment with theater owners even asking for refunds.[197]

After the break up of the studio system in the fifties the next big change is happening in the industry now. Particularly in the way the movies are financed, made, distributed, marketed and exhibited. The change has been impelled by certain decisive factors-the changes in the governmental policy, the margin squeeze, industry status for the film trade, tax-free multiplexes and 100 % foreign direct investment[198]. The companies are looking forward to investing in the sector in this encouraging environment despite margins being projected at 20 to 30 % alone. From this chaos strong professionally managed companies are considered to arise.

The companies are looking forward to the integration of production, distribution, and exhibition functions and earning revenues from each of these.[199] Till now the entire risk in filmmaking was being borne by the exhibitor and the distributor. The prior sales, advances of the rights that have taken place already cushion the producer[200]. New techniques and models are being frantic tries to minimize the risks. Business deals not on out right purchase but on the basis of commission is being tries out. Most importantly films are being brought on commission basis[201]. All the revenue and profits they garner will be shared along the distribution chain. Instead of just one man –the producer--safely pocketing it at the cost of everyone else, there is thus less risk in the commission based business model. Leading

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[197] For instance for the film Baba starring Rajanikanth that sunk much below the expectations Vanitha Kohli,*op.cit.*,p.33. Other rights or revenue sources like music rights and satellite rights are not of help either in contrast to the cost that it used to recoup between 60 and 70% of the investment. The margins have fallen with the production costs going up between by 10 – 15 Crores. The secret seems to be in the manner of tapping the market.

[198] Janima Gomes, *Internationalization of the Indian Film Industry*, Indo-Italian Chamber of Commerce and Industry, Mumbai,p.20.

[199] *Id.*, p.35. For instance Metalight industries strategy is echoing these calculations. New modes of economizing the production and distribution is being implemented.

[200] For instance for the film Baba the rupees 10 crores film sold its Indian theatre rights in the southern states for 13 crores. Overseas rights were sold for another 8 crores and music for 3 crores, product endorsements for another 6 crores. Thus without the film having been seen by anyone it had speculatively fetched rupees 44 crores. After seeing the rushes.. All the speculators lost their money including the theatres, the music companies and the overseas rights holders as well. Jolted from the experiences as a result of the blind following of the old models. *Id.*,p.36.

[201] *Id.*,p.37

distribution companies like Columbia Tri-Star. Distributors in the altered environment can therefore no more act as part time financiers of entrepreneurs. The new signal is pointing towards lending institutions like the IDBI and Bank Of India to finance 50% of the film[202].

The corporate are infusing discipline from thinking to execution. This is reflected in the need for a bound script before discussing the project. (For instance companies like I Dream productions) in fact IDBI has a twelve man advisory committee to vet the scripts, screenplays, shooting schedules, casting dates all of which have to be on paper[203]. The pre-production preparations take four to six months (that includes signing the artist) and any delay leads to adverse cost implications[204]. Therefore production companies are now targeting a production gestation period of 9 to 12 months. Computerized ticketing will ensure that the transparent source of revenue is maintained. There will be less fragmentation and more concentration, revenue streams other than domestic theatres. 30 to 40% of money recovered may come back to the film but the rest may be written off as the debts of the badly performed films. The actors are also becoming comfortable with their altered working environment were in they are amenable to the comfort of remunerative security but at the same time are answerable in respect of accountable practices a well sticking to their work assignments in a disciplined manner[205].

Much of the uncertainty that stalks the performing artist with respect to the transactions in the film industry can be resolved by the effect of the corporatisation. Written agreements and transparency in the payment promise and made can be expected. There could be much more professionalism in meeting commitments and deference to agreements made. It could also lead to the performing artist being able to fix his value more fairly and objectively.

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[202] *Id.*,p.40

[203] *Ibid.*

[204] <http://www.balajifilms.com/corporate/production schedule.htm > as on January 1st 2005.

[205] Leader speak column in India infoline column interview with the heads of Ke Sera Sera Production which is a corporate entity that has endeavored to produce such hits as Darna Mana Hai, Company, Road, famously associated with Ram Gopal Varma Productions. Mr. Ash Pamani, chairman and Parag sanghavi, president and CEO of the company. July 23rd 2003.

With the certainty that shooting dates to scripts required to be ready beforehand, it enhances the expectations of the artist and inspires confidence in the industry. It can very well prepare the ground for the residual system to take roots either through contracts, individual or collectively bargained actually or by means of statutory interventions. This sense of security can result in fewer onuses being placed on the initial heavy payments and confidence to depend on deferred accruals of payments out of the exploitation as the distribution chain is no longer an untrustworthy account of revenue. With the banks keeping a keen eye on professionally managed companies, weak bargainers like the performing artist can expect a fair and safe deal from the films exploitation. The euphoria over the changes is not without the critics particularly on account of the fact that several ventures in the altered corporate pattern have not met with great success[206]. Despite the increasing corporatisation and the standardized practices like written contracts and royalty clauses being written into it, the enforcement and ability to protect are still major issues to be tackled and it is the legal system that has to be prepared to this end.[207]

Internationalization of Film Industry

The internationalization of the film industry in India is also another contributory factor that demands the hasty legislative changeover in keeping with the trends both contractual and statutory in this regard abroad. Liberalization following the Uruguay round had effected changes in the audiovisual policy in this vital sector. It has also been shown that the open policy has not had any adverse impact on the audiovisual trade of the country. Rather it has encouraged greater thrust to explore co-productions and intrusions into foreign markets[208]. Performing artists

[206] "Corporatisation wont change India's Feudal System", The Hindu Business Line, 15th March, 2003, Available at <http://www.blonnet.com/2003/03/15/stories/2003031501970500.htm >as on January 1st 2005.

[207] Interview with Ravi mohan, managing director of Mumbai based credit rating information services of India with Neeraj Jha published in the financial express titled 'spurious merchandising is very discomforting', August 27th, 2000,Financial Express. <http://www.financialexpress.com/fe/daily/20000827/ffe22102.html >as on 1st January 2005.

[208] Arpitha Mukherjee, *Audio Visual Policies and International Trade: The Case of India*, Hamburg Institute of International Economics, HWWA –Report, (2003). Available on <http://www.hwwa.de/Forschung/Publikationen/Report/2003/Report227.pdf> as on 1st January 2006.

have begun to enjoy the practices such as flat fee accompanied by back end wages based on the performance in the international market. This has begun to be resorted in situations where in the producer might not be in a position to pay the essential remuneration for the Indian star. For instance some of the top *Bollywood* names that have begun to find acceptance and calls from the international production companies are engaged in this form of contract. Aamir khan in 'The Rising' based on the 1857 mutiny directed by Ketan Mehtha has been provided back-end remuneration based on the showing in the US and U.K markets. Ashwariya rai is another artiste who has found herself among such offers.[209] The internationalization of the film industry has also seen the entry of foreign film companies venture into both production as well as distribution of Hindi films.[210]

That the winds of international professionalism is here is testified by the fact that the actors who once used to jeopardize production by double booking themselves, being late and even raising their pay midway through the shoot are being more professional. The air of informality is being dispelled in order to accommodate the new trends of formal professionalism. The *modes operandi* of signing movies is undergoing a change with the international film stars with their roots in *Bollywood* have begun to sign up with western talent agencies like William Morris agency that ensure that their commitments are honored. However in the altered environment the stars are not complaining.[211]

The trends have begun to rub off on young professionals like Farhan Akhtar and Ronnie Screw Walah (both recipients of professional education abroad) of the United Television in projects like *lakshya* (7 million dollars was sunk into the project) where in contracts were duly executed to all the crew. Actors insisted on a finished script, the set was insured and the schedule of the shooting was meticulously laid down. This is in stark contradiction to the deals that were sealed by resort to a mere handshake or a word. Industry experts expect the use of western practices to descend in another three to five years.[212]

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[209] <http://www.dailyexcelsior.com/web1/03nov17/national.htm> as on 1st January 2005.
[210] <http://www.dailyexcelsior.com/web1/03nov17/national.htm> as on 1st January 2005.
[211] Alex Perry," Queen of Bollywood," *Time*, Oct 27th, 2003, p.47. Amithab Bachchan is delighted at the turn of events and called it the end of disorganization that had ruled for so long.
[212] *Ibid.*

In other words confidence inspiring standards and practices have begun to permeate the Indian film industry. The internationalization has already led to top stars being provided remuneration based on the profits from certain markets. However these are based on mutual contracts and not based on the statute. This should pave the way for conditions of trust and transparency to activate a model of royalty payments based on either statutory copyright or neighboring rights or collective bargaining. This can also pave the way for models of remuneration to be implemented in India as they have been executed in other countries.

Labor Jurisprudence, the Film Industry and the Performing Artist

The case law of *Hindustan Journals Limited* v. *Dinesh Awasthi*[213] was one of the first to consider whether the activity of creating intellectual products would come within the canopy of the terms of the Factories Act. In the course of the case the court referred to the English Factories Act, which expressly omitted the employment of theatrical performers from the ambit of the Factories Act under Section 151.[214] However it was pointed out that a similar exclusion was not found under the Indian Act. The High Court while considering this case was of the opinion that the 'news' was not an article or substance or commodity to the making, altering, repairing, ornamenting, finishing or adapting of which Section 2(k)(i) has a reference[215]. This logic does not help the performing artist to protection under the Act, as the produce of intangible intellectual output was not considered as a process of manufacture. Therefore under the logic propounded by the court no protection would be available to the performing artist as he is

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[213] AIR 1957 M.P.125.

[214] Section 151 of the English Factories Act, 1937 says any premises in which the production of cinematograph films is carried on by way of trade or for purposes of gain, so however, that employment at any time of theatrical performers within the meaning of Theatrical Employees Registration Act, 1925 and of attendants on such theatrical performers shall not be deemed to be employment in a factory.

[215] Under the terms of the Act 'factory' means any premises including the precincts thereof (1) when ten or more workers are working, or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily carried on or (ii) where 20 or more workers are working....without the aid of power or is ordinarily carried on but does not include.....restaurant or eating-place. By the term 'Manufacturing Process' is meant any process for making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale transport, delivery or disposal.

rendering a job not of any manufacture but intellectual creativity. It is also noteworthy that ancillary labor enactments such as the Payment of Wages Act require the terms to be applicable to premises that fulfill the definition of the term 'factory'. Thereby weakening its application to the creative industry and the workers therein as the characteristics of this industry would not fulfill the requirements of the term' factory'.

A case law of considerable importance that appears an influential precedent with regard to status of the performer and other contributors under the labor law in India is *KVV Sharma, Manager, Gemini Studio, Madras*[216]. The facts involved the conviction of the manager of Gemini Studios for not observing several norms required under the Factories Act[217]. In order to take it out of the realm of the labor laws, the manager put forward the argument that the production of a finalized talkie film was mostly intangible material, contributed by the individual genius that is incapable of regimentation or standardization by strict labor norms. There is no artificial or mechanical process involved in the making of the film. The court took a different view from that expressed in the prior precedent pronounced by another High Court. The film production was held to be a 'manufacturing process' under the Factories Act. This decision provides a gleam of hope to the workers in the films including the film artistes as to the enjoyment of labor and wage security under the Factories Act. However the question would still remain whether the creative artist can be considered as 'worker' under the terms of the Act as distinct from others pursuing different occupations in the film production. Further a distinction can be made with workers in studios and those in independent productions.

It would be necessary to see whether the systematic performance or creation of the creative work or the performance affixed can be termed as a 'manufacturing process' as the raw film undergoes a treatment along with the affixation of the performance and comes out as a film to be distributed for the purpose of

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[216] AIR 1953 Mad 269.

[217] Rahul Mathan, *The Law Relating to Computers and the Internet*, Butterworths, London (1st edn. -2002) p.231. The decision has come under heavy criticism and scrutiny particularly the fact that publishing a record and the like could be called manufacturing and invokes liability under the Factories Act. According to Rahul Mathan, the provision of the Factories Act is meant to apply to only those who work heavy machineries and premises thereto. Intellectual activity would not qualify under the terms of the Act.

screening. The mechanical manufacturing process can occur simultaneously with non-manufacturing activity while affixation and other mechanical process can be considered as a manufacturing process. The work of creative intellectual activity need not be construed as a manufacturing process. The term manufacturing process appears to connote the application of skilled force on a material object to make a new object or alter an existing object. Film is not a material object that is being made but an artistic creation that is carried in a material object. From the performers point of view whether the performance rendered would be part of the process of adapting any article or substance with a view to its sale, transport, delivery or disposal is the question that needs to be resolved.

Some of the other legislations such as the Payment of Wages Act too appear doubtful about being applied to the performer as the definition of the term factory in the Factories Act is followed in the Act. Even though the last standing precedent from the High Court Of Madras does ignite hope to the workers in the films nevertheless there has hardly been an instance where in a performer has moved the courts for seeking relief under the aegis of these enactments.

The question whether filmmaking is a manufacturing process is open to interpretation or whether managerial or supervisory cadre as excluded under the Industrial Disputes Act would include the performers or creative personnel in the film industry under the Industrial Disputes Act is open to question. The most crucial question being whether creative personnel can be considered to be 'worker' in the context of all these workers legislations.

The very fact that film specific worker legislation was attempted in the eighties is reason enough to infer that the existing labor laws did not fit in with the needs of the creative film industry. This is further substantiated by the thoughts in the statement of objects and reasons to the *Cine Workers and Cine Theatre Workers (Regulation of Employment Act, 1981)* that said that taking into account the rigors of the creative industry much more of freedom was to be provided to the employers in the industry.[218] The enactment of the special legislation in fact excludes the application of the general workers legislation to the film industry. The enactment has several inbuilt constraints and limitations.

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[218] H.L.Kumar, *Labor and Industrial Law*, Vol.1, Universal Law Publishing Co. Pvt. Ltd., Delhi, (1st edn. -2004), p.683.

It covers only a limited section of the performing artists and other workers within a particular income category. It is doubtful whether it would extend to the television sector that was only a fledging one in the early eighties. It is not being implemented or prosecutions launched. The most important requirement of executing agreements written with these workers is least implemented in the film industry. None of the institutional mechanisms envisaged under the enactment have been set up. After much persuasion in the late nineties an effort was made to raise the limits of the income category.

The laws it appears were formulated with the vision of the stereotype greasy factory environment and not the info intellectual or entertainment factory farms that contribute and engage as many hands as those in the former (if not more).

An analysis of the level of labor security enjoyed by the creative workers in the entertainment industry reveals the ambiguity and the insufficiency of the present labor legislations to accommodate them within their framework. The uncertainty encountered by the creative workers in other fields is a pointer to the status that the film workers and performers are likely to get under the aegis of the present labor laws.

There had been a profound move in the eighties to make enactments such as the Factories Act, The Payment of Wages Act, The Workman's Compensation Act, The Industrial Disputes Act, The Employees State Insurance Act, The Employees Provident Fund Act, The Industrial Employment (Standing Orders Act) and The Shops and Commercial Establishment Act applicable to the film industry.[219] The proposition was also for including a provision of penalty and imprisonment on those who contravened the provisions of the Act. However this idea did not see the light of the day. One of the specific drawbacks had been that these legislations categorized the beneficiaries either with respect to character of the work rendered or with respect to the wage limits. Though with regard to the former criteria there can be differing opinions and interpretations with respect to the latter it excludes a major chunk of workers who receive remuneration above a particular limit.

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[219] See General Secretaries Report (1st January 2005 to 1st August 2005), Indian Film Directors Association, Bombay.

In the ordinary parlance the industry status to the entertainment sector would have attracted a host of labor laws existing in the country. However the situation lacks clarity and certainty in this respect even in post industry position extended to the entertainment industry. The extension of the appellation 'industry' to the entertainment sector from the year 2001 imparts mixed fortunes to the creative artist under the umbrella of the industrial labor jurisprudence. In the context of the term industry, the jurisprudence enunciated by the Supreme Court in this respect is discouraging. The performing artist does not seem to satisfy the requirements of the provisions of the Industrial Disputes Act even if it is assumed that a production company is accepted as an industry. Thus from a labor jurisprudence stand point the present declaration of the industry status to the entertainment sector need not be advantageous to the artist even though that may benefit other workers in the industry.

Is the Performing Artist a Worker?

In a case law decided in 2001 of far reaching consequence to the entertainment industry and the workers and particularly the creative artists, the Supreme Court laid to rest any speculations on the fate of the creative artist under the industrial labor jurisprudence. *In Bharath Bhavan Trust, Appellants* v. *Bharath Bhavan Artists Association and another, Respondents*[220], the Supreme Court in a bench headed by Sri S.Rajendra Babu and Sri Shivraj .V. Patil decided a very consequential judgment for the creative artist. The appellant, Bharath Bhavan Trust had entered into an agreement with 13 creative artists for the performance and production of a drama theater arrangement. Apprehending that their services are likely to be terminated or not renewed on the expiry of the contract, the artists filed a suit for declaration and injunction for regularization of their services. The said artists raised a dispute, which was referred to the labor court for adjudication in 33/971D, and the artists filed their claims before the labor court and sought for interim relief. The preliminary objection was that the Trust was not an industry and that the artists are not workmen under the Industrial Disputes Act. After

[220] AIR 2001 SC 3348.

initially giving an award the High Court directed the Labor Court to once again peruse the documents and pass orders. The labor court held that the appellant is an industry and that the artists are workmen.

The Appellant Trust based their arguments on several decisions that the institution could not be classified as an industry in spite of the very wide connotations of the term imparted to it under the *Bangalore Water Supply and Sewage Board Case* v. *Royappa, (1978) 2 SCC 213,* particularly since the appellant was characterized as indulging in aesthetic activity. The attention of the court was directed to the case law of *Miss A. Sunderanmal* v. *Government of Goa, Daman and Diu, (1988) 4 SCC 42* in which teachers were not held to be workmen although educational institutions may serve as an industry. The case law of *T.P Srivastava* v. *National Tobacco Company of India Limited, (1992) 1 SCC 281* was also advanced where in the court held that a salesman employed for canvassing and promoting sales of company's product in an area involve duties that requires him to suggest wages and means to improve samples, study of type and the status of the public to whom the product has to reach, study of market condition and supervising the work of other local area sales men. It cannot be termed as manual, skilled, unskilled or clerical in nature but requires an imaginative and creative mind and such a person cannot be termed a workman. It was pointed out that the incidental activity entrusted to the artists are all connected with the production of drama and theatre management and cannot be taken to be a separate activity to classify them as workmen.

The artists countered that considering the period for which the artists were engaged and the nature of the activities carried on by them even though to some extent creative is not by itself sufficient to state that they all fall outside the scope of the definition of workmen. They advanced the case of *Prabhath Brass Band* v. *Their Workmen, (1959*) 1 LAB LJ 78 (IND.TRI: Bom) (5), where in a set up was available to provide instrumental music on occasions like weddings or similar functions and those who were engaged in playing the band or music were held to be workmen. Relying on the case law of *H.R. Adanthaya* v. *Sandoz India (Ltd)* [221] it was pointed out that even though respondent artists may be classed as

[221] AIR 1994 SC 2608.

skilled persons in their respective fields, they were also workmen despite that fact that that they may not be engaged in manual work.

Significantly the court considered whether the institution for the promotion of art and culture is an industry and whether artists are workmen and applying the rationale of *Bangalore Water Supply* v. *Royappa*[222] they analyzed whether the institution engaged in a systematic activity or whether it was organized by cooperation between employer employees for the production of goods and services. The court found the reasons to classify Bharath Bhavan as an industry not compelling enough. It felt that it was only engaged in the promotion of art and preservation of artistic talent. Such activities are not one of those in which there can be large scale production to invoke the cooperation of efforts of the employer and the employee nor can it be said that the production of the plays will be a systematic activity to result in some kind of service. Therefore though it was not sure, it expressed doubts with regard to the eligibility.

The court went into the question of the status of the creative artist assuming the institution employing them to be an industry. The court analyzed whether the creative artists would fall within the four corners of the term 'workmen'. It ruled and observed that an artist engaged in the production of drama or theater management or to participate in a play can by no stretch of imagination be termed as workmen because they do not indulge in manual, unskilled or technical, operational; or clerical work though they may be skilled. The court opined that it is not such a work that can be read *ejusdem generis* along with other kinds of work mentioned in the definition. The court relied on the definition of *A.R. Adanthaya* v. *Sandoz India Limited.*[223]

The court noted that the work respondents performed or the creative artists performed is in the nature of a creative art and their work is neither subject to an order required from the art director nor from any of the artists. The court observed that in order to perform their work they have to bring to their work their artistic ability, talent and a sense of perception for the purpose of production of drama involving in the course of such work, the application of the correct technique and the selection of the cast, the play and the manner of presentation,

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[222] (1978) 2 SCC 213.
[223] AIR 1994 SC 2608.

the light, shade effects and so on. The court noted that the work rendered by the artists is creative art which only a person with an artistic talent and requisite technique can manage to call such person a skilled or a manual worker would be altogether inappropriate. An artist must be distinguished from skilled manual worker by the inherent qualities that are necessary in an artist allied to training and technique.

The court relied on the case law of *T.P Srivastava* v. *M/S National Tobacco Company of India Limited, AIR 1999 SC 2294,* where in the section sales man engaged for canvassing and promoting sales of the company's products in an area could not be put under the category of workman. The court most significantly noted that no work could be considered bestowed to them because the work of an artist is essentially creative and freedom of expression is an integral part of it.[224] However the following observations could make a difference to the ratio being applied to the entertainment industry as distinct from a charitable institution. (Though the court presumes during the logical analysis of the problem that the status of industry is bestowed on the organization). The court sought to distinguish on the basis of the fact that firstly no goods and services were produced and secondly acting that is done is not for the business of another. There is a mere expression of creative talent that is a part of the freedom of speech and expression. These significant differences could make a difference to the analysis, as the film industry is an entertainment service industry with a commercial angle overwhelming all other factors.

This could tilt the fortunes of the creative contributors to the film industry, as the rationale seems to be indicating the commercial angle as determining the question of eligibility. However this is in contrast to the ambit of the meaning appended to the term industry. It appears that delineation could be drawn between the industry commercially in operation and those which are not producing goods and services and which is not intended to execute any business. Thus creative talent applied for business purposes begets the status of workman under the Industrial Disputes Act for the creative artist but application

[224] The case law of *Hussein Bhai* v. *Alath Factory Thozilali Union*, AIR 1978 SC 1410 was also cited.

for non-business purposes would not.[225] This does present a contradiction though there are judgments to the effect that charitable institutions should also be considered as industries and that non profitability should not be considered as disqualifying the institution from being attributed the status of an industry.

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[225]*Bharath Bhavan Trusts, Appellants,* v. *Bharath Bhavan Artists Association and Another, Respondents,* AIR 2001 SC 3348 at p. 3352.

CHAPTER 9

AN ASSESSMENT OF COLLECTIVE ORGANIZATIONAL INITIATIVES AND CONTRACTUAL PRACTICES IN THE AUDIOVISUAL INDUSTRY WITH REFERENCE TO PERFORMING ARTISTS

Objective of the chapter: An assessment of the manner of development of the collective organizations in the film industry and its effectiveness is of immense importance if one has to think in terms of an intellectual property paradigm to function in favor of any section of the creative contributor to the audio visual industry particularly the performer. The understanding of contractual practices is essential to measure whether any thing in the nature of recognition of intellectual property or residual based practices have been in vogue in the Indian film industry. The issues of unemployment, disability from old age or sickness are problems that afflict both the artist and the worker, which leads one to explore alternatives in economic and social security mechanisms. The purpose is to understand the state of sensitivity to these problems from within the industry that would go a long way to find whether the present scheme of things would suffice for the future and what changes are required for incorporating the residual model.

Collective Organizational Structure in the Film Industry

The trade union movement or the organization of the work force in the film industry began with the late fifties. The developments in the south Indian film industry and in the western sector[1] can be taken to be representative in several senses because the film industry in the south produced more pictures than any other film-producing center in the country and it represented a wide vernacular segment. Though the workers began organizing themselves distinctly on the

[1] The employees of the western India are represented by the Federation of Western India Cine Employees, Bombay (FWICE). Around 1000 films are produced every year in India and a major segment is from this sector. This is besides television programming.

basis of the respective skills that they contributed to the film industry, later they were to come under a common umbrella that was to represent them in their dealings with the state as well as the other interests in the film industry. Today the south Indian film industry is represented by 24 craft unions under the canopy of the Film Employees' Federation of South India (FEFSI) that came into being in the year 1967.[2] It has a member ship of around 25000 members. Similarly the film employees in the western sector are also organized and similar number of craft unions exists under its umbrella too.

All these organizations are further affiliated to the All India Film Employees Federation (AIFEC, headquartered in Bombay) that is the sole recognized entity by the central government to represent the concerns of the film worker. It acts as a bargaining front for the crafts within its fold with the state and the central government as well as the other industrial associations. It has been recognized by the state in echoing the sentiments of its constituents in the parleys with the government[3].

It would be pertinent to understand the objectives and the functioning of the Film Employees Federation Of South India to understand about the sophisticated nature of its functions in comparison to its compatriots in other countries. It would indicate the preparedness of institutions in the future to undertake any other collective administrative function in the country with respect to creative contributors in the film field. The FEFSI is an umbrella organization representing 24 craft unions including performing artists such as the junior artists, the stunt artists and the cine dancers association. It is noteworthy that performing artists are also included within the unions though the major creative performing artists have decided not to form themselves into a union for reasons of convenience and therefore do not come under the canopy of FEFSI.[4] But the creative quotient has nothing to do with this demarcation or choice as the technicians like the directors, the cameraman as well as the scriptwriters have also organized themselves into trade unions. However, membership is provided directly only to unions under the

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[2] A similar system can be seen with respect to the western segment also with 22 craft organizations.

[3] Madhusudan, *Film Production as Industry* in Hemachandran (Ed.), *Film Trade Union Movement Southern Zone, A Flash Back*, FEFSI, Chennai (2000). This souvenir was released on May Day 2000.

[4] *Film Employees' Federation of South India- Constitution*, FEFSI, Chennai, p.2.

canvas of the Film Employees' Federation of South India. The unions are more in direct contact with their members.

The apex body aims to realize the welfare of film employees. The body has been instrumental in coordinating the various constituents of the federation and liasoning with the other institutions and interests associated with the film industry. The objectives of the FEFSI exhibit the concerns that the trade union movement has kept itself busy over the years. The body functions with the objectives of fostering brother hood among the cine employees in southern Indian states excluding the state of Maharashtra.[5] Any existing organization for cine employees that is not a rival to any of the unions would be eligible for membership.[6] It is an avowedly non-political and non-communal organization. [7] The body seeks to promote the economic and cultural interests of the members. It would guide, assist, coordinate, safeguard and promote the interests, rights and privileges of the cine employees in all matters including living conditions. It would promote and maintain a high standard of professional conduct and integrity. It would assist in the formation of trade unions in the yet to be organized areas. Most significantly to negotiate with the state and central governments to make adequate legislations for the cine employees and to secure the representation of the cine employees on delegations of commissions or committees set up by the government or other bodies in which the representation of cine employees as non-officials is desired and any other legitimate activity that are appurtenant to and facilitate the realization of the objectives stated.[8]

Significantly, the definition of the word 'cine employee' in the constitution of the FEFSI is wide enough to encompass the film artiste as well. He is defined as one who is employed on wage, salary or contractual basis in any work connected with production, distribution and exhibition of films.[9] The words 'on contractual basis' makes it clear that any body getting higher than the minimum or mutually arrived

[5] *Ibid.*
[6] *Film Employees' Federation of South India- Constitution*, FEFSI, Chennai, p.2.
[7] *Id.*,p.1.
[8] *Id.*,p.2. Thus the objectives as exemplified in the FEFSI rulebook clearly can accommodate any other task or responsibility that would promote the interests of the cine employee in its respective affiliate unions
[9] *Ibid.*

at tariffs would also come within the terms of the word 'cine employee'. This also creates a presumption that the artist as he is connected with the process aforementioned would not fall outside the purview of the definition. But with the identity of an employee he may be denied, presumably, as having no intellectual property rights in the performance, if rights are ever granted to him in the future. The same rationale might apply to other creative contributors in the film medium as well. This could be cited as a technical reason for the performing artist in the future not to evince interest in forming the trade union if he has a desire to intellectual property status. The use of the word employee and the word employed might be a misnomer. This might be inadvertent fallout of the definition. A major drawback of the rules is that the union would not recognize fresh organizations in addition to an existing trade body representing the same workforce. This creates a status quo and also a real possibility of an unhealthy monopoly. The Federation neither sees whether the existing one is a truly representative one or not nor does it look into the adequacy of its infrastructure.[10] However the important point is that a structure already exists with inherent and express powers to function on behalf of cinema employees adapting to the changed times or to canvas on behalf of the employees. The body also functions as a grievance redressing office for the complaints of the cine employees against the employers and vice-versa received through the affiliated unions. It also acts as a medium to implement the consensual decrees entered into any matter involving the members of the affiliates. It entertains complaints of the cine employees against an affiliate. The organization can institute legal proceedings on behalf of the federation, carries on any negotiation with the employers and their organizations on behalf of the federation subject to the approval of its general council. [11] Each craft union under the FEFSI has its own rules by which they function.

[10] *Ibid.*
[11] *Id.*, p.7. Functions of the Executive Committee.

Programs of Action

The body has been coordinating several programs for the welfare of the artists like pension scheme and the scholarship schemes; a lump sum payment during death etc. It is the via media between the schemes brought forth by the central and state governments that have been instituted. The beneficiaries concerned or the dependents have to apply through the channel and the application would be canalized and processed by the office and forwarded to the government institutions[12].

Labor welfare is extended to both daily as well as contractual labors in the form of medical allowance and educational scholarships.[13] There is no assured pension scheme either from the state or the central government.[14] It is important to bear in mind that the FEFSI does cover a section of the artists. In case of normal death there is a lump sum grant of rupees 5000/- from the welfare fund by the central government and rupees 10000- in case of accidental death. Some unions might give a substantial amount at the time of retirement. This clearly points out to the lack of a sufficient sustenance mechanism for a section of the artists coming under the organization of trade unions and allied bodies.[15]

It is important to dissect the exact composition of the sections of trade unions that constitute the FEFSI. The technical personnel and the artistic contributors together with workers constitute the FEFSI membership. Amongst the technical personnel there are those who creatively contribute to the film that includes the directors, the storywriters and the cameramen[16]. It is to be noted that they are all trade union affiliates and the personnel mostly contract according to their bargaining power in the industry. Therefore it cannot be inferred that only those who do not creatively contribute constitute the trade union confederation. The

[12] Similar features can be found for the employees of the western India who are represented by the Federation of Western India Cine Employees, Bombay (FWICE).
[13] Interview with Sri Sambathan, Manager FEFSI, 13th of September 2003.
[14] Interview and data provided by the Manager of FEFSI under authorization from the Gen.Secretary.
[15] *Ibid.*
[16] *Film Employees' Federation of South India- Constitution,* FEFSI, Chennai, p.2. Source: FEFSI.

point to be noted is that perhaps among the artists the creative artists who determine the cast are not part of the trade union body. But the background performers such as the cine dancers, stunt artists, the dubbing artists and the junior artists are all members of the trade union block. Thus distinctiveness on the basis of aesthetic contribution of the members of FEFSI cannot be made. Further the only support for those under the trade union in the absence of a contract specifying a sum would be the tariff or the minimum wages. But where the sum promised is a oral contract, the aggrieved need not seek recourse to the tariff and can very well seek the intervention of FEFSI for getting the amount promised for his contribution to the film. In these circumstances there would not be recourse to minimum wages or the tariff as the person has been promised much more. There is no hard and fast rule that the tariff shall only be strictly adhered to the point being that the tariff shall always act as the minimum in the absence of the agreement to the contrary. It is through pressures such as non-cooperation or confrontation and mediation that the issues are mostly resolved.

Performers in the Audiovisual Industry and Their Organization

The performing artists in the film industry had begun to be organized into an association as early as 1930's in both the Bombay film industry as well as the south Indian film industry. It was ostensibly for the welfare of the artistes. It is to be noted that the distinction between major and the junior artistes was already drawn by the first twenty-five years of the film industry. Though not unified on the lines of trade unions, they were associations registered under the societies acts. But these early experiments at forging the unity among the artistes did not hold on and they became dysfunctional and died as a consequence.[17] Similar efforts appear to have occurred in Bombay in the 1940's.[18] They did not have a vibrant program of action and therefore did not become noteworthy by any course of

[17] An association begun at Madras in 1938 for an association of actors lasted only for 6 months .M.V Mani was the Secretary and the star of the times M.K.Thyagaraja Bhagavathar was elected the President. M.V.Mani was also a nationalist. Theodore Bhaskaran, *Trade Unionism in the South Indian Film Industry*, V.V.Giri National Labor Institute, Noida (1st edn.-2002), p.12.

[18] The Cine Artistes Association that was a newly formed Association of Junior Artistes, The Film Artistes Association of India with Sohrab Modi as President and David Abraham as the Secretary, Junior Cine Artists Association in Bombay. *Organizations in Indian Motion Picture Industry* in *Hand Book of the Indian Film Industry*, 1949, MPSI Publication, Bombay (1950), p.400.

action, as one does not find mention of their role in any contemplated policy initiative during this period. It was during the period after the Second World War that the utility of organizing along trade union lines was found to be promising and utilitarian. For instance, the extras were dissatisfied with their wage rates and once the war was over they advanced their claim to a higher wage rate at rupees 5 per day.[19] One can note that in comparison to the monthly salary that the main artists and certain technicians were enjoying, the extras who were also performing artists but relatively irrelevant and subdued to the major scheme of things were earning a daily salary.[20] The demand was realized from the studio owners and film producers by striking work. The first signs of class-consciousness were apparent.

It is important to note that among performing artists in the film industry in India, the recourse to unionization has not been uniform across the country though in other categories this can be discerned. Thus while the performing artists in the Bombay –western film industry can be seen to have formed into trade unions in the fifties[21], while a similar organizational endeavor can be seen in the south[22], the performing artists have restrained from forming into a trade union and have instead registered as charitable societies.[23] The recently formed artistes associations for instance AMMA in Kerala and even technicians association MACTA have desisted from registering as trade unions. The reason being that the recourse would be to the minimum wage tariffs in times of disputes with

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[19] The extras were paid rupees two as a daily wage by the employers.

[20] Dr.Inturi Venkateswara Rau, *The Trade Union Movement in South Indian Filmdom*, Hemachandran (Ed.), *Film Trade Union Movement*, Southern *Zone, A Flash Back*, Published by Film Employees Federation of South India (FEFSI), Chennai (2000). It was the 'extras ' (as they were called then) that first raised the question of raising the wages and struck work. It was at the Jaya film studio compound at Madras (now Chennai) that the struggle saw its culmination.

[21] The Cinema and Television Artists Association (CINTAA) was established in the year 1956 and registered as a trade union. On the other hand South Indian Film Artistes Association was set up in the year 1952 as a society (*Thennindian Nadigar Sangam*).

[22] The late Chief Minister and the super star of *kollywood* Sri M.G Ramachandran together with such stalwarts as S.Kalavanan, N.S. Krishnan and Director K. Subramanium founded the organization of artists. The organization was further developed by Shivaji Ganesan and people of great proven mettle such as Radha Ravi, actor, former Member of Parliament and member of the Legislative Assembly of Tamilnadu. Courtesy interview with Selvaraj, Executive Committee Member, South Indian Film Artistes Association, on the 14th of September 2003 at Madras.

[23] This includes the AMMA and MACTA from the state of Kerala but these are not affiliated to the union canopy. In Kerala even the technicians are not registered as trade unions.

regard to payments in case the association is registered as a trade union but as a Society it would be subject to some kind of consensus. But more nearer to the truth would be the fact that the performer or the performing artist did not belong to the category of the worker, as they were creative artists. Even though inadvertently this choice might have been made for the sake of remunerative benefit the fact that their bargaining power was far higher than that of the worker or that they were conscious of their distinctiveness from the workers in the cinema industry. It is important to note that the CINTAA of Mumbai though registered as a trade union too does not engage in minimum tariff agreement unlike other craft unions. In Kerala, the associations representing actors do not favor the collectively bargained minimum tariff.

It is noteworthy that among the performers associations only the performing artists in the Western Sector (CINTAA) are affiliated to the all India structure of unions. This exposes a grave disadvantage that major character-performing artists may face while any copyright is accorded to audiovisual performances.

The South Indian Film Artistes Association was open to all artistes with no distinction on the basis of regional or parochial lines. This can be attributed to the fact that the south Indian film industry headquartered in Madras and the production of films in Malayalam, Telugu, Kannada and Tamil took place in Madras. Cinema artists as well as drama artists are eligible to be members of the body. Thus all visual performing artists have been brought within its fold. This is a distinctive feature of south Indian film artistes association as distinct from CINTAA well as AMMA. AMMA does not represent television artists.

Objectives of These Organizations

There is a broad similarity with respect to the activity carried by these organizations. The objective of the South Indian Film Artistes Association was to secure the welfare of the artist, for protecting the interests of the performing artists, and for his social security[24]. The welfare activities include the provision of

[24] Based on an interview with director Sri Selvaraj, Joint Secretary of the *Thennindian Nadigar Sangam* (South Indian Film Artists Association) and an active trade union member on the 14th of September 2003.

a fund for the purpose of providing relief to the family of a member who has expired. It is not a continuing benefit in the mature of a pension but a one-time payment of a fixed amount.[25] All these are yearly payments to those who are found eligible. The entitlement of the beneficiaries increase or diminish in tune with the number of candidates to avail the same as this is from a fixed fund that does not fluctuate. Free medical aid and free dispensary services are also provided and even bills are met upon the production of proper documentation and letters being produced. A committee constituted to decide on the eligibility supervises the process in this regard.[26]

Unsupported by any of the state institutions the association has on its own accord started or drawn up a pension scheme for its deserving members who have retired or are old in age.[27] The eligibility would be decided according to the applications received therefore there are no hard and fast rules in this regard. The committee is vested with the discretion whether to grant or not to there fore an equal distribution cannot be realized by the scheme in which the choice of the members would play a role. The association has been recognized by the central and the state governments to assist it in the matter of implementing programs for the film artists.

The performing artist at present can avail three pension schemes other than the one at present granted by the association of artists. The central and the state governments are the sponsors of these pension funds. Besides the pension schemes awards carrying cash prizes are also distributed to the artists of both theatre a, folk and cinema and percussion artists. Concessions are also granted by the government for those aged above 60 with nothing to depend on and are helpless. The state government would accept recommendations from the *Nadigar Sangam* and the beneficiary would be entitled to rupees 500 per month from the state government.

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[25] Each member to be part of this is expected to pay rupees 10 per month that is Rs. 120 per year. The family of the deceased would then become entitled to rupees 10000/- on the death of the member. On the same lines the association for the benefit of the members has also instituted educational scholarships. Rs. 500 for first to fifth standard, 5th to 8th Rs. 750, 8th to 12th Rs. 1000, and for college degree education a sum of Rs. 1500.

[26] But not everyone comes forward to avail these benefits only the very needy come forward to beget these schemes.

[27] Rs. 300 per month.

The respective state governments have also been initiating measures to afford a pension scheme for disabled and indigent artistes. Either it is done directly or through autonomous organizations created for the purpose[28]. There is a pension scheme of the state of Tamilnadu to aged artists above 60 an application with recommendation from the Nadigar Sangam would have to be made from those totally helpless financially and nothing to depend on. A sum of Rs 500 per month is availed by the beneficiary. The central government through the Sangeeth Natak Academy is providing a pension of Rs.2000 per month for the artists but that is not easy to beget as only those who have rendered outstanding contributions to the world of visual arts get selected[29]. There is no bar to the recipient enjoying parallel benefits from two or more pension schemes at the same time. It can be inferred that the existing welfare measures for the performing artist who is unemployed or retired do not provide a certain benefit rather it depends on a procedures as well as the discretion of the scrutinizing authority. In other words a certain remunerative model is yet to emerge for the unemployed and disabled performer who has fallen on financially bad times.

There are moves to provide insurance cover to the artistes and a provident fund to which the producer and the worker also contribute the problem is that a one-day worker and a hundred day worker cannot be equated. A group insurance scheme is also being formulated but here the age is the problem and the insurance companies are willing to entertain only those within the age of 40. But those who need help and those who are in the artists association are all above the age of 40. And so the companies as well as the producers are not interested. The aforementioned problems point to the obstacles in the way of realizing a social and economic security instrument like insurance owing to the occasional employment in the industry and the age group into which the majority of the subjects fall.

The amount disbursed is from a corpus fund that is for the pension and is limited in its utility. There is no automatic entitlement that happens, as the number of

[28] The Kerala State Chalachitra Academy supervises the disbursal of the pension scheme drawn up by the state government.

[29] Interview with Sri Selvaraj, Joint Secretary & Executive Committee Member, South Indian Film Artistes Association, on 14th September 2003 at Chennai.

applicants is disproportionate to the amount with the fund. The eligibility criterion is still not defined clearly other than the fifty years minimum and therefore an assured entitlement does not happen. There are numerous artists who are lesser than fifty and therefore they do not qualify for the pension even if they want to retire and they are unemployed. There is an element of subjective satisfaction involved in selecting the beneficiary and the preferences need not be based on objective grounds.

As for the private initiatives that have been initiated though it does provide relief the amount is meager and is tantamount to mere tokenism. The corpus fund is raised through private contributions and resources raised from the charity show conducted by the artistes organizations. A survey would suggest that the artists who need help would be in the age group of 40 to 50; they are unemployed and have turned out to be misfits for any other job. The very use of the word pension would be a misnomer as it is indigence and erratic employment that the artist is faced with though old age and disability also contribute.

Such initiatives are witnessed in Malayalam film industry too. With the nature of the industry being uncertain the artistes are always in the throes of uneconomic and social insecurity. There are no schemes that entitle the artist to economic and social aid automatically on fulfillment of any criteria that places them in a distress category due to unemployment, old age or illness or other incapacity. The government schemes administered by government agencies have a filtering process that bestows tremendous discretion of pick and choose on the government officials and therefore all those who appear do not avail of he benefit. Further, the constraints are several in this regard. Certain voluntary organizations have begun to help in this regard rather quiet honestly but they do have a limitation of a corpus fund. The association of Malayalam movie artists provides a sum of Rs.2000 to the recipient on a monthly basis. This is evenly distributed to both accomplished as well as those not quiet well-known artistes. A sum of Rupees 1.25 lakhs is being expended for this purpose. The beneficiaries' ranges from artists like Madhu to Sukumari to several others of lesser standing and credentials in the Malayalam film industry. This is from a corpus amount of Rupees 80 to 90 lakhs that has been added up from the various stage programs

conducted by the society. The beneficiaries are selected from among the different applicants by a committee constituted in the body for the same. The association also at its will and discretion extends help to those in dire straits.

The association has also been instrumental in formulating life insurance and accident insurance schemes by which the artists are covered by these schemes without incurring any further amount other than their subscription to the organization membership. This provides security cover in an industry where any institutionalized insurance cover either by the employer or otherwise was lacking. This is an automatic entitlement to the members of the association where by they become entitled to treatment expenses with a ceiling limit. The highlight of this scheme is that the premium amount to be contributed is being met by the organization.[30]

The membership of this organization demands a sum of Rupees 1000 every year from the artiste. In this context it is appropriate to be reminded that the membership to this organization is not automatic on being actor or on his readiness to be a member upon payment of subscription fees rather there is considerable discretion on the screening committee to usher the member into the membership of the association. The doors to membership are not open to everyone who has acted. Though during the initial period there was a liberal eligibility for membership even if they have acted in a role in a film, following organizational problems the present move is to be more discerning and clench fisted with respect to the membership to the organization. Thus there is no automatic entitlement to the benefits for all artists. Further the television artists as well as dubbing artists or play back artists are not open to the membership of this front.

The other resolutions of the association includes the aim of protecting the rights of the artist, to maintain and develop self discipline and professional and social ethics among the members, to attempt remedies on issues concerning the artists, to beget the benefit of the collective efforts where in individual effort could not succeed, to conduct programs like star-nites. The body intends to protect

[30] Press release by AMMA office, Trivandrum, Courtesy: Sri Edavela Babu, Joint Secretary, AMMA, on 25-11-2005 at Trivandrum.

members from unemployment and to provide financial help, to act as an advisory body to government departments for the uplift and development of the film industry and to act as arbitrators in all disputes submitted to them for arbitration. The body also intends to amalgamate or affiliate with any other society wholly or partially with objects similar to AMMA.[31]

The aforementioned initiatives at welfare from the societies and trade unions of artists expose the limitations of the schemes particularly the limited corpus and the process of choosing recipients and the limited number of recipients who can avail the schemes. This surely points to the need for an alternative model that might act supplemental to the charity based on the market forces. The aforementioned account points out that the concept of residual has not entered into the domain of transactions in the industry nor has it ever been debated or contemplated as a viable alternative.

Categorization Among Performing Artists

It is important to note that the artists have been divided into junior artists, stunt artists, the cine dancers and the others. Junior artists, stunt artists and the cine dancers are not members of the South Indian Film Artists Association. This feature is common to the western Indian CINTAA as well as AMMA[32]. The distinction is commonly based on the amount of creative contribution by the manner of acting and rendering the dialogues and the position accorded to the artist by convention and mass appeal. Though the metes and bounds of this distinction have not been spelt out the difference is a glaring one as the junior artists, the stunt artists and the cine dancers are paid according to the hours they put in and according to the tariff fixed with their organizations or according to the minimum wages. They have formed themselves into a separate organization right from the very beginning. Though a junior artist would not be qualified to come under the canopy of the artists association nevertheless the members of the artists association who have slipped into the category of junior artists will not be disentitled to ask for any benefits accruing from the artists association. The

[31] *AMMA, Byelaws*, AMMA, Trivandrum.

[32] Though this exclusion is not glaringly evident, nevertheless a look at the membership roles would show main artists and character artistes being the members.

benefits of the collective bargaining agreements can only be availed by the members of the association.

There is no hard and fast rule common to different film industries in India that all those who are engaged to act ought to be members of the association. However, such a stipulation does appear in the Western sector that only members of the organizations/ unions should be engaged by the producers who have inked the collective agreement with the workers unions[33]. Therefore the benefits of any organizational security percolate only to members. The lack of a proper legal regime exposes those who are not members of any association to have recourse to the usual legal means of redressal, which is grossly inadequate.

Collective Organizations and their Approach to Artiste's Problems

The association comes to the help of the performer in case of non-payment of the remuneration by the producer. This is usually done by directing the lab not to release the prints to the producer unless and until the money has been paid to the performer. Mostly nobody complains about the payments not being made for fear of losing their future opportunities with influential producers. Others who have the clout and the potential stand up and protest and realize their dues ready to face the repercussions[34]. If in case the producer does not pay up despite the intervention of the association the common recourses have been boycott and non-cooperation or help the aggrieved in litigation. Though the courts as the last resort is rarely considered the best available remedy.

Moral Rights - Depiction

The associations do not tread on the question as to what is a desirable practice their concern being only that what is promised is given to the performer. It can be

[33] Based on interviews with Sri Raja, Secretary, Junior Artists Association, on 16/8/2005, Mumbai, Himanshu Bhatt, Secretary, Cine Singers Union, 9/8/2005, Mumbai, Shivlal Suvarna, Association of Voice Artists, 10/8/2005,Mumbai (AVA).

[34] "Malayalam Actors, Producers Lock Horns", *The Times of India*, May 27, 2002, <http://timesofindia.indiatimes.com/articleshow/11191127.cms> as on August 22, 2004. Actor Dileep who initiated legal proceedings against the producer for non-payment of dues was banned by the Producers Association and fined. Similar actions of boycott have been initiated by the producers' coterie against both artistes as well as directors.

said that the artists association is not only concerned about the economic rights of the members but also the moral aspects of their treatment both on and off screen. The artists cannot be depicted on the screen in a manner against their wishes or in any way demeaning to their honor, dignity and reputation without their consent. In other words they cannot be exploited merely by the fact that they have signed up for the film. Thus representing in a vulgar light far more than what the story line would mandate, to expose the body beyond the lines drawn in decency, to be attributed what another does in the film either by depiction or by reference to name. In such instances the association has intervened in the past and sought the exclusion of the respective scenes from the film. The situation in question related to the obscene depiction involving a leading actress of the Tamil cinema under a well-known director and actor. The actress in the present case was Sukanya and the lead actor kamala Hassan.[35] The producer finally relented to expunge the scenes. The objection was with the obscene use of a double in a nude scene for the film' Indian'. The association intervened and directed the lab not to release the picture until the issue was resolved. The lead actor wanted the original shot to be retained nevertheless around 400 feet of the film had to be sniped off. Though the exact instances where in the association would intervene is not defined nevertheless it can be said that the association would intervene in case of a complaint regarding unhelpful working conditions and indecent and in-dignifying treatment both on and off the screen. It can be inferred that many of the disputes are resolved at the desk of the professional body itself through its use of mediations and good offices without recourse to the courts.

The responsibility on the organization is very onerous as there is never a proper script in advance and only a thin story line is narrated to the artist before hand. If the actress is uncomfortable with an actor or a scene then she communicates it to the director. There are no clear-cut rules in this regard. But the actress cannot be forced to enact a scene that is derogatory and in dignifying. It is through mutual cooperation and understanding that the work has to be executed. Even if the script demands it, the actress can object to the scene if she is uncomfortable doing it. But all these situations also raise probable consequences whether the actress can be terminated in such an instance and the amount received from the

[35] As narrated by Sri K.Selvaraj, Executive Member of South Indian Film Artistes Association on 14th September 2003 at Chennai.

producer given back to the producer or to give her the remuneration for the share of the work contributed. The matter is not something left to the will of the director or the producer alone. The actress is seen to have recourse and can disagree keeping in view the accepted trade practices like informing the lab. Thus there are certain implied norms that have to be adhered to and it is not a one-sided power relationship between the producer and the artiste. This is not a general characteristic in the country though as during the Manisha issue the Association in Mumbai kept mum over the issue. However issues are frequently brought to the attention of CINTAA also for resolution.[36] But the standards and norms are hazy and relative with reasonability and subjectivity being an influencing factor. The guidelines are not clear. It is not uncommon for the actors to have knocked on the doors of the court for a fair depiction either in the film itself or in the advertisements to the film. For example Meena Kumari alleged that posters of her film *Saath Phere* showed her in a bad light and obtained a stay from the court.[37] The Manisha issue clearly brought this to the fore with the actress seeking the intervention of the courts, the Cinematograph Board as well as the Women's Commission to beget justice. The episode also brought out the recourse to alternate means of third party mediated settlements as well.[38] Recently in the Malayalam Film industry, the two superstars, Mohanlal and Mammooty objected to the use of a facemask resembling their faces in a dance sequence in director Vinayan's new film titled 'Boyfriend'. It is important to note that their recourse was not to the courts but to their association AMMA[39]. A letter asking for the explanation from the director was sent by the artistes association to the director seeking his explanation. Thus in a digital age manipulation of images have become commonplace. The hazards of subjectivity in such judgments is evident and the lack of a legal rationale stark.[40] The aforementioned episode

[36] Interview with Rajeev Menon, Secretary CINTAA, 3rd August, 2005 at Mumbai.

[37] Quaied Najmi, "Double Deal, A new twist to Body Deal Controversy", *The Week*, September 5th 2002. She alleged that a dupe had been used but the impression created was that she had posed.

[38] Note, "Shashilal Nair Apologizes", PTI, October 5th 2002,*Rediff Movies*, <http://www.rediff.com/movies/2002/oct/05nair.htm> as on 1st January 2003. He had to tender an unqualified apology to the division bench of the Bombay high court for having sought the intervention of a third party while the matter was sub-judice.

[39] Note, "Another controversy brewing in Malayalam films", <http://www.kaumudi.com/news/121605/x_headlines.stm >as on 1st January 2006.

[40] The same superstars did not object to a similar choreography in an earlier film of Lal Jose. However it is a matter of conjuncture whether their permission was sought for the same.

reveals the lack of a coherent legal logic and also the increasing reliance on unions and associations to settle such issues.

Self Regulation - Role of the Collective Organizations in Standardizing Practices

It is important to note that the film industries on a pan Indian scale have been inclined to self-regulation rather than being regulated by the state. This is significant considering the fact that any introduction of a copyright based solution or invocation of intellectual property character through the means of statute would also result in animosity from the producing interests. In the south the need for self-regulation was felt by the industry during the seventies. The film industry in Bombay had already adapted to self-regulation practices as well as bargaining since the late fifties.[41] The code of conduct formulated to regulate the film artistes did have a determining impact on the working practices of the artists. But it touched only a fringe of the real problems of insecurity, uncertain contractual practices and the artistes' welfare. The self regulatory norms mandated the need for the script before the commencement of shooting; the shooting schedules had to be filed in advance particularly the call sheets had to be provided to the directors, artists and the technicians. The consent of the artists, directors, music directors and technicians would have to be in writing. The schedules have to be such that the shooting would have to be completed within one year from the date of the first shooting day.[42]

The artistes were to be on the sets on time fixed for the commencement of the call sheets. The producers were to honor all their commitments and be regular in payment as per their understanding with the artists and technicians. It was also mandated that the artists, technicians' studios and others should keep up their commitments and obligations as agreed to by them.[43] It was also mandated that before the release of the picture that all the dues to the artists and others must be met by the producer. In the case of disputes a self-regulation committee would be constituted. In case of nonpayment of dues the committee shall instruct the lab

[41] Interview with Sri Chandrasekhar Gourishankar Vaidya, at Mumbai on the 3rd of August 2005.
[42] *Journal of the South Indian Film Chamber of Commerce*, Madras, Oct. 1970, p.13. Though the written contractual obligation was made mandatory through the self-regulatory measure but the consequence of breach has not been spelt out.
[43] *Journal of the South Indian Film Chamber of Commerce*, Madras, December 1970, p.14.

not to deliver the prints unless the claims are settled. But such references shall not be made at least seven days prior to the release of the picture. With regard to rest of the areas of understanding in case of any dispute the self-regulation committees' decision would be final and binding upon the parties. Another significant point stressed was that the choice of the technical and other personnel for the production would vest with the producer. It is important to note that the self-regulation committee was serious about the resolve to set their house in order.[44]

The eighties could be considered as the period in which the conditions in the film industry brought to the fore the dissatisfaction of both the employees a well as the employers. It was the trade unions that began to place fresh conditionality before the producers. The unwritten code system was proving to create misunderstandings and exploitation of the worker as well as the producer. While the trade unions demanded their dues aggressively the producers were known for nonpayment or delay in the payment of wages. The trade unions in turn would demand delayed wages even at the rate of compound interest. The situation led to confrontation and resort to agitation like strikes and lay offs. The consequent effect on the production in the industry impelled the need for corrective measures by drawing up a code of conduct agreeable and adhered to by all sections in the industry.

It is noteworthy that the grievances of producers appear to be targeted against the trade unions rather than the performing artists. Thus while the artists appeared an easier lot to tackle the trade unions were found hard to tackle through accommodative practices. It is significant that in the south Indian film industry the performer (character Artistes) were not organized on the trade union lines or if they were in any manner organized did not enter into periodical tariff arrangements. This could have contributed to the character artists being more pliable and less complaining.

[44] *Id.*,p.17. Within a period of two to here months the committee took note of some of the disputes that was brought to its notice. That included questions regarding the amounts due to the artists, call sheets of artists, shooting without clearance certificates and it seemed it had all been tackled successfully wit the cooperation of members.

Self-Regulatory Methods to Resolve Disputes

A mutual agreement was entered into between the FEFSI and the South Indian Film Chamber of Commerce for resolving disputes. The resolving mechanism was to be in place for a period of 5 years. The body called the Joint Consultative Committee would need a quorum of three from either side. A procedural modus operandi was also formulated where the complaint would be processed and attempted to be resolved. The employee can raise a dispute through the craft union and the union will write to the employer to have the issue settled. If this process does not yield results then the craft union would write to FEFSI and the latter would address the employer. At this, the employer can refer the matter to the SIFCC (South Indian Film Chamber of Commerce) and it can write to the FEFSI. The matter would then be referred to the JCC (Joint Consultative Committee) and its decision would be binding on the both the parties to the dispute. Thus mutual mediation is the preferred method. There was still no call from the unions or from SIFCC for a legislation or statutory standard to regulate the industrial relations in the film sector. The SIFCC would advise its members to adhere to the format, as notified in the gazette by the central government under the cinema workers and cinema employees' welfare act. However the representative bodies do not insist upon this. In case of disputes and the agreement is not in the standard form the minimum wages would subsist according to the tariff fixed mutually between the bodies.[45]

It is important to note that the mandatory legal provisions have an optional character from the perspective of those in the industry. Thus a lot of leeway was provided to the players in reference to the explicit and oral agreements. There were to be no unilateral action from FEFSI side and no disruption in work from either side as well.[46] The role of the artists in these deliberations appears to be unclear particularly since it is also an affiliate of the Film Chamber of Commerce.

[45] *Journal of the South Indian Film Chamber of Commerce*, Madras, June 1987, pp.5-8.

[46] *Ibid.*

There was also the tendency of the trade unions dictating to the producers as to who should work for them. The producers also resented this. It is noteworthy that the need for a code of conduct and the need for a dispute resolution body were realized by the producers. The producers began to talk with the FEFSI in this regard. The need for respect of agreements and a pronounced code of conduct to be respected along with recourse to a dispute resolution body was desired by the interests in the industry. Significantly a statutory resolution to the problem was either not contemplated or was not desired by the important players.

However despite these bold initiatives (since the beginning of the eighties) practical difficulties have surfaced in the implementation of the dispute resolution and the agreed code. Implementation appears to have struck a jarring note and adherence was also piecemeal. The showdown between the might of the workers unity and the capital investors continued sporadically requisitioning the creation of more constructive measures. But despite the difficulties in stitching together compromises the industry still strove to self regulate rather than invite the states regulatory frame to bring in order.

Since the year 1989, the standard form agreements have to be reviewed every three years.[47] While there appears to have been no striking participation in the talks by the artistes, there is significantly no standard agreement that has been drawn up with respect to the artistes but a model agreement has been endorsed. The endeavor was to standardize agreements in the entire gamut of the employee – employer relations and to streamline the production of films so that the industry functions without hassles and allegations of harassment in any manner. Interestingly it cannot be considered a voluntary self-regulatory measure, as there was a significant participation and supervision of the same by the state of Tamilnadu. Thus the state had played an important role in the drawing up of the terms and conditions between the producers and the workers under supervision from the labor department.

[47] The reason for this was a standoff and a prolonged strike in the industry begun by the cine lighmen for better wage rates. Even in this impasse the artists do not seem to have come out stridently to voice their own claims nor is the focus on them

It is important to note that the need for standardization has not arisen owing to any issue with artists acting as a contributory factor though the acting fraternities too have been benefited by these self-regulatory standardization measures. There is no conspicuous presence of any artistes' representative in the tripartite committee formed for the supervision and implementation of the said aforementioned agreement.

One can see similar self-regulatory initiatives both in Bombay as well as in Kerala. There too the artists have not been the reason for these changes. However these mechanisms of regulation like the joint committees have been in vogue in Mumbai as well. Despite the performing artistes being registered as a trade union agreements in the form of minimum wages do not find a place there. In the eighties, with the break away of the south Indian film industry into their respective states the activity in madras as a hub of the south Indian movie film production had ebbed. However, production still continued in Madras but the wholesome dependence was lost. Of late with the influx of cable television, rise in the cost of production, change in the public taste and perception and rampant video piracy the film industry in Kerala has not been facing good tidings. The pressure of the industry passing through a critical juncture was being felt on the personnel including the artistes as well as the producers and distributors and exhibitors working along the chain of cinema entertainment. With returns not rising to the costs incurred defaults along the payment line and mirage of adversities began to be seen and arbitrary counter measures began to be proposed in order to ease the pressure or the financial emergency. The countermeasures proposed triggered a catastrophic standoff that led to a total stoppage of all production for over 3 months.

Organizational Moves –Increasing Consciousness of Rights

During the last bend of the nineties one can discern a move to form organizations along trade lines in the Malayalam film industry. This can very well be considered as responses to the changed circumstances where in norms and practices of yore had begun to come under strain. It was also a pointer to the fact that the, Malayalam film industry had begun to take roots and a permanency in the state of

Kerala or a self sufficiency within the state itself and its historical ties with the south Indian fraternity was no longer essential. Therefore a wholesome restructuring appeared to be essential as organizations in Chennai were no longer effective to counter and tackle issues of production in the state of Kerala. The Association of Malayalam Movie Artists (AMMA) was formed in the year 1996 and the Malayalam Cine Technicians Union (MACTA) was formed soon after. Both these outfits were formed ostensibly for the welfare of their members as well as for protecting their interests.

Factually one can notice an increase in issues coming to the fore with the organizational developments.[48] Either this is a mere coincidence or by design, but it is a significant factor. Issues about which the writers and actors were not willing to speak about were coming out of the closet and debated at the organizational level and disputes discussed in the public forums and news media. Earlier there was a fear of being ostracized by the producers and so several instances of injustice and unfairness was pushed under the carpets. However the growth of the star images and the realization that market was being controlled not due to the guile of the producers tact but the actors mass following and endearment has perhaps led to a change in the distribution of power within the film industry. One can also notice a growth in the image of the lead stars in the film industry in Malayalam that has grown beyond the borders to an international stature. The actors themselves had turned producers also so they had come to realize the actualities in the production of films. Further the influx of trained hands in the film industry had set in expectations and the need to sustain professionalism in work practices. Issues such as restraint on trade and non-payment came to the fore as the Malayalam film industry tried to grapple with the new dictates of the entertainment market.

Some of the issues that came to fore included the case of bouncing of cheque's that was becoming a common phenomenon but rarely spoken about but of late, post –organizational endeavor, the actors have come into the open about it.[49] It

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[48] K.G.Kumar, "Unionized Glamour", *The Hindu*, (Kochi edn.), *Business Line*, April 5,2004, <http://www.thehindubusinessline.com/bline/2004/03/12/stories/2004031200321700.htm> as on August 22, 2004.

[49] "Malayalam Actors, Producers Lock Horns", *The Times of India*, May 27, 2002, <http://timesofindia.indiatimes.com/articleshow/11191127.cms> as on August 22, 2004.

also brought to the fore the primitive instincts or resort to practices like isolation and boycott of the creative artist by the industry. The issue showed that organizational interference could ease the pressure on the individuals who earlier found it extremely uncomfortable to bring such issues to the open. The issue also points out the state of practices in the film industry where in written documents is not part of the usual contractual practices and the industry functioned on the basis of faith, goodwill and cooperation.[50]

A most striking aspect of these episodes was the extreme care taken to keep the role of the government from interfering into the issues afflicting the film industry.[51] The episodes also brought to the fore the growing concern among the artistes, the technicians and others that something drastically had to be attempted in order to secure their economic and social security.

The three wings of the industry attempted like their senior counterparts in Chennai to resolve differences by entering into a written understanding according to which the conduct of the constituents would be guided.[52] It was to be supervised by the tripartite body having representatives of all the three bodies. A 21-point agreement was entered into between the three organizations to address the issues thrown up by the adverse circumstances in the film industry. The initial 21-point agreement was entered into by the three principal components of the Malayalam film industry-AMMA, MACTA and the Kerala Film Chamber of Commerce and Industry.[53] It can be seen that the agreement reflects the endeavor to circumvent the crisis of survival that the Malayalam films were fighting out. Besides several economy measures like limiting the number of

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[50] According to superstar Mohanlal, it is the *kootayma (cooperation unity)* that sustains the industry. One of the points that he stressed during the press conferences held in the midst of the film industry crisis.

[51] Just like their Tamil and Mumbai counterparts. "AMMA Keen on Talks, Film Chamber SaysNo", *The Hindu* (Kochi edn.), May16,2004, <http://www.hindu.com/2004/05/16/stories/2004051601760500.htm>as on December 10, 2004.

[52] Prema Manmadhan, "New Norms for Cine Field", *The Hindu* (Kochi edn.), December 26, 2002, <http://www.hinduonnet.com/thehindu/mp/2002/12/26/stories/2002122601210100.htm> as on April 10, 2004.

[53] Entered into on 13th of December 2002, Friday. The signatories to the same were Sri Siyad Kokker on behalf of the chamber, Sri K.G.George on behalf of MACTA and Sri Mammooty on behalf of the AMMA. Bulletin brought out by the chamber during the crisis detailing and reminding the industry that the AMMA was breaking its word on the issue by indulging in stage shows that had been banned in terms of the agreement. Courtesy: The Kerala Film Chamber of Commerce Bulletin.

assistants and other personnel that the performing artist could bring along, the agreement also stipulated that the script should be finalized before the shooting commences. Most importantly the provision with respect to script marks a big change to the manner of functioning of the traditional film industry. Importantly the director, scriptwriter, and producer or the production supervisor on behalf of the producer will have to testify the Script to the Technicians Association. It is only on the basis of the No Objection Certificate provided by MACTA that the shooting can be commenced. Most importantly when the film arrives for title registration at the film chamber, the producer will have to give an assurance that the respective producer has engaged only the members of MACTA. Those of the new comers will at least need to take a temporary or provisional membership of the technicians association. This is a significant clause, which forbids engagement of outside hands, and therefore the security afforded by the association cannot be circumvented. Another significant clause is the complete embargo on the producers, distributors and exhibitors in engaging in television production. Most importantly it has been stipulated that the producers while engaging artistes or technicians should enter into written agreements with them. (Though they had not decided the composition of the agreement). The producers also entered into an agreement with the artistes[54] in the Malayalam film industry. The leading actors and actresses or those with equal importance should stay away from appearing in television serials and regular shows. The same would be brought to the notice of the association of Malayalam movie artists and the latter is expected to take due steps in this regard. Other than the front; line actors others must see to it that they do not disturb the call sheet commitments given to films producers and if any disturbance to the shooting schedule happens then the same would be communicated to AMMA to take action. It is mandatory that call sheets are procured from the artists with their signatures on the same and this is applicable to all artists bereft of any distinctions. AMMA is expected to take action against these artistes who are reluctant to sign on the call sheet to the concerned producer.

Most importantly the artistes who are engaged to be acting for any producer are expected to be members of the AMMA. It is for the producers to make sure that

[54] Kerala Film Chamber of Commerce Bulletin, 13-12-2003, p.10.

the artiste is a member of AMMA or not. If not, then if the artiste approaches the association for membership then the association shall certainly make an award to this effect. However of late there is a rethinking on this from the AMMA circles. The cine artistes are restrained from either producing any television serials or from appearing in any advertisement on behalf of any of tem. Actors who are receiving more than rupees 50000 for a film were to reduce their remuneration 25% to 30%. The remuneration should not be increased for the next two years. Those who are not amenable to this would be liable to action by the chamber and AMMA.

It has been agreed that that up to 2 lakhs should be paid to the artists at the time of shooting and dubbing and those who are to earn more than rupees 2 lakhs are to be paid 2/3rd at the time of shooting and dubbing and the rest 1/3rd only in the event of the producer producing the lab letter to the chamber and it would be the responsibility of the chamber to see to it that the rest of the amount is paid to the concerned artiste.

Most significantly, the agreement mandated the need for written agreements like in the past in order to protect the interests of the either side and the written agreement must include the date, the remuneration agreed upon and a copy of the same should be given to the producers association, the film chamber and the artists association. Fund raising programs conducted by AMMA as well as MACTA should have the permission of AMMA and the chamber. The artists and the technicians are expected to desist from cinema-oriented programs and avoid giving regular interviews to the television[55].

This agreement did not hold well with the artistes deciding to unilaterally hold stage shows to be eventually telecast on the channels for raising funds for the welfare of the artists. This led to a standoff between the artistes and the chamber. Shooting came to a standstill for well over three months throwing the industry into a grave crisis. The episode also saw schisms in the artists unity where in a significant minority of actors decided to sign and stick to the agreement insisted upon by the film chamber[56]. They found nothing wrong with the terms of

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[55] The Agreement was signed on behalf of the Chamber by T.T. Baby, on behalf of AMMA by Sri Mammooty and on behalf of MACTA by Sri Sibi Malayyil.

[56] Vipin V. Nair, "Film Industry in a Soup", *The Hindu Business Line*, April 21, 2004, <http://www.thehindubusinessline.com/2004/04/21/stories/2004042101111700.htm> as on April 22, 2004.

restriction imposed upon stage shows or insistence upon arbitration. This led to the artists' association threatening to take action against them[57]. The episode brought to the fore the helplessness of the government to bring the parties to the negotiating table[58]. The government maintained that it had intervened only because of the lives of innumerable workers that were at stake. This revealed the attitude and the seriousness with which the government of the state perceived the problems of the performing artists. While the artistes were keen on government intervention into the problem, the chamber was not inclined for the same.

The episode also brought to the fore the indignation among the artists for a fair level playing field and the question whether the chamber was imposing conditions fairly and whether a unilateral imposition could be termed as the customary pattern of the industry.[59] The episode also revealed the divide in the film industry between the various constituents of creative bloc like the artists and the technicians. The technicians association was staunchly behind the Chamber and found nothing wrong with the conditions imposed. Further they also appropriated themselves to the mantle of creative contributors and the artists as being merely the performers.[60] The incident also showed that it was the artistes who yearned more for governmental intervention than the coterie of producers.[61]

The episode revealed the fact that the formulae (the agreements entered into) as a panacea for all the ills besetting the film industry in the current circumstances lay elsewhere. It also points out the fact that the desperate film industry players were forking out solutions by even riding rough shod on the rights of the artist and technicians to practice their profession and trade that verges on anti competitive practices thereby perpetrating likely violations of the principles of restraint of trade and unfair practices. Instead of adapting to change in the entertainment

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[57] "Prithviraj to Accept Film Chamber's Conditions to Act", *The Times of India*, April 29, 2004, <http://timesofindia.indiatimes.com/articleshow/649023.cms> as on December 10, 2004.

[58] "AMMA Keen on Talks, Artistes says No", *The Hindu*, (Online-edn.), May 16th, 2004, <http://www.hindu.com/2004/05/16/stories/2004051601760500.htm > as on 1st January 2005.

[59] "Artistes Being Blamed for the Crisis", *The Hindu*, (Online–edn.), May 7th, 2004, <http://www.hindu.com/2004/05/07/stories/2004050710210400.htm > as on 1st January 2005.

[60] "Crisis Deepens as AMMA begins Rehearsals", *The Hindu*, (Online edn.), 3rd March, 2004, <http://www.hindu.com/2004/03/03/stories/2004030307530400.htm > as on 1st January ,2005.

[61] "AMMA Keen on Talks, Film Chamber Says No", *The Hindu*, (Kochi edn.), May 16, 2004, <http://www.hindu.com/2004/05/16/stories/2004051601760500.htm> as on December 10, 2004.

environment, the film producers are trying to take an intimidating approach towards the television medium and the artists' freedom to creativity and practice of profession. Nowhere in the world where in collective bargaining agreements have been entered into has such a curb on the freedom of the artists been imposed even if on the plank of self-regulation.

The aforementioned state of affairs in the Malayalam film industry is symptomatic of the state of affairs in the film industry all over the country.[62] The point is that it is only the episode in the Malayalam film industry in recent times that these issues have surfaced out into the open as a stand off. It is noteworthy that other than prescribe the restrictions on the artistes there is very little in the agreement regarding the duties of the producers towards the artists working in the film. The issues such as restraint of trade or unauthorized exploitation by the producer have not yet formed part of issues discussed in the film industry. It is thus not surprising that these measures are turning up to be adhoc and falling short of being a long term solution to the malady afflicting a sick film industry. The real solutions to artists bringing down their demands of increased remuneration lies in providing them long term financial, economic and social security with a sense of certainty.

Practices and Working Conditions in the Film Industry

There are fairly uniform impressions of the form of practices and working conditions in the south Indian film industry and in the Western film industry in India and no indications of any divergence in trends in the rest.[63] While written

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[62] Paraminder Vir, John Woodward and Neil Watson, *The Indian Media and Entertainment Industry*, available at <http://www.ukfilmcouncil.org.uk/filmindustry/india/> as on December 1, 2004.

[63] The following assessment of practices is based on interviews and doctrinal material gathered from the individuals and organizations in the film industry. A model questionnaire concerning core issues was followed during the interviews to gauge the practices in the film industry. The same was adapted to suit the individual and the organization. See **Annexure I**.,p.XII for the model Questionnaire for interview. The Interviewees included Sri Adam Ayub (Director, Actor and Producer and founder President CONTACT), Ms. Anupama (Asst. Director), Sri Anwar (Programme Producer -Doordarshan), Ashok.k.Jagtap (President, Cine Musicians Union), Balan K.C.N (Secretary Junior Artists Association). Bhagyalakshmi(Dubbing and Voice Artist), Chandrasekhar Gourishankar Vaidya (veteran Director, producer and Actor and Office bearer of Employees Associations) , Devanand (veteran Actor ,Producer and Director), Dinakar Choudhary (Secretary General IMPPA), Favio D'souza (C.E.O. , IMI), George, K.G.(Veteran Director and President of MACTA), Glen(Senior Junior Artiste),), Himanshu Bhatt (Singer,Hon.Secretary AIFEC and President Cine Singers Association), Haripad Soman *(f.n contd. on next page)*

agreements have been desired by almost all representative fronts of the film artistes, there has been little practical adherence to the same in the film industry. Both the artist as well as the producers has only tried to evade any written obligation considering the fact that any written obligation could inconvenience the multiple assignments that they regularly enter into and the haphazard manner of executing them. There is nothing in the nature of a formal professional practice in the film industry. All understandings are based on an attitude of give and take. There could be certain transactions where in work is executed on the basis of written understanding and standardized procedures but mainly the dealings are based on mutual goodwill and cooperation.[64] It is an environment in which informal relationships thrive. Even if a written agreement is entered into between the performing artist and the film producer, the terms would be make believe and the sum to be paid would be a shade of what is really transacted. There is no law that requires the contracts to be mandatorily written. The organizations do not scrutinize that the same is carried in deed. Even if there are stipulations in understandings between artists' organizations and the producers' organizations that there shall be a written agreement, it is rarely that this is carried out in true spirit of the agreement. It is observed more in breach. While the need for a written agreement might have been expressed wherever there has been any organizational effort, at a pan Indian level, the expression that best describes the relationship in the film industry is that of a 'gentleman's word'.

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veteran dubbing Artiste and Supporting actor Idavella Babu (Actor and J. Secretary AMMA), Jaisheel Suvarna (voice Artist and office bearer –AVA), Jalabala Vaidya (Actress and Theater Personality), Janani Ravichandar (Asst. Producer), John Mathew Mathan (Director and Producer), Jose Prakash(Veteran Actor and Producer), Krishna Das Ace percussionist *Edakka* Player), Late Smt. Leela, P. (veteran playback and recording artist), Louis Mathew (Programme Officer Chalachitra Academy) , S.Chandran(Exhibitor ,Producer & Office bearer ,Distributors Association), Mohan , Omana T.R, Raja (President of Junior Artistes Association),Rajeev Menon (Secretary CINTAA) , Rajeev Ranga (ex-President Cine Dancers Association Mumbai) , Rajendra Babu (Script writer and Office bearer Malayalam Chalachitra Parishad), Rakesh Nigam (C.E.O. ,IPRS), Rana Prathap (Programme Officer A.I.R.), Rasheed Mehtha (Movie Stunt Artistes Association) , Rita Mehta(voice artist), Selvaraj (Director and Office Bearer) ,Sampath kumar (Actor), Shivlal Suvarna (dubbing and voice artist) , Sonic, O.P.(music composer), Sri Madhu (Veteran actor ,producer and Director), Thankamma Shetty (Secretary of AIMPTP), Theodore Bhaskaran (Film Historian and Author), Upendra Channana (Secretary of Indian Film Directors Association), Vaudevan,T.E.(Veteran Producer), Lt. K.N.Venkateswaran (General Manager ,South Indian Film Chamber of Commerce) , Vishnu Sharma(Voice Artist), Vishwas Njarakkal (Actor).

[64] *Ibid.* While there was a broad concurrence of opinion cited below by all those interviewed in respect of the following inferences, some of the names of hose interviewed are cited along with the inferences.

The agreement is mostly for the payment of a fixed amount for the labor rendered by the performing artist and it is rare and restricted to the superstars that additional stipulations granting any other means of gratification is mentioned.[65] Like for instance in exceptional circumstances, through the grant of satellite rights or any particular territorial rights. For the vast majority of artists there is no practice of any repetitive income from any exploitation made of the film. Once the film is made or the acting is rendered then the rights are transferred to the producer and he is the final owner of the film. The concept is not as well articulated; it is important to note that those in the industry only state that there is no further right for the artist generally and they do not speak in the jargon of transfer of rights.

The actors are scarcely aware of the legal issues or the law on the point, as they do not bother about the same. Most of the actors do not bother about these technicalities and consider themselves lucky with the opportunities that they get. While a rigorous regime that follows written agreements and formal contracts would surely help when defaults are made with respect to the promises, a lot of features have to change in the industry if this is to happen, like for instance the pattern of finance in the film industry, the incidence and the manner of tackling piracy etc. In circumstances where in the film industry is fighting against heavy odds there is definitely no room for these honest practices as no one with 'good' money would be willing to invest in a risk borne industry.

Any dispute with respect to the work get settled through mediation rather than through any resort to the formal channels of settlement. The artist represents to the organization, which intervenes in case any request or complaint is made to it. In most cases the issues are settled mutually without recourse to the courts. The artist tries to avoid raising issues in these circumstances because he could be jeopardizing his chances in the film industry *vis a vis* the same producer or other producers in the industry unless his bargaining power in the industry is beyond these pressures. Boycott of artists are normal practices if they do not bend to the whims and dictates of the industry.

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[65] Interview with Sri Edavela Babu, Joint Secretary of AMMA on 25-11-2004.

Since the commencement of independent production in the film industry varied trends can be seen with respect to practices in the engagement of the artists. Both written and oral agreements are part of the practices with respect to the engagement of the performing artist in the film industry.[66] The practices varied according to the stature of the artist. The written agreement (if it was resorted to) did not have a standard format and included usually a letterhead with dates for the shooting and the payment made.[67] The payment was made initially with an advance; the rest made in scheduled payments with the final installment to be paid either before or after the dubbing was over. Any delay on the part of the producers to execute the contract was adjusted and accommodated between the artiste and the producer. There was no hard and fast rule in this regard. A statement of balance used to be taken from the producer before the dubbing was over. Thus there was accountability with regard to the payments that was received from the producer. As there was a written instrument there was no opportunity to default nor would there be any ambiguity and misunderstanding as to the payments made or to be made in the future.[68] The remuneration has always been fixed. The need for formalities depended on the standing of the star rather than any standardized observance and these varied from actor to actor according to the respect commanded by the artiste. Thus while the stars do not have a bother, the other artistes are insecure with regard to the payment promised.

There is no mandatory dictum, stricture or a statutory rule demanding that the agreements should be in writing. The agreement is drawn between the producer of the film and the performing artist. Most of the deals are made on the basis of informal promises based on mutual accommodation and understanding. In its most informal form as an oral understanding even the date and the period of the project are tentative or not discussed. The film actor merely accepts the token

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[66] Though the statements are contradictory and there appears to have been an incidence of both versions of contract, nevertheless there appears to have been a greater incidence of written contracts before the mid seventies at least in the south Indian film industry.

[67] This seems to be more of a statement of accounts for accountability rather than any agreement with respect to the work done. But generally even that was a rarity. Interview with Madhu on July 1st 2003 at Trivandrum.

[68] But versions differ depending on the category occupied by the film artiste. Interview with Sri Madhu of the Malayalam film industry who was a star in his own right during his professional days. Sri Madhu began his career in the film industry in the 1962 at the age of 29 after passing out from the National School of Drama, New Delhi under *Chandrathara* productions.

sum of advance agreeing to work for the particular banner or producer. Thus the commitment is to execute the work proposed at some point of time and to produce it in mutual convenience. The actor may not even know of the story line or as to who the co actors are and even his own role might be ambiguous and hazy. In case of default very rarely are courts resorted to as a measure of performance of the oral agreement. Informal interventions are made by friends and those within the profession to reach an amicable settlement in the matter. There is no bar to the artiste taking up simultaneous assignments provided he is available when required and these considerations are all flexible with compromises being made. Thus it can be inferred that there is only fixed remuneration in the film for the actor and that is the accepted practice. There is no practice of deferred payment (back end payment) or increment based on the exploitation or on the profits made when the film is put to a new use or exploited on another medium. The stars could raise their remuneration prior to the shooting if they have prior intimation or understanding that the film be dubbed into other languages. But scarcely has any objection been raised when the same film is being dubbed into another language. When the same film script is being re-shot in another language with the same star cast, the stars can demand another remuneration, as it is a new film altogether for which their acting skills are put to test all over again. The presumptive practice has been that the performer has no lien on his labor or no further right on his performance once he has received his down payment or the fixed sum in installments. The accepted practice or norm being that all the payments must have been received by the time the film is processed at the lab.[69]

The Superstars and Contracts in the Film Industry

Contracts and privileges for the film artiste vary according to the category to which the artist belongs in the film industry. The status of the main artistes and those enjoyed by others vary. The bargaining position is stronger for the former and therefore both with respect to remuneration and the working conditions the main artists are in an advantageous position. This categorization is not an arbitrary one made by any particular individual or coterie rather it emanates from

[69] Interview with Sri Sampathan, Manager of FEFSI on the 11th September 2003.

the popular support among the filmgoers in the country[70]. As long as a film artiste commands a following of fans at the box office, he is considered as a major artiste. The super stars are the crowd pullers many of whom are the reason for the story rather than the other way around. They can dictate their price according to the estimate of the popularity and likely market of the film. The manner of payment can also be drawn according to their preferences, as most often the producer would not be able to meet the cost that has to be initially incurred as star cost. In order to facilitate payment in such cases, the agreements are drawn up which assign exploitative rights to the artist. Either this can be in terms of a proportion of returns from the market or it can be in terms of returns from the territory or it can be in terms of the returns from a medium of exploitation. This arrangement is mostly only in lieu of a fixed amount and not any recognition of a royalty based system based on the notions of intellectual property in the performance. It can be drawn up also in addition to a payment of an agreed fixed sum depending on the demand of the actor and the contract drawn up. There is no general notion of any payment being paid only upon the success of the film in the market or on the basis of a percentage of the collections in the market where the film is exhibited. The likelihood of such contracts being drawn up is with respect to the top stars who cannot be afforded by the producers.[71] The stars of regional films command anything between 25 lakhs upwards per film. Loose estimates hover in the region of 2 crores for some of the bigger regional film stars in markets like Tamilnadu. The stars on the national platform like the film industry in the *bollywood* command anything beyond this limit. Therefore with respect to the hot stars in the Indian film world different models of agreements or rather packages are being tried out. The stars take into account all forms of exploitation for the present and the future before striking a deal. They are more well advised and know the true exploitation possibilities to quote a fair return for their following in the market. Thus a trend of the producers bearing less of the initial burden owing to star costs has been offset by these arrangements that includes the residual payment based on mutual contracts. There is no customary practice of

[70] In this respect it can be said that there is an element of honesty in the film industry.

[71] One live instance of the agreements with respect to the mode of payment has been illustrated in *Fortune Films* v. *Devanand*, AIR 1978 Bom.17 where in payment was to be made in LIC annuity policies. Megastars like Rajani Kanth (for the film Baba) and Amithab Bachchan (for the film Boom), Aamir Khan (for the film Mangal Pandey) have received remuneration by way of satellite rights and overseas rights or territorial rights.

residual payments in India rather such mechanisms are innovations on the basis of individual contracts.

Problems Facing the Artists

The problem of dishonored payments and cheques occurs frequently in the film industry. This is attributed to the producers' inexperience or their lack of credibility in the film industry. Much of the work in the film industry is done on the basis of personal relationships. Instances of non-payment or cheque bouncing are not resolved by recourse to courts but mediators are called in to settle the issue.[72] The mediators can either be individuals or organizations that represent the performer.[73] The disadvantage that does not inspire litigants to seek judicial intervention can be attributed to the long time consumed by the courts for resolution of the dispute. Apart from the very well known stars who can demand and dictate the bargain, the others who perform above the rank of juniors and the extras do not enjoy the security of proper payment nor the representative valor of the trade unions. It is heart rending that one can even find the artistes with over 25 years of standing dependent on the industry still going without payment for the opportunity or negligibly paid as against what was originally promised to them.[74] There are those who are wholly dependent on the film industry as they left their lucrative stage and other professional talents to the vagaries of the film world. Thus there is a broad category that suffers economically and is prone to exploitation. In spite of the huge banners under which they have had to work, their remuneration for small character roles was in the range of Rs. 300 to Rs. 500 per day (even today) and not infrequently nothing at all. The business relationships are based on the personal understanding and what is given cannot be called remuneration rather it can be considered as an informal gift. The

[72] Even superstars have been victims of bounced cheques. In fact Dileep has had to take recourse to the courts for a cheque that did not come good at the bank from Dinesh pannicker supposedly a safe and credible producer with several films to his credit.

[73] Today AMMA, representing Malayalam film artistes, takes up the cause of the artists who face any of the problems aforementioned.

[74] Interview with Haripad Soman, on 2nd July 2003 at Trivandrum and at Chennai on 11th of September, 2003 at Chennai. An actor in around 200 films as both dubbing artiste and a performing artist in the Malayalam film industry based in madras. But not in the star or popular supporting actor category. Today he lives with a hand to mouth existence in a one-room apartment in Chennai along with his wife and two teenage children ready to do any job that would come his way.

payment ranges from Rs. 3000 to 5000 and it is unrelated to the duration of engagement. It is usually the manager who comes and calls for an assignment. There were no written agreements and it was all orally agreed between the manager or the producer and the character artiste. As for dubbing assignments there was a marginal difference between the remuneration when the voice was dubbed for the superstar and the rest. There was a slight increase when it was to be dubbed from one language to another.

In case of disputes the matter would go to the union and it is on the basis of a compromise that the issue is resolved. That is if it were Rs. 5000 that was promised then it could come down to Rs. 3000 when the dispute was settled and 10 percent would be given to the union for their services. However seeking the mediation services of the union is considered as a minus mark in the film industry and the future prospects for these artistes in the film industry (particularly those in the non superstar and non-junior categories) would be in peril. The artistes feel that neither the institutional mechanisms nor legal regulations work in the film industry.

The unions do not make or impose mandatory observance of having a written contract in order to uphold the claims of the actors under the contract. The voluntary organizations formed for the protection do not inspire much confidence either. Their membership fee is in itself a disincentive to join.[75]Even when the films in which they essayed a role has done exceedingly well and have topped the box office charts, the artiste's have not received anything more than what he received as a paltry one time payment of a fixed sum.[76]

The artists do not enjoy any economic or social security. Presently there is no assured pension or any other scheme from the state or the union government. However certain voluntary artistes organizations like AMMA[77] have begun making provisions for pension (about 1000 rupees). Though it is quiet negligible. It is provided out of the interest accrued from the amount raised out of the performances and functions (stage shows) conducted by the organizations. The

[75] While the Malayalam movie artists association charges a one-time fee of 7000 rupees and a yearly fee of Rs. 600 the Chalachitra Parishad charges a sum of Rs. 200.

[76] Sri Haripad Soman began his career in the year 1975 under director Sreekumaran Thambi, a well-known film director. He has acted in numerous films in character roles that have gone on to become super jubilee hits in the Malayalam film industry under well-known banners. *Yatra, Padayani, Hridayam Padum, Kallu Karthyani, Vandanam* and *Chitram* are some of them.

[77] Association of Malayalam Movie Artists (AMMA).

criteria to be fulfilled for eligibility can be unemployment or ill health. But the artiste does not become automatically eligible for the pension once he becomes a member. Rather he has to apply for pension and the office bearers in charge would process the application. There is considerable discretion whether to allot the pension to the applicant. The Artists considers this degrading to his status after having served so long in the industry [78]. The desperate artist is dependent on the help and kindness from others. The state has not yet begun to treat the artiste like any other employee in any industry. As the artists and the industry are contributing to the taxes, it is essential that they be supported during times of unemployment[79].

Generally there is no insurance during the course of the shoot. For instance, superstar Jayan (Malayalam film industry) who died while shooting for the film *Kollilakkam* was not covered by any insurance. There is neither any welfare fund nor any help otherwise. There is no institutionalized assured system for aid during unemployment.[80]

Thus the perils of the trade for the artiste reflect no standard practice nor mechanism to provide economic and employment security. Besides, there is no social security in the form of insurance or old age pension. Today there are organizations that upon their discretion come to the help of the artistes.[81] The organizations of the actors are not professionally organized and are not headed by those with a long-term vision[82]. A semblance of unity is not materializing. The star system is a major stumbling block for the unity.[83]

Though the question of pension, remuneration, medical and accident insurance, and the need for a legal framework have been discussed not much of a head way has been reached to see these being strictly put into practice at the

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[78] Interview with Jos Prakash on 24th November 2002 at Ernakulam.

[79] *Ibid.*

[80] If it is prevalent in tea plantations then why not in films asks the veteran actor Jos Prakash now aged 77 and disabled.

[81] AMMA and MACTA for the Malayalam film actor and the technicians. Such bodies exist in other languages as well. Most of them following the same modus of discretionary provision for help to the artistes who are their members depending on a lot of imponderables.

[82] The office bearers are amateurish and consequently the management is not at all well organized. The leadership including him was and is brainless to do it. Even as the president he was incapable to do it. All are selfish and not concerned about the rest. Even group insurance has to been taken up as an agenda. The reason is the star domination.

[83] Interview with Sri Jose Prakash on 24th November 2002 at Ernakulam. Before joining AMMA he was a member of the South Indian Artistes Association as well as the Dubbing Artists Association. Now he is 77 and one of the senior most artistes in the film Industry..

organizational level. In fact the reluctance to endorse safe contractual practices can be discerned in the attitude of artists as well as the producers. With the film industry being a safe haven to utilize unaccounted money, the hesitancy to have records of the transactions is easily explained. But this state if affairs helps only those in the higher layers of the star hierarchy. The lack of standard contracts hurts the interests of others who are either not paid or are inadequately paid. However the top stars would find this arrangement inconvenient as it would be constraining their professional commitments that are randomly entered into as adherence to written schedules would make the multiple commitments that they undertake at the same time unmanageable. Therefore the resultant state of affairs is in the interests of the top artistes as well as the producers to make quick money and not externally imposed by any interest I the film industry.

The Intellectual Property Framework Under the Present Conditions

The artistes and others opine that in these circumstances, the adoption of the intellectual property framework could be appropriate and desirable but not advisable under the present Indian conditions.[84] Many facets of the industry would have to be rectified in order to facilitate a residual or copyright model to function, beginning from the need for clean institutional finance to incorporation of provisions, transparency in contracts and legal safeguards and trustworthy collective administration mechanisms to bring about these changes.[85] Even if the envisaged structure would be helpful to the artists lower down, they would not be thinking beyond their chances in the film industry. The artistes would not be agreeable to a complete dependence on this model like for instance the idea of shared profits or delayed payments. As they would not trust any delayed payments in a country with a weak implementation infrastructure.[86] The existing awareness on these issues is very low and none among the artists have dwelled on these issues either casually or with seriousness or been involved at the organizational level.[87]

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[84] Based on the feedback and opinions from the aforementioned interviews and other data collected from the artistes, producers and directors in the film industry.

[85] Interview with Sri T.E.Vasudevan on 15-11-2001, 19 –11-2001 and on 25th April 2005.

[86] Almost all artistes and organizational heads have voiced this view.

[87] In the interactions by the research scholar with both artistes as well as different organizations this was a glaring factor. The priority given to this concept was low.

The understanding till now has been that the once the artist receives the remuneration for the skills in acting she has no longer any ownership over the product. No sentimental or any other moral claim attaches to the product. They have as yet not recognized any moral claim in this regard. There is as yet no expectation of authorship nor have these issues been discussed.

The attitude is one of pessimism under the conditions prevalent in the industry today.[88] It is felt that though a different format of agreement with the producer would be desirable nevertheless it would not be practical in our country. The size and the economics of the film industry varies in each regional language and therefore the model would not work as it does in western countries with a world wide market. Importantly it is believed that even if such a system comes into vogue where in the artist would retain his rights in the performance unless assigned, the practice would see to it that he assigns every right in the performance prior to the signing of the movie. The superstars who get their due without fail would not be requiring the help of these provisions and would not be too keen to have agreements in black and white. As for the other artists they would continue to be at the mercy of the producers as they would have to agree to an all out assignment of their rights if any to be cast in the project.

Further unless and until the chain of distribution and exhibition of films in the country is straightforward and transparent the artist would find it increasingly difficult to follow up and administer the rights if ever he licenses the rights granted to him. The organizations at present representing the workers or the artistes cannot be trusted with such an onerous responsibility as they have been inefficient in looking after the responsibilities entrusted to them in the past. In such circumstances, the artists would have no interest in sharing the risk of the film as getting any money in the future is out of question and practically impossible in India. Further the data regarding each and every transaction would be hard to come by. The producers themselves do not have a copyright society to administer the exploitation of their works or scrutinize the same. They do so individually. Though this includes even the web cast and the Internet rights, it is dependent on the individual assignment and licensing of rights. Therefore there is

[88] While all the views were similar, yesteryear superstar of the Malayalam films Sri Madhu was candid in his inference that if such rights were provided by statute hypothetically then the industry would resort to an outright assignment of rights.

no body at present to follow up and check unauthorized exploitation or grant collective licenses for the audiovisual.[89] The producers associations do not insist to their members that they need to compulsory deal with written contracts.[90]

The conventional practice in the film industry suggests that once the performing artist consents and performs then the recorded performance is the property of the producer of the film. This is however subject to contract to the contrary.[91] Drawing up a contract to contrary depends on the star value of the performing artist. Thus there are no notions of limited contractual extent or exploitation in favor of the performing artist rather only if there is a contract to contrary is any rights saved for the performer. Interestingly even Sri Devanand who first explored the possibility of a statutory right for performers right by resort to the court is of the opinion that contractual specification is essential if rights are to be construed in favor of the artists as the industry practices presume otherwise.

The transactions between the artists in India and the foreign production companies do not inspire much confidence. Even production companies that come from countries with rights for performers do not extend the same by contract to performers in India when they use the manpower on the Indian soil.[92] For instance the Actor Viswas Njarackal who acted exceptionally in the film "*Marana Simhasanam*" or "The Throne of Death" received a payment in the range of a few thousand rupees alone.[93] It was a production company based in England run by an Indian (Produced by Preeya Nair and Murali Nair, Director) who received all the accolades and cash rewards even at such acclaimed shows such as Cannes. However there was not even a written contract entered into with the artistes and apparently the film was completed on a shoestring budget. On the other hand a performer in England would have to be paid the residuals

[89] Interview with Dinakar Chowdhary, Secretary General, Indian Motion Picture Producers Association (IMPPA), on 22-8-2005 at Mumbai.
[90] Interview with Thankamma Shetty, Secretary, Association of Motion Pictures and Television Producers Association (AMPTPA), on 1st September 2005 at Mumbai.
[91] Interview with Sri Devanand, a superstar actor, producer and director for nearly three fourths of a century, at Mumbai, on the 20th of August 2005. He began his career as an actor for the Prabhath Studios in the year 1944 at a monthly salary of Rs. 400.
[92] See "The Face of Misery", *The New Indian Express* (Kochi edn.), May 8th 2004, it carried a photograph of the Actor, Sri Viswas Njarackal at a relief camp trying to get a square meal per day.
[93] Interview with Viswas Njarackal at his tented residence right in the middle of a flooded paddy field at Njarackal, Vypeen, Kerala on 1st December, 2001.

according to the collectively bargained contracts as well as the statutory rights. The foreign television channels operating in India taking advantage of the liberalized environment also takes advantage of the absence of a legal regime protecting the performer. The only saving grace being that they insist on a written agreement with a clause that retains no rights in the performer for a single payment with remuneration based on episodes or work per day.[94]

As for the moral rights of the artists, there is considerable difficulty for the artist to know how the treatment is going to be like considering the fact that the script is rarely ready prior to the signing for the film. There is a lot of distortion and mutilation in the roles essayed by the artists.[95] Further there is the practice of intermediates incorporating vulgar and obscene bits into the reels too. The present convention is that the producer is provided with all or entrusted with the right to make any changes that he considers essential to the film or modification that he considers essential to the film. The presumption can only be negated following a contract to the contrary that is proved by the artist. The use of the body double too falls into the aforementioned category. If the actor finds anything undesirable in the enactment by his body double then there must be a mechanism to heed his remonstrance. The artist is not consulted before any change is made in respect of his performance. The unions of the artists' have begun to think about these issues. Though there is nothing expressed in the rules that credit lines should be provided, the practice has come to observe but not uniformly as of a right. It is left to the discretion of the producer. The playback artists are equally concerned about remixing that has been rampant where in the originals sung by them are made often distorted and fused with other new rhythms and backgrounds[96]. These songs are also juxtaposed on new audiovisuals without seeking the concurrence of the original playback artistes

[94] Interview with Vishnu Sharma, Office Bearer AVA at Mumbai on the 10th of August, 2005 and with Ms Anupama (Asst Director)

[95] The Manisha Koirala issue reflected the helplessness of the law to precisely help out the performing artist in this regard.

[96] See the opinion of Asha Bhosle who says that the permission of the singers also should be taken when remixes are made. See in *IPRS Leads Revolt Against Remixes*, IPRS, Mumbai.

using their own voices or a version recording is done. There is no one to take any initiative in this regard.[97]

The artists are not happy with the film industry at present. The center or the state government is not putting in any money into the film industry, as they are willing to do in any other industry. The state does not make nor does it exhibit films. The entertainment tax does not go back to the industry.[98] Only petty rations like the awards for the best film and the best artists are distributed yearly. The term Industry is only on paper. In other industries a lot of benefits are enjoyed by the labor. In spite of several deputations having gone to the government concerning all these issues there has not been any action so far. There is a need for statutory streamlining as when the law is violated then the artist in the industry can fight on a legal platform.

There should be a right for the performer in the repeated exhibition and derived exploitation unless the contract specifically says otherwise. But the circumstances are such that the producer himself does not benefit from the deal, as at present he does not receive profitable returns from his investment either due to the travails in the cinema industry or because of systemic faults. With respect to derived exploitation from other media, as the exploitation is from songs and scenes, there should be some kind of remunerative arrangement as the channels are earning heavy advertisement revenue. For instance films given to channels for five years are telecast as feature films as well as used for insertions in several other film based programs any number of times. Despite these opportunities, the artist does not receive any returns for his labor.

There is a need for legal awareness among the members in the industry. Even the producers are not taking care to see that the new media like satellite television does not exploit them with an unfair bargain. Initially they used to part with rights to telecast to the satellite companies for as low as Rs.15000/- for a

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[97] Based on the interview with Late Srimathi P.Leela on the 27th of October 2003 in Chennai. She recollected that while she was on the payroll of Columbia Records, artistes such as M.S.Subhalakdhmi was with H.M.V. She has had a prolific career both as a play back singer and as a recording artist in all South Indian languages. A veteran singer, since the inception of the playback singing in the south Indian film industry from the year 1947 onwards. She began to sing at the age of 12 in the 1944. But her break was in the year 1947 in the film *Kanyadanam*.

[98] Interview with Jos Prakash on 24th November 2002 at Ernakulam.

period of five to fifteen years[99]. Now that the possibilities of the new media like cable television or direct to home have become more certain separate commercial treatment for each exploitation should be preferred. In older times the cheque of the music company used to arrive with 5 percent going to the producer and 5% to the singer and the rest to the gramophone company. Today in spite of the tape taking over the cheque with the royalty does not arrive.[100]

In spite of the uncertainties in the model of residual remuneration, the artists would certainly prefer licensing rather than out right transfer. Either there could be rights or contractual instruments – like those enjoyed by certain superstars like Rajnikanth. A model of joint ownership in the film along with the producer is not considered advantageous for the artiste. The percentage royalty formulae would be agreeable provided it is initially met with a maximum single remuneration. The artists prefer a maximum remuneration complemented with a percentage from the earnings because it is neither feasible nor convenient to look to the producer for a punctual share of profits. [101] The same disadvantage is there with regard to the residual payment system after a fixed sum has been paid. But the substantial upfront payment diminishes the latent risk in mopping up the returns arising from the exploitation.

There is a lot of unsolicited and non-remunerative exploitation of performances without the approval of the artists. There should be a law for restraining the use of songs or scenes for commercial purposes through wrongful unsolicited insertions. It must be considered as a breach of contract unless there is specific approval for the same. These additional avenues of commercial opportunity were never contemplated by the performing artiste in films at the time of signing the contract or these terms never found expression in the implied or express contractual terms.

Collective bargaining is preferable to legal mechanisms and statutory provisions [102] as the latter has not proved to deliver results in the short term. The recourse to the courts would be inadvisable as it could take up to twelve years to resolve the issue. There can also be change in the minds of the people and change in the

[99] Interview with Sri T.E.Vasudevan on the 15th and 19th of November 2003..

[100] Sri Jos Prakash used to get Rs. 500 for recording for a film disc.

[101] Minimum remuneration guarantee on the basis of seniority or ability would be difficult. Even a carpenter gets Rs.250 daily.

[102] Interview with Jos Prakash, veteran actor 24-11-2002 at Ernakulam.

circumstances and fortunes in the industry. Legal framework could turn out to be rigid in this context. Even now issues are being settled through collective bargaining and mediations. Voluntary mediation and self-regulations would be desirable though minimum legal safeguards would be welcome.

Though the idea of a royalty system and the collecting society administering the same is desirable considering the fact that the old age, unemployment and illness are realities with no resolution in sight for the artistes at present, the artists are skeptical to the idea of the royalty based system of remuneration.[103] The artistes fear that such a society would not be managed efficiently and there would not be trust worthy distribution of the royalties received. This is based on their experiences with the voluntary organizations in the past that have been representing their interests.[104] The functioning of the representative associations in the past does not bolster confidence in the artistes that a model of remuneration based on delayed payments would be efficiently implemented. They point out that when the down payment promises often do not get fulfilled then how can a system of delayed benefits be considered trustworthy.

The producer in the Indian film industry undergoes enormous amounts of stress in the process of reaching his product to the consumer[105]. Mostly the film producer is heavily indebted to the financiers at exorbitant rates of interest. There are frequent occasions where in the negative rights of the film is vested with the financier as security for the payment of liabilities by the producer. The consequences are that the producer becomes alienated from the product in the chain of relationship with the financier and the distributor. It is the financier who interacts with the film distributor. In order to realize the value from the money lent for the film the financier also deals with the same to the satellite channels with no hold on it for the producer. Thus at the practical level there is an alienation of the product in contrast to the legal and implied understanding about the ownership of the film.[106] The chain of transactions and the systems of commercial deals that

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[103] All the industry associations including the producers who were interviewed were not averse to the idea of residual payments in the collective agreements or statute but every one including the artists were apprehensive and had misgivings about the delayed payments and the transparency that was required including the infrastructure that was required to implement it efficiently.

[104] Interview with Actress T.R.Omana and others at Chennai on 24-10-2003.

[105] Interview with T.E. Vaudevan

[106] Interview with Director Selvaraj held on 14-9-2003 at Madras.

are entered into by the producers at present too would have to be standardized and made more transparent if the returns have to be honestly accounted for. Thus within the web of transactions, the notion of performers rights must be fused into these realities and dealings. If ever performer is to beget statutory residual rights his position must be safeguarded in instances where in the original producer has alienated or bartered away his own rights. The benefit of each transaction must also float down to the performer by means of presumptive norms transferring the performers rights along with that of the product to the new owners or exploiters. In other words a mere grant of rights to the performer would not do any good unless all the sectors from production to distribution to exhibition and marketing were standardized.

A point of concern at any future grant of rights in the nature of residuals has been that multiplicity of rights would need to be cleared and this could cause problems in the exploitation of the entertainment unless it was all bestowed for clearance under a single body. It is a matter of concern to them that the imposition ought not be at the cost of the interests of the lyricists, the composers and the publishers. There still exists reservation on the basic issue whether performing artists should be eligible for copyright or intellectual property protection. It is pointed out that other than follow the instructions of the music composer or the director the singer or the artists do not create any thing by themselves.[107] Both the producers as well as the co contributors like the composers and the lyricists question the claim by the artists towards a copyright.[108] This is on the basis that the artist does not make any creative contribution other than sing according to the dictates of the music composer. A most important argument being relied on by the music publisher with regard to film music is the lack of a direct contractual relationship (or privity of contract) with the contributors or artists to the film music[109]. The film producer is the person responsible for the rights of the music and he either validly licenses or assigns the rights to the music publisher. In fact there is the practice of the film producer indemnifying the assignee from any

[107] Interview with O.P.Sonic (Director-IPRS), Music Director and Hassan Kamaal (Chairman-IPRS), Lyricist at the IPRS office in Mumbai on the 10th of August 2005.

[108] Interview with Hasan kamaal (lyricist and writer)– Chairman, IPRS and O.P. Sonic(composer) (Director-IPRS) on the 10th August 2005.

[109] Interview with Favio D'Souza, C.E.O of Indian Music Industries, Mumbai, 29th August 2005 at Mumbai.

claims based on an agreement of guarantee. Therefore the music publisher claims to be least bothered with regard to the claims made by the artists or the lyricists or the composers to whom any thing might be due either based on the statute or based on the contract with the film producer. Till date there is no obvious deference shown to the designs of the Section 38. The counter question being raised is that if those who enjoy real copyright do not get their wholesome rights as prescribed by the Act then what about the performing artists who are provided with a special right alone. The law is replete with ambiguities. The position of the contributors have been further dampened by the case law pronounced by the Supreme Court in *IPRS* v. *Eastern India Motion Picture Association*, AIR 1977 SC 1443, which narrowly construed the right of the contributors who are otherwise vested with copyright. There is the need to have a re-look at the case law in the light of the changes made in the statute.[110] If those who enjoy real copyright do not get their wholesome rights as prescribed by the Act then what about the performing artists who are provided with a special right alone. The law is replete with ambiguities.[111]

It is important to note that the IPRS(Indian Performing Rights Society) as well as the Indian Music Industries have started to collectively license music distributed by means of webcasting or Internet streaming. However the performer does not receive any remuneration from these modes of unforeseen exploitation. This is despite the fact that the original contracts have never envisaged these technological means of exploitation.

An Analysis of the Content of Written Agreements

When the production company follows the mode of a written agreement with the artiste or any other contributor, there are common provisions, which are usually found in them[112]. The agreement mentions the name of the production company and the artiste or technician concerned. It is noteworthy that the agreement is for utilizing the services of the artist[113]. The agreement mentions a host of means to which the services would be applied that includes different languages (Indian),

[110] Interview with Rakesh Nigam, CEO of the IPRS, on the 10th of August 2005 at Mumbai.
[111] *Ibid.*
[112] The copy of a usual written agreement. Source FEFSI. See, **Annexure II**., p.XIV.
[113] Annexure II (i).

the technical application and also any devices. Thus unless qualified or restricted, the contract specifies and grants rights for a wide application. Importantly with respect to the payments only a single one-time payment of a fixed sum is stipulated though it maybe paid in installments before the release of the picture[114]. The dates have to be, mentioned and it should not be interfered with owing to the multi engagements. It is specifically mentioned that the dates are the essence of the agreement[115]. It is significant that it is specifically mentioned that with respect to the director and screenplay writer, the remuneration will include the dubbing and remake rights into other languages. It is restricted to the specified languages with regard to the artist. While the artist has to attend to the shooting, he does not have any say in the costumes, which fully rests with the discretion of the producer –director. The artist has no right to interfere with the making of the film other than follow the instructions of the producer / director[116]. In case of non-cooperation with the Director /producer the producer is vested with the right to dismiss the artist[117]. Significantly in case of dispute it is an alternate dispute forum of the producer's council that is preferred. Very importantly it is mentioned in the last line that all the rest of the terms and conditions would be as per the terms of practice trade.[118] From the agreement it is evident that there is neither mention of the right to the script nor any right to the credit or any right to be consulted or to the role. They are merely to do as is bid by the director or the producer once they have consented to serve for the amount. Most pivotally there is no mention about any intellectual property ingredient. However the extent has been mentioned which is unlimited. The final clause placing everything at the altar of practices of trade makes the conventional practices take over in issues where the agreement is silent.

The Performing Artist and Collective Agreements in the Film Industry

Just like the attempt to find traces of practices in the film industry that indicate any resemblance to those models being followed in the countries like United Kingdom, united states and France, it is important to weed through the standard agreements that have been formed amongst players in the industry to see

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[114] *Ibid.* Clause 1.
[115] Annexure II (ii). Clause 3.
[116] *Ibid.* Clause 7.
[117] *Ibid.* Clause 8.
[118] *Ibid.* Clause 10.

whether there are features that reflect a framework where in a intellectual property model would work. Artists other than the junior artists, the stunt artists, dubbing artists and the dancers are all treated equally in the fledgling culture of standard contractual practices taking root in the industry. There is no distinction between the superstars and character artistes with respect to the minimum guarantees to be enjoyed under the model agreements drawn up under the aegis of the Joint Action Committee. It is important to note that the performing artists in all the three industries taken for study do not enter into any collective bargaining agreement stipulating minimum wages. Other than the model agreement that evolved in the south Indian film industry and the general norms agreed upon between sectors in the industry there is no periodically renewable agreement of rates and conditions with the performing artists.[119] Interestingly out of the confrontationist atmosphere that prevailed in the south Indian film industry mainly between the trade unions and the producers there has emerged sample agreements pertaining to the performer artists as well. Though nothing is stated as to how this was formulated and who all were taken into confidence while this was being drawn up.[120] This appears to be courtesy the Telugu film producers' council and it has been referred to be kept as a guide while entering into an agreement with the artists.[121] The agreement is with regard to the artist on the one part and the producer on the other. (There is no definition as to which the artiste is to whom this agreement is supposed to apply to). The agreement does not seem to form a part of the agreements or memorandum of settlement that have been entered into between the joint action council and the diverse crafts under the aegis of the Commissioner of Labor, Tamilnadu. But it has been included as a reference guide. There appears to be no structured implementation format for the same. Other than reflecting the practice sentiments in the industry it cannot be said to do any thing more by way legal or dispute resolution recourse.

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[119] AMMA has entered into a 21-point charter along with MACTA and the Film Chamber. The CINTAA is affiliated to the Federation of Western India Cine Employees (FWICE).

[120] Joint Action Committee (JAC) had compiled all the agreements entered in the south Indian Film industry and published it in 1989 under the title JAC; the agreement is reviewed and revised every three years. *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989), p.14.

[121] This also dilutes the mandatory nature of the sample agreement in that as it is a guide it need not strictly followed.

The role that the artist is to portray in the picture is to be mentioned in the agreement. The agreement contains the details of the remuneration and the manner in which the same would have to be paid to the artist. The same has to be paid in convenient installments before the completion of the picture. The advance has to be paid together with the signature on this contract and the amount advanced is specified on the agreement entered into. The artist is expected to render services to the entire satisfaction of the producer. The artist would have to attend the shooting indoor and outdoor as per the confirmed call sheets that have been agreed mutually.

The artist also has to attend the rehearsals of both music as well as dialogues whenever required. In case of re-shooting and retakes on account of administrative reasons or from the censor board side the artist cannot ask for any extra remuneration. The producers are endowed with the full right to dub the picture into any other language and also the right to use the voice for both music as well as dialogue and the artists shall have no right to question the same. Even if the artist can dub his own voice the producer reserves the right to use some other voice to dub the same. Thus the artist does not retain any right to retain his own identity and original creativity and is fully at the mercy of the producer. There is not even a need to consult the artiste in this regard before the producer can take liberties with his performance. The artist is expected to obey the director and cannot conduct himself contrary to their instructions. -There are no exceptions to this contractual stipulations thus the artist would have to allow himself /herself to be used in the absence of a script in the manner as directed by the director or the producers. This is not desirable as there are no exceptions to these inflexible strictures even when what is demanded is unjust and contrary to dignity. The artiste was to be under the supervisory control of the producer or his nominees with regard to the work in the picture or the general behavior while in work.

Most importantly the producer reserved to himself the right to terminate the services of the artist without stating any reason if they are not satisfied with the artists work. The artists' services can be terminated if they suffer a loss of form or figure .any further remuneration would not be paid but the artist can retain what has been paid. However the decision is not hard and fast the decision thus

regard, in case of dispute would be taken by the joint coordination committee of the film producers council and cine artists association.

There is no instance or situation cited were in the artist can walk out of the production in disagreement with the producer. At least this circumstance has not been made part of the model agreement meant to guide the producers. Further the there is no time limit or duration for the work of the artist is completed or the number of calls sheets. There shall be an attempt to provide the artist with dates in advance. On which the artist shall be present on the sets and on the hour's specified. Thus even if the duration of the shooting extends for months or years the artist cannot complain unless the film is completed. Thus there is no security for the artist nor is there a definitiveness for the artist. This creates both financial and employment uncertainty. There is nothing in the agreement that reserves any right for the artist. The artist is considered as nothing more than a service provider employed by the producer for a contractually agreed sum of money. The bargain is heavily one sided with no discretionary or artistic and minimum rights for the artist.[122]There should not be any lapse on the part of the artist. Though this is the model rule. This might not be carried into practice in letter and spirit. But this certainly shows the way fir the trends and attitudes in the film industry with regard to the status and relationship between the producers and the actors.

In the western film sector under the general terms of the original agreement signed to which the CINTAA is also a signatory, certain clauses intend to set down norms of conduct pertaining to the industry. It is provided that it shall be the duty of the employers and their members on employment by them to issue in writing a contract of employment or letter of appointment with all necessary details unambiguously such as the date of commencement of unemployment, duration of employment, amount of emoluments, mode of payment, nature of work etc., and that the contract or letter of appointment shall be issued before the

[122] The artists have to wear such costumes as are selected and designed by the producer and the technicians for dance, makeup, hair styles, tailoring and playback etc. all these shall be at the discretion of the producers .any personnel at tenders would have to be paid for by the artist himself. Artist is not entitled to any special facilities like ac make up rooms, food and cigarettes, petrol etc.

commencement of the duties relating to the contract or letter of appointment.[123] This brings to fore the need for contract and the importance attached to the terms of the contract. In the absence of a contract, it is stipulated that the minimum terms of agreements would apply.[124] However this would not apply with respect to the performing artists as there is no minimum rate stipulated in this regard. Further though this rule is in existence there is no duress from the CINTAA that only written contracts should be followed.[125]

According to convention followed, in the absence of contracts and in case of disputes, rates that are contemporaneous with the times and standing of the artistes would be awarded.[126] It is significant that in the absence of any thing to the contrary, it is conventionally understood that the rights in the performance in the film pass over to the producer. In fact in a more colloquial sense once the performance is rendered, the produce of the labor belongs to the producer. There are no preordained norms or rules with respect to the manner in which the performance may be incorporated or used by the producer. Though complaints do often arise in this regard, it is resolved through the process of mediation.[127] In the Malayalam film industry as a result of the recent agreement between AMMA, MACTA And the film chamber written agreements have come to be considered as mandatory[128]. There is the need for call sheets to be signed. A most significant aspect is the need for the artiste to be a member of AMMA if they have to be in the industry. This points to the mandatory need for union membership. The manner of payments have been stipulated taking into account the phases of film

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[123] Clause (3) of the Agreement between Indian Motion Picture Producers' Association and the Film Producers Guild Of India Ltd. and the Federation of Western India Cine Employees, Bombay signed on 18th March 1966,p.2.

[124] *Ibid.* Clause (5) of the agreement.

[125] Interview with Rajeev Menon, Secretary, CINTAA, Mumbai on 3rd of August, 2005.

[126] Interview with Sri Rajeev Menon, Secretary on behalf of CINTAA at Mumbai on 3rd of August 2005. Based on interview with Sri Chandrasekhar (he has been an actor, producer and director and came to the film industry in the early forties as an extra). He is senior most member of the film industry a past office bearer of both CINTAA as well as Federation of Film Employees. Interviewed on the 3rd August 2005 in Mumbai.

[127] According to Rajeev Menon frequently on such issues such as treatment on the sets or the way the performance is sought to be used, the artistes do approach the association. But a compromise is worked out.

[128] Entered into on 13th of December 2002,Friday. The signatories to the same were Sri Siyad Kokker on behalf of the chamber, Sri K.G.George on behalf of MACTA and Sri Mammooty on behalf of the AMMA. Bulletin brought out by the chamber during the crisis detailing and reminding the industry that the AMMA was breaking its word on the issue by indulging in stage shows that had been banned in terms of the agreement. Courtesy: The Kerala Film Chamber of Commerce Bulletin.

production presently. It has been agreed that that up to 2 lakhs should be paid to the artists at the time of shooting and dubbing and those who are to earn more than rupees 2 lakhs are to be paid 2/3rd at the time of shooting and dubbing and the rest 1/3rd only in the event of the producer producing the lab letter to the chamber and it would be the responsibility of the chamber to see to it that the rest of the amount is paid to the concerned artiste. Thus it can be seen that all the major film producing industries in India display similar characteristics that profoundly for the purpose of this study includes the fact that the collective agreements or model –sample agreements do not exhibit any notion of residuals or intellectual property right being attributed to the performers performance.

There are no specific pronouncements regarding the credit lines or any need for permission to distort or manipulate the performances, though customary practices of trade has started providing the character artistes with a bylines. However it remains unclear in the Indian context whether it can be traced to any conventional right. It is however significant that in the absence of any contract the remuneration of the star would be depends on the contemporary rates for the artiste. This could mean the market value, which could be a sum, arrived by taking into account the diverse means of exploitation of the product and the likely extent of exploitation.

The Junior Artists

The junior artists form a significant segment of the performing artists in the audiovisual industry. Their importance has been evidenced by the early unionization by them both in the western as well as in the south Indian film industry[129]. It is of note that the categorization into major artists and junior artistes had taken place considerably early in the film industry. The criteria though a bit confusing when looked at objectively nevertheless points to the

[129] In the South Indian Film Industry in the aftermath of the deadlock between the various interests in particular the trade unions and the producing interests in the film industry in 1989 steps had been take in order to come to an agreement with respect to practices in the film industry. The agreement related to wages, the working conditions as well as the sections that would benefit from the same. *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989). These rules are always updated e very three years.

importance to actor owing to the following and the characters represented on screen. Thus the creative value of the performer is taken into account in this categorization. The benefits in terms of higher pay and working conditions differ between the major artists and the junior artists. The junior artists in turn have been further categorized according to their worth. This categorization is relevant as seen in the context of intellectual property attribution of rights in the demands creativity and originality. The practices of trade have already brought forth a distinction based on creative factor. The junior artists in contrast to main artists have been eligible to receive daily wages alone based on the hours of work and often on the kind of roles.[130]

A most significant highlight of the standards set has been that the producer shall have the inherent right to employ any person of his choice as union artist or artistes for the picture. The junior artists can also work with he producer of his choice. This casts away any terms dictated by the unions or the producer to the artists to act or not to act under any banner. Further recruitment of junior artists need not be through the union alone. This means that the producers in the industry too can recruit those who are not union members. This also suggests that the recruits both who are with the union and those who are not in the union would be governed by the terms of the standard agreement. The junior artists have been classified into four on the basis of their work and so is their remuneration relative to their classification[131]. The classification has been on the basis of the requirements that can be expected in an average Indian film[132].

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[130] The call sheet timing varying between –9 hours. Thus the call sheet timing can be between 7 a.m and 2 p.m., 9 a.m and 6 p.m./, 2 p.m and 10 p.m., 10 p.m. To 6 p.m, and 6 p.m to 2 a.m. This shall be inclusive of the tiffin and the food break. There is also a distinction between the local and outstation shooting. The latter meaning outstation work involving overnight stay. *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989), pp.57-61.

[131] *Ibid.* For instance the payment shall be on a call sheet basis with A grade artist given Rs. 60, the B grade artist Rs.50, special grade artist being paid Rs.90 and the special character artist being paid in the amount of Rs. 120 per call sheet. These rates have been subject to periodic review every three years.

[132] *Ibid.* Thus the special grade artist includes playing characters such as judges, police constables, police inspectors and other police officers, Gurkha, soldier-military, folklore, historical and mythological, customs officer, doctor, maids in historical, folklore and mythological (interestingly the maids in social pictures do not come under this category. Airport officers, nurses, carrying of dead body and pallak, dance movement, bit dialogues, ladies with swimming dresses and other revealing dresses, rishis, tribal, naval crew, Arabian character are included

The effort of the artiste has been taken into consideration in arriving at his remuneration. [133] Very significantly for risky shots and special effects shots there is a provision for additional remuneration but for this no standard common has been set and this was to arrive at mutually between the parties concerned. The agreement would have to be in writing and entered into before the commencement of shooting.

Another important feature has been that for a double version film the wages equivalent to one and a half wages per call sheet would have to be paid to the junior[134]. This is heartening in that it shows that the value of the services is linked, though marginally, to the extent of exploitation. Another noteworthy feature is that with respect to work rendered for foreign films double the usual amount is charged.[135] Contingencies such as cancellation of shooting owing to any natural causes or unforeseen reasons within two hours from the call sheet without a single shot being taken then half the call sheet wages along with the traveling allowance would have to be paid. A provision that would enhance the security of the performer is that the wages would have to be paid within a period of seven days after their work is over.

A feature that had been found amiss is the lack of a provision for credit lines of junior artistes and their lack of any say in the manner in which the movie is made and edited. Further there is no practice of any residuals or royalty payments in proportion to the manner of exploitation. There are no honors and awards for the junior artists for their contribution either from the industry or from the state. It is noteworthy that there is no general understanding that agreements with the junior artists ought to be in writing.[136] The state help has been dismal in terms of the time taken and the amount availed.

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within this grade. Special character shall include clean-shaven heads, body with paints, devils, rakshasas, motorcycle and car driving.

[133] *Ibid.* For those who are cycling in a song sequence one and a half wages per call sheet would have to be paid. Similarly for outstation work involving overnight stay the junior artist would have to be paid none and a half wages per call sheet. In case the junior artist is engaged to act as a dupe for a hero, heroine or villain they shall be paid Rs. 100 for local and Rs. 150 for outstation shooting involving overnight stay.

[134] An oft-heard complaint is that this amount is often eaten away buy the middleman without informing the producer. Interview with Glen.

[135] This is more conspicuous in the Bollywood. Interview with Sri Raja, General secretary of Junior Artistes Association in Mumbai on 16-8-2005.

[136] Voucher slips are provided after the work is over.

Unemployment is a crucial issue affecting the junior artistes. The engagement of non-members by production houses is also seriously affecting them.[137] There is no certain social and labor security for the junior artists. The organization tries to meet medical and other needs from its limited corpus. There is no assured insurance cover as of now despite the risky nature of the work at times. There is no retirement pension and the only earning is when the card of membership is sold to a new entrant for Rupees 80000/- or 1 lakh. Even when dire medical necessities arise it is not unusual for the junior artistes to sell their membership to meet the needs and survive.[138]

Thus from the aforementioned terms and conditions it can be inferred that certain factors have been taken into consideration in order to arrive at a fair remunerative module for the junior artist. Time spent for work, the effort taken at certain roles, the factor of a double version picture, outstation work, dupe for major stars, risky shots are all taken into consideration. What is conspicuous is that while a straight line cannot be drawn between the junior and major artists it is unclear as to when one would slip into the shoes of the other. The deciding factor with regard to that status appears to be the personnel discretion and the ratings in the film industry based on inarticulate premises such as popularity and determining presence of the star. Further the prior designation, as a junior artist would have no influence on the fortunes of the artist as regards extra remuneration from the producer if he has played a determining impact on the films fortunes.

The Stunt Artistes

The stunt artistes have become indispensable to enhance the alluring character of the film as an entertainment medium the world over. Their vocation is fraught with immense thrill and danger. From the perspective of the study it is important to note that the stunt artistes have been categorized separately as regards their work, contractual obligations and rights. Both in the south as well as in the western sector of the film industry the stunt artistes have consolidated

[137] This is in violation of the fundamental understanding that the signatories to the collective agreement shall engage only members.

[138] Interview with Mr.Glen, an experienced junior artist, on 16-8-2005 at Mumbai, who has been with the film industry for well over 30 years. His wife was also a junior artiste, had to sell her membership card for seventy five thousand Rupees in order to treat him after he sustained a fracture at work.

themselves into unions – as a trade union. The categorization indicates that despite the relevance of this trade to the industry they are not treated at par with the major artistes. The unionization was impelled by the prevalence of contracts right were both oral as well as written, even the basic wages were denied, the working hours had no limits and most importantly the stunt artistes were used for multi tasks. The stunt artists despite the creative skills essential for the execution of their jobs were not receiving their due.[139]

The unionization and consequent collective bargaining has led to streamlining of working hours and wage rates from time to time.[140] One of the conspicuous features of the stunt artists working condition is the absence of written contracts in their engagement. The reason adduced is that the stunt artist is a daily wageworker. However the possibilities of exploitation has been diminished with the amount in the bills being distributed through the association. The entries of their respective engagements are entered into a ledger at the office. It is noteworthy that the stunt artistes are graded and categorized and payments are proportional to their category. They are categorized into fighters, assistant masters and duplicates. The wage is dependent on the shift and includes a minimum wage as well as allowances.[141] It is significant that duplicates are paid more owing to their value in deputing for other major artistes in the execution of their scenes. In other words the creative value and labor is accorded importance in the categorization. The south Indian film industry is more sophisticated and has clear cut provisions regarding enhanced payments for the stunt artiste when they dub or dupe[142], when they work in more than one language versions of the film, more is paid for donning certain specific roles, for certain risky shots[143]. If the

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[139] Based on Interview with Rashid Mehtha (Secretary, Movie Stunt Artistes Association) interview held on 6-8-2005 at Mumbai.

[140] The Movie Stunt Artistes Association was formed in the year 1959 in Mumbai.

[141] For a Hindi film budget over 50 lakhs, the agreement between the film makers combine /AMPTPP/FP Guild and federation of Western India Cine Employees with effect from 1-1-2003 provides a revised wage of Rs. 1046 for fighters, Rs. 1268 for Asst. master and Rs. 22157 for duplicate. Source: All India Film Employees Confederation (AIFEC), Mumbai.

[142] Importantly in case of dubbing, for every dubbing the stunt artiste a sum of 200 should be paid for every call sheet on the spot. For every film produced in more than one language for every shot taken half the rate of the particular language shall be paid in addition to the full rate of the highest rated film to the stunt artist working taking into account the number of schedule days fixed for the sequence concerned irrespective of location. *J.A.C.* , Joint Action Committee of South Indian Film Producers, Madras (1989), pp. 93-101.

[143] *Ibid.* No extra wages would be paid for stunts that do not involve any risk. However the instances were in risk is involved are the following- diving through a glass –Rs. 1250/- -for each

stunt artiste also works as a dupe he shall be paid both the wages. In the event of any accident all medical assistance shall be rendered to the injured artiste. In case of any disability or death suitable compensation shall be paid in accordance with the prevailing statute.

The wages would have to be settled within 3 days from the end of the fighting sequence. If on any other reason there would be the need for replacement then the issue with regard to the remuneration dues would be settled basing on the quantum of the work or period of service including issues with regard to the mane or names that have to be given in the credits. In case of dispute the decision of the joint consultative committee shall be final[144].

The instances of improper payment or non-payment of bills regularly surface for the stunt artistes. The stunt artistes make a complaint, either oral or written to the producer, to the federation. The producer is served with a notice and then the Joint Settlement Committee would decide on the dispute. In the event of failure on the part of the producer to comply then punitive measures such as non-cooperation would be imposed. It is striking that the emphasis is on alternative dispute resolution rather than on the judicial system, which according to them is a drain on resources time, money and energy.[145] Therefore there has hardly been any recourse to the judicial system.

From this it follows that, as at present the working conditions of the stunt artistes do not contain any component of the notion of intellectual property or any thing similar to it in the like of contracts based on royalty payments. Even now their concern is with the realization of the basic wages and to standardize the same in tune with the cost of the times. Importantly royalty payments have started coming up in the discussion forums but the lack of supportive mechanisms is proving to be a discouraging factor.

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time. They are paid rupees 1250 for jumps involving motorcycle, car, jeep, scooter, tempo, and autorikshaw. The producer, director and stunt artiste would decide the number of jumps. For burning fire proof suits a sum of Rs.1250 per call sheet .the dresses shall be supplied by the producer. There shall be a medical attendant during each risk shot.

[144] These are clearly expressed in the collective agreement of the South Indian film industry. See *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989), pp.93-101.

[145] This points out to the tremendous drawback that statutory streamlining would face as the judicial option is least resorted to.

In the absence of any statutory remedy therefore for any protection the membership of the union becomes a sine qua non.[146] The artistes because of the long process involved do not favor the little that the state provides as welfare and the limited possibilities involved in availing of the same.[147] Very rarely do stunt artistes avail of the option. In such a risk borne vocation it is astonishing that there is no insurance or other security instruments to cover the artiste in times of misfortune.[148] Further the stunt artiste has a very short life span of profession, he retires between the age of 45 –50 or earlier if he is afflicted with illness or physical disability. The association has striven to create conventions to meet the exigencies in this regard by making the producers pay up to meet the medical costs if the injury happens during the course of their shoot. Loans are also advanced free of interest which they are expected to pay back from their work. In other words the declaration of the film trade as an industry has not impacted the worker positively.

It is important to note that the stunt artists in the country are disadvantaged even when they dupe or dub in that they do not receive a senior grading though they are provided with a marginal increase in the fees. They do not receive credit lines according to the custom followed in the industry. There is nothing in the nature of a royalty payment or notion of intellectual property on the industry at present or remuneration tagged to the performance of the film in the market. Even when the film is dubbed to another language the stunt artiste receives only a marginal increase in daily wages even though this shows that additional exploitation has been taken into reckoning in fixing the wage. The wages it can be noted depends upon the duration, the nature of the work and the risks involved.

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[146] The membership of the association is dependent on passing a test conducted by the stunt directors. The applicants have to comply with certain fitness specifications .the skills of the aspirants are tested frequently and certificates are granted to them. Interview with Rashid Mehtha, Secretary of the Stunt Artistes Association in Mumbai on 5th August 2005.

[147] To quote Rashid Mehtha, " those with dignity will not be going there".

[148] The private insurance companies that do propose to cover the circumstances require high rates of premium. When the associations are unable to meet it then the individuals would find it extremely demanding and daunting.

The Child Artiste

As a child artiste this predicament is more acute as it is the guardian who accepts or rejects opportunities and in most instances a career and remuneration does not cross the mind of the child artiste. In most instances there never was nor does the artiste ever sign any formal contract nor was it in vogue that a written consent was essential. Other than on certain occasions where in the producers credibility was in doubt owing to unfamiliarity. Thus most of the opportunities were based on informal contacts and acquaintances in the industry. *Particularly since the career of the aspiring artiste takes off or the opportunity just comes by chance owing to personal relations with the moviemaker or through personal channels* [149]. In the standard agreements reached between the producers and the various unions with respect to wages and working conditions in the south Indian film industry and in Bollywood, no special agreement has been reached with regard to the conditions in engaging child artists. Therefore all the agreements reached between the major artistes equally applies to the child artistes.

Dancers

Dance has formed a pivotal part of the film narrative in India. Therefore dancers either in groups or in solo have always added to the appeal of the film and the entertainment sensibilities of the Indian filmgoer. Much time and effort and cost is incurred in preparing and choreographing dance sequences. Highly talented and professionally skilled dancers, both male and female execute the steps making it an awesome and winning performance. In India both in the south and in the western film production sector dancers have formed themselves into unions from the fifties.[150] The pattern of remuneration reflects the relationship that the artistes have with their performances once they have rendered the same for the audiovisual. It is just like all other performers, a mere provider of a service of

[149] Interview with T.R. Omana on the 24th of October 2003. T.R Omana has worked in the film industry in the capacity of film artiste and dubbing artiste in film, radio and television medium since 1962. She has contributed and acted in over 500 movies since the age of 12.

[150] The Cine Dancers Association affiliated to the Federation of western India Cine Employees (F.W.I.C.E.) formed in the year 1958 and the South India Cine Dancers Association, Madras.

labor for wages. The dance director who only has a direct relationship with the producer most often calls upon the dancers. The rate is agreed upon with the dance director and the dance director has to distribute the money to the dancers. Either it is a contractual lumpsum amount that is agreed upon or it is based on the wage rate agreed upon by the collective agreements of the union.[151] Interestingly the dancers prefer to call themselves as an independent union.

There is no compulsion for the agreement with the dancers to be in writing nor is there any representative status granted to the dance directors on behalf of the dancers. There is no reference to the single dancer only groups (perhaps that is the general way it would happen. It is important to note for the purposes of the study that no rights in the nature of residuals or royalties are prevalent either in the practices of the trade or in the collectively bargained agreements. However significantly it is stipulated in the agreement that for a double version picture the amount equivalent to a one and a half wages would have to be paid. For every additional version another half payment shall be paid. This points out that the different mode of exploitation has been tagged to the wages in a limited way.[152] In the absence of mutual contracts the minimum wages operate which is based on the duration of work, whether it is outstation or local[153]. The maladies of uncertain payments and lack of written documentation plague the dancers in the

[151] For instance under the JAC agreement in south Indian Film Industry the producer shall make a written agreement with the dance director regarding his or her remuneration in the absence of a remuneration rupees 2500 shall be the Remuneration per dance sequence for the purpose of settlement. The remuneration of the dance assistants and the dancers are as followers 500 for 12 hours that is 11/2-call sheet. Rs 300 for the second day of 12 hours of work. Rs 200 for the third and subsequent days of 12 hours of work. Until completion of the particular dance sequence. In case any fresh dancers are engaged for the second day or for subsequent days for the first time they will be paid the first days rate that is rupees 500/-. *J.A.C.*, Joint Action Committee of South Indian Film Producers Association, Madras (1989), p.81.

[152] For a double version picture the amount equivalent to a one and a half wages would have to be paid. For every additional version another half payment shall be paid.

[153] Under the JAC agreement the rates are applicable both for the local and outstation shootings. If shooting is extended up to four hours after the first days shooting of 12 hours an additional amount of Rs.165 shall be paid. If extended above 4 hour. If there is a delay of seven days in the completion of the dance sequence the payment shall be paid one after consultation with the dance directors an additional amount of Rs. 165 shall be paid. If shooting is extended with the second and subsequent days after 12 hours of work up to 4 hours an additional amount of Rs. 100 shall be paid .if extended beyond 4 hours another Rs.100 shall be paid.

same manner as it has other performers[154]. Further the immense competition leads to a great deal of under cutting by the middlemen from what is promised. be it the contractually agreed amount or the wages promised under the tariffs.

In the union agreements it has been specifically mentioned that the payments to the dance directors and dance artists would have to be paid directly within a period of seven days after the completion of the particular dance sequence. There is no valid reason by which the dancer can excuse him-self upon legitimately sound reasons. There is no suggestion of any insurance facility. It is of note that in case of dispute it shall be mutually settled based on the quantum of work rendered including the name of the persons whose names ought to be given in the credits etc. this points out that the practice of giving credits is part of practices of trade[155]. In case of issues that are not covered in the aforementioned agreement they will be discussed and decided by the joint consultative committee of the film industry. The dispute resolution would be by the joint action committee that is dominated by the producer interests.

Musicians and Playback Singers

The playback singers' form a very important constituent of the Indian film industry. The importance of these artistes can be found uniformly spread across the various regional industries and the Hindi film industry. Besides the voice imparted on the screen, audiocassettes based on the same is also brought out. In the early years of the recording industry the gramophone companies were making the recording artists sing on the basis of royalty payments from the sale of the records. There was no minimum payment but only royalty from the number of discs sold[156]. But then the payment used to be regular and proper. It can be

[154] Interview with Rajeev Ranga, ex president of the Cine Dancers Association, Mumbai on the 23rd of August 2005. The association is in the thicket of legal battles between themselves and therefore is in the hands of the administrators' appointed by the courts.

[155] *J.A.C.*, Joint Action Committee of South Indian Film Producers Association, Madras (1989), p.81.

[156] Based on the interview by the author/research scholar with Late Srimathi P.Leela on the 27th of October 2003 in Madras. A veteran since the inception the playback singing in the south Indian film industry from the year 1947 onwards. She began to sing at the age of 12 in the 1944. But her break began in the year 1947 in the film *Kanyadanam*. While she was on the pay rolls of Columbia records artists such as M.S.Subhalakshmi were with His Masters Voice (H.M.V.). She

inferred that the idea of royalty payments have not been alien to the contributors to the audiovisual industry though the revenue has to come in from the audio exploitation of the same. The artistes in the early years were under contracts with the different record companies such as Columbia and the HMV.[157]

There was a difference between the way in which the playback artist in films were treated and the way in which the audiocassette companies treated the recording artists. In the early fifties when the play back trend began the artistes was paid in the region of Rs. 250 to Rs. 750- 1000 per film. It was a one-time payment. This was in contrast to the record producers who paid in the royalty system. The contractual practices included both written contracts and oral agreements. It was not considered an indispensable part of the practice of engaging a play back singer. The payment was made after the recording was over and not before. It had its fallouts in the sense that the performing artist often had to face the situation of the payment not being made at all. While the radio used to have a written contractual system, it was also based on a one time fixed payment system. There is as yet no pension scheme for the playback artiste from the state though there are state awards that have been instituted. The artistes form a part of the Cine Musicians Union, which represents and acts on any complaint that they may have. The union being affiliated with the Film Employees' Federation of South India was registered as trade union[158]. As regards television coverage of the performances no permission of the artists are taken for the live stage shows being covered in India. In foreign countries the permission of the group was taken before recording the show. For shows exclusively for the television there were no written contracts other than for Doordarshan. There were only a one-time payment made and no royalty based systems existed. The Joint Action Committee self-regulatory code refers to the playback singers only in the agreement concerning music directors and musicians. It is specifically provided

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has had a prolific career both as a play back singer as well as recording artist in all south Indian languages. She has sung more than a 1000 songs in career spanning over five decades.

[157] *Ibid.*

[158] The artistes are generally unhappy with the functioning pf the association and it has not yielded much in terms of economic and social security. Though it would be better to have a collecting society, as the royalties do not pour in punctually it would need a very healthy management. Even now the record companies are not regular with the royalty payments. *Ibid.* Interview with late Srimati P. Leela.

that it is the inherent right of the producer to employ any person of his choice as the music director /musicians and singers.[159] It is also mentioned that it is the inherent right of the music director, singer and musician to work under any person, employer or producer. Specific call sheet timings are also provided. The payment of the singer, the music director and the musicians has been structured around the duration of the song[160].

It is important to note that with respect to the music directors' remuneration, there is a mention about royalties. The producer shall enter into a written agreement with the music director containing details of the remuneration and the duration of the picture and specifying the eligibility for record royalties and the all India radio royalty. A standard rate has been prescribed in the absence of a written agreement.[161] If the music director willfully or otherwise abstains the producer is vested with the right to remove him and engage another person and pay the person the money for the effort that he has put in. This includes the taking into account the credit to be given for the effort.

Significantly standard rates have been prescribed for musicians.[162] It is however mentioned that the payment to the musicians shall be made on the spot in cash.[163] At the time of the spot payment the payment shall be made against individually stamped vouchers duly indicating the name of the player, the register number of his membership of the union, instrument he has played together with the full address of the recipient. While the production executive has to make the

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[159] *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989), p.101. There appears to be a distinction between musicians and singers as the latter do not seem to fall within the former term and there are differences in treatment.

[160] If the duration of the song exceeds 5 minutes extra payment would have to be made. If it exceeds five minutes and goes up to 6.5 minutes then one and half remuneration of the song needs to be paid. If it exceeds 6.5 minutes then double the remuneration for the song has to be paid. It is specifically mentioned that this has to be paid to playback singers also.

[161] *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989), p.101. This has been upgraded to Rs. 75000 and 50000 respectively in the revised and renewed agreement of 2001. All rates are subject to change periodically. . For a Tamil or Telugu film the rate being rupees 25000/- and for a Malayalam /Kannada film the rate being rupees 15000/-.

[162] For recordings or composing work each musician shall be paid Rs. 130 per day or per recording. of the last call sheet of a rerecording program if extended beyond 9.30 p.m (including the grace time an additional *batta* of Rs. 130 shall be paid and the remuneration shall be added at ½ call sheet amount for every additional two hours or part thereof. Cine Musicians Union, byelaws, 2001, p.31. As per agreement with film chamber with effect from 2-5-2001.

[163] *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989), p.102.

payment individually to the players a copy of the bill has to be sent to the musicians union for reference and record.[164]

For solo singers it is mentioned specifically that the remuneration shall be fixed in advance. This means that there is no standard rate applicable as regards the solo playback singers. For group singers the conditions are different. Though it has not been mentioned. The remuneration for the musicians has been separately mentioned categorized according to the instruments they play. The aforementioned collective bargaining standard agreement points out to the subtle yet significant classification inherent among the musicians and singers. There is no mention of any standard term in the agreement granting a right to a royalty to any one particularly the musicians and the singers. This it appears requires a specific incorporation into the contract. The solo playback singers do not even have a standard rate to fallback on in order to get a minimum remuneration in times of misunderstandings or non-honoring of promises. There is no stipulation that that there should be a written agreement with regard to the musician and the play back singer.

In Kerala film industry there is no separate organization representing the singers, musicians and the music directors and unless they could all come under the Malayalam Cine Technicians Association (MACTA). The playback singers do not have an organization of their own in Kerala. The musicians do have an outfit but it is non functional. It did have a tariff rate card but no royalty payments and no notion of any intellectual property in the performances. However in recent times as a fall out of the government order banning the live accompaniments in youth festivals the performing artists formed the All Kerala Performing Artists Association to give a voice to their problems[165]. Though the organization is at a fledgling stage, it promises to fill in the vacuum with respect to the needs of performers who live from the cultural prosperity of 'Gods Own Country'. According to him no rights in the nature of moral right to a credit or title is prevalent in the industry. The difficulty often cited being the large number of performers. The performance is left to complete use of the producer who uses in

[164] This has been upgraded to Rs. 130 in the 2001 agreement. A conveyance allowance of Rs. 30 has to be paid to the orchestra player and junior playback singers for one call sheet or for a day whichever is applicable. The rates are subject to review every three years.

[165] Interview with Tripunithara Krishna Das, an ace *Edakka (*a variant of the drum commonly used in temple rituals*)* exponent on 25-10-2005 at Tripunithara. He is the Secretary of the new organization.

every conceivable manner. The computer can take a small sample of the performance and use the same in any variety of situations in the same language or another language without compensating the performer in any manner. The private television channels provide just a voucher for the receipt. There are no further conditions in the voucher but it is understood that they have the rights to the performance and for the repeats of the same without any additional expense to the artiste.[166] The duration of the call sheet is supposed to be for ten hours long. The onus is only on the remuneration for labor. Once the labor is rendered then the ownership of the recorded performance is vested with the producer, in other words, there is no notion of intellectual property or copyright with respect to the performance. Any such ideas would require special inscription by way of contract. There is no hard and fast rule regarding the need for written agreements and therefore commonly it is only the word of mouth and goodwill that sustains the industry.[167]

In the western sector or Bollywood, a most profound distinction maintained since the commencement of play back singing has been the categorization into lead singers and the chorus singers and back ground musicians. This is a major distinction as the valuation of the services varies from category to category. The lead singers have always valued distinctly from the other two categories[168]. While the organization called the Cine Singers Association formed in the year 1956 is a front for all the vocalists in the film industry nevertheless the practices have treated the two segments distinctively. (For the musicians –the Cine Musicians Union is the representative trade union formed in the year 1956). The Cine Singers Association is also a registered trade union registered in the year 1956. Though under the canopy of the Cine Singers Union both the solo lead singers as well as the chorus singers are clubbed together nevertheless the discomfiture at this categorization has been evident. There have been attempts in the past by a section of the lead singers to step out and try to forge an identity and demand

[166] *Ibid.* For an eight-member troupe a sum of 25000 rupees would be received from channels and have to be divided between the members.

[167] *Ibid.* Eve for films the experience has been the same with not even an acknowledgement in the titles. Krishna das had played one enchanting beat in the award winning film *Devasuram* for the actor Oduvill Unnikrishnan essaying the role of the percussionist in the film, but not even a credit line was provided to the playback artiste.

[168] Based on interview with Sri Himanshu Bhatt, Secretary of the Cine Singers Association on 9th of August 2005 at Cine Singers Association office in Mumbai.

rights and interests different from those provided to the generality[169]. The issue of royalty has been one such issue. Whether the issue of royalty was an issue of contract or emanating from intellectual property consciousness remains foggy. But the idea appears more from the need for remuneration emanating from contract rather than emanating from the aspect of intellectual property. However there was no unanimity of opinion among those comprising this splinter group and the initiative failed to take off. So it can be considered that it was generally felt that the lead singers ought to be eligible for royalties in addition to the single payment of an agreed sum that they procured.

The Cine Singers Union is a member of the Western India Cine Employees, which in turn is affiliated to All India Film Workers Confederation and is bound by its rules and limitations. It enters into a periodic agreement with the producers associations to fix the tariffs and other working conditions[170]. Normally the tariffs are fixed after a period of three years has elapsed after the prior agreement. In case the new agreement is not entered into after the said period then the rates unilaterally fixed by the association would come into force. The tariffs are based on the shift worked for the assignment. There fore it is dependent on the hours of work. It is a minimum tariff and the employer is at liberty to pay more than the minimum tariffs.

It is important to note that this clearly points out to the status of the singer as a provider of service labor rather than a creator of any intellectual property. There is no system of royalty payments based on the use of the performance in the collectively bargained agreements. The singer is entitled to no further remuneration than the shift based tariff. This also points to the lack of any specific agreement or the need for any, as it is a daily rated wage. Thus a pay

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[169] *Ibid.* In the year 1969, Latha Mangeshkar and Mohammed Rafi decided to form another organization for the playback singers. However difference of opinion cropped up over the issue of the need for royalty and the movement lost its momentum.

[170] There is a different rate prescribed for films costing below fifty lakhs and above fifty lakhs. For the former Rs. 1141 is prescribed for a four-hour shifts that is inclusive of lunch hour of one hour. Conveyance allowance of Rs. 50 and late night allowance of Rs. 50 has to be paid. For the regional films the rate is a shade lower at Rs.1027. For overtime and rehearsals an amount of Rs. 285 have to be paid for each hour. For films costing above 50 lakhs, (*f.n contd. on next page*) the pay per song would be Rs.1194 per song for 4-hour duration shifts. With overtime and rehearsal charges at Rs.299 per hour. Similar rates apply for back ground scores as well. *Courtesy*: All India Film Employees Confederation, Mumbai. Agreement entered into between federation of Western India Cine Employees /Film Makers Combine /A.M.P.T.P./F.P. Guild Employees on wages of Cine Singers Association for the period from 1-1- 2003 (this is periodically revised).

slip or a voucher would alone suffice as a testimony of the service rendered. As for the lead singers most often it is a mutually agreed rate per song that is agreed upon to be paid rather than the minimum tariffs. In the collective agreement no separate treatment is provided to the solo lead singers either with respect to special tariffs or royalty payments. Thus the customary practice with regard to lead solo singers is different from the others under the singers association.

In other words when the recording is used for a different purpose, under the rules agreed upon there is hardly any reprieve for the singer other than base the issue on the norms of implied contract. When the recording is used for dual versions of the movie for instance both in English and in Hindi, as is the trends today or dubbed into another language while retaining the same songs there is no additional remuneration paid with regard to the singers. This is particularly true with regard to the chorus singers as the hours of work are taken into consideration rather than the film banner or the song in question. The extent of exploitation is not a factor that is taken into consideration to decide on the quantum of compensation. Despite the fact that no separate categorization is made on behalf of the solo singers, the industry has adapted to the reality that they cannot be categorized in to the lot of generality of singers covered by the tariffs. However there is no system of royalty payments as a customary practice unless it has been mentioned specifically in the contract. There is no additional compensation in proportion to the quantum of exploitation, as it is in the general practice of the industry understood that the rights vest totally with the producer once the payment has been rendered. Even the use of the same song in another film is left to the choice and the right of the producer and the permission of the original singer are not sought for. Similarly when the song is being played in diverse media distinct from the film as an audio or an audio visual, no additional compensation even if the agreement has been silent regarding all these means of exploitation. The concept of intellectual property being absent once the lump some payment has been provided then the work is understood to belong to the producer.

Though the need for written agreement is required is insisted upon under the terms of the collective agreements in force since the nineteen sixties, the lack of it is not considered an offence or a serious anomaly in conducting business in the industry. This is considered as normal as there are the tariff rates to fall back

upon. In case of disputes and non-performance to the promised payment then the dispute settlement mechanisms of the federation would be invoked. In case of the decision not being carried into effect by the indicted party then a notice of non-cooperation would be promulgated against the violator.

A significant aspect of the practices is the secondary significance attributed to the legal means of redressal. The impetus is placed on alternative means of dispute resolution consisting of the members of the workers federation and the producers association. The judicial means for resolving disputes is rarely resorted to by the parties as it has been found to take a long amount of time and incurs enormous expense. Such time and effort in a fast paced media industry is a meaningless waste[171].

It is important to bear in mind that while those unions relying on a tariff rate falls back on it in the absence of an agreement to the contrary, those which do not go by a tariff rate need to have a specific agreement entered into by the parties individually. In the absence of which the reliance would be on the contemporary bargaining power of the party to be decided upon implied terms and practices in the industry by the dispute resolving authority. Those artistes who have a tariff rate to go by but those who have been promised a higher sum by the producers or employers need to show proper documentary proof of the higher wage promised failing which in case of dispute the resolving authority would have to fall back on the tariff rates. In other words there would be a lesser effort by the resolving council to go into the implied terms in the absence of cogent documentary proof to the contrary.

Need for Membership

A conspicuous feature of the cine singers and the practice of their functioning or working in the industry has been the mandatory need for their membership in the organization. Neither are the producers expected to engage the workers who are non-members nor are workers expected to work with non-member producers. In case of violation of this understanding then the workers and the producers who violate this understanding stand to be penalized and fined by the machinery

[171] The party against whom the finding is made would have to pay 10% to the federation as costs for the efforts at the resolution.

constituted for this purpose. However instances are a legion where in the non-workers are roped in to sing or to otherwise perform.

New Trends

The Singers Association of India is a relatively young registered organization formed by the lead singers of the industry [172]. The organization has been formed with the purpose of securing the rights and obligations of the singers. The reason has been attributed to the fact that there exists no organization representing the singers. The actors receive all the attention. The Cine Singers Association, in existence since the fifties, which did and does have the lead singers a well on the rolls does not appear to have inspired confidence on the lead singers. Earlier in the sixties too there had been an attempt to form another association but the effort did not bear fruit over the differences that cropped up between Latha Mangeshkar and Mohd. Rafi. The present attempt was meant to be a continuation of the efforts made by the Mangeskar Sisters, Kishore Kumar and Mohammed Rafi in the sixties, which fell off due to difference of opinion between Latha Mangeshkar and Mohd. Rafi over the question of royalties. The impetus has been given to the interests of artists who are either old or ill and have fallen on bad times (in oblivion). According to Sonu Nigam every singer has a time graph after which they would require support and help. The organization has vocally stated that it does not intend to interfere into the rates charged by the artists and it has been left to the bargaining entered into individually[173]. However royalty rates and issues pertaining to it have been issues that have been stressed by the organization[174]. However as yet no collective attempt has made in this direction by this section of elite lead singers nor has any pressure been brought to bear on the industry either with respect to standardization of practices or the question of royalty model of remuneration. Therefore a determining impact is still

[172] Sonu Nigam, Alka Yagnik, Kumar Sanu, Udit Narayan, Asha Bhosle and Lata Mangeshkar are all members of this initiative. The founder president being Alka Yagnik as the organization stands today. It has been registered as a society and not as a trade union. Upala KBR, "Sonu Takes on Film Industry", *Midday*, 31st March 2004, <http://in.nri.yahoo.com/050331/156/2kh5q.html> as on 21st August 2005. The organization is seeking to raise its corpus from the programs conducted by its members.

[173] *Ibid.*

[174] Interview with Himanshu Bhatt, Secretary of the Cine Singers Association, and the Hon. General Secretary of the All India Film Employees Confederation in Mumbai, interview on 10th August 2005.

to be felt. There is a certain emerging unity between the artistes and the music directors in this regard particularly with respect to royalty rates[175].

The main issues have been the denial of credit title of the artistes and the issue of royalty. The singers are being sidelined during the promotion of the film music with the major focus on the star actors. Secondly the singers are not even acknowledged in the credits when the song is being used in telecasts in various film-based programs on the television and other presentations. Thirdly, the remixes and the version recordings too present problems as the sniggers either by statute or by means of the contract most commonly do not receive any royalties. There is also the problem of the original performers not having any right with respect to the song and that need the permission of the producer or the IPRS even to render on stage the song or perform the song that they themselves had sung. This is owing to the conventional practice that once the remuneration has been begotten then they no, longer retain any rights *vis a vis* the song[176]. Despite the multiplicity of avenues for the exploitation that includes the songs being played over the radio, the television and the Internet there is no remuneration from these repetitive performances that have debilitating hit the sales of copy sales like cassettes and the compact discs[177].
Thus despite issues being stressed that often have solutions from the copyright framework, it can be seen that the parties do not ever refer to the copyright act or to the intellectual property paradigm. On the other hand the endeavor is to bring these issues within the practices of trade in a collective manner, there is no reference to a statutory solution.

The Cine Musicians in Audio and in the Films in Bollywood

A section that has been seriously affected by the increasing electronization and digitization of music has been the musicians who accompany the singers in the

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[175] Abhilasha Ojha, "What's Wrong With India's the Music Industry?", 5th September 2005, <http://us.rediff.com/money/2005/sep/05spec.htm >as on 5th September 2005.
[176] Singer Sunidhi Chauhan in Delhi was stopped from singing songs that she herself had already rendered for the music producers, as she had not taken the license from them to perform the same.
[177] Abhilasha ojha," What's Wrong with India's the Music Industry?", 5th September 2005. http://us.rediff.com/money/2005/sep/05spec.htm as on 5th September 2005.

audio as well as the audiovisual recording.[178] The number of cine musicians required for the recordings have dwindled drastically from the engagements that came their way a decade ago. The additional accompaniments are reduced, as the equipments are today able to recreate almost all the instruments that were separately played by hand. Besides the digitized theft of opportunities, the musicians are also struck by the influx of television and radio channels that have eaten into the live performance opportunities that used to exist in the past. In this scenario of dual disadvantage the musicians are in an unfair bargaining position leading to practices in the industry that hands out an unfair deal. Even the minimum wages fixed in the industry are not paid to the musicians and they are at the mercy of those in the industry. The path to opportunity is littered with middlemen and commission agents who demand their pound of flesh before parting with what is due to the musicians.

Cine Musicians Association is a registered trade union and has represented the musicians since the year 1952.[179] The union is a part of the All India Film Employees Confederation and the union enters into a periodical - triennial agreement fixing the working conditions and the wage rates.[180] The wages are fixed according to the number of hours put in by the musician on a shift system worked out by the terms of the agreement.[181] There is no need for a separate agreement to be drawn up, as it is a daily wage rate that is followed. The workers are free to receive any thing beyond that is affixed by the minimum wages in the agreement.

There is no system of royalties for these background musicians and no concept of intellectual property is evidenced in respect of their efforts in a contract

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[178] Based on interview with Ashok Jagtap, President of Cine Musicians Association at Mumbai, on 21st August 2005.

[179] See, "Cine Musicians Association- Constitution" , Cine Musicians Association, Mumbai, p.1. Both audio as well as audiovisual recordings are covered by the association

[180] Interview with Sri Ashok Jagtap, President, Cine Musicians Union, in Mumbai, 21-8-2005.

[181] It is important to note that there is a categorization among artists into B, A. SPL. ,EX.SPL,SUP.EX.SPL. and Top. The present wages for B is Rs. 622,A Rs. 697,SPL– Rs. 851,EX.SPL. Rs.1275, Top-Rs.2267. these are for one song for working for four hours. There is an increase when the artiste works for two songs and for 6 hours. For the background score the full shift is deemed to be for 7 hours duration. Extra wages need to be paid for the overtime for every hour or for every half hour. These rates are reviewed and subject to change periodically.
Courtesy: All India Film Employees Confederation, Mumbai: Agreement entered into between Federation of Western India Cine Employees /Film Makers Combine /A.M.P.T.P./F.P. Guild Employees on wages of Cine Musicians Association for the period from 1-1- 2003 (this is periodically revised).

collectively bargained. There is no separate rates fixed for solo performances of the artiste and it appears that the same tariff rate applies for both the classes of performers. It is found that the same tariff card is followed for both the audio as well as the audiovisual recordings of performances.

It is noteworthy that there is absolute absence of any safeguards against unauthorized exploitation and any distortion or misattribution of the performer in the collective agreement. Once the wage ids procured there is no more a link of the artist with the performance. It is significant that despite the incorporation of section 38 in the year 1994, in both audio as well as the audiovisual the same practice is followed.

The economic and social security system is a self designed one with limited help from the government that is common to all the other trade unions. The association has set up a family benefit fund to be provided to the nominees of the deceased members families.[182] A medical aid fund and an old age benefit fund.[183] These are all based on the processing of the applications made by the association. The number of applicants varies from year to year. The funds are canalized from the collections and corpus maintained by the association. There is no help in this regard from any external agency. It is on a first come first served basis.

The cine musicians are trying to do away with the uncertainty created by middlemen and lack of credibility and transparency in transactions by trying to evolve a system where in the employer engages the musician through the association. Direct interaction of the middlemen or messengers with the musician has resulted in a situation where in the corrupt and exploitative trends have come to hold sway[184]. The management of the contracts by the association and documentation by them is expected to secure them against this. Another significant proposition made in recent times by the association has been for the initiation of the royalty payment[185].

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[182] This is from a fixed deposit earmarked for the purpose. There is no insurance scheme as the eligibility for the same was for people below the age of 65.See, *Fifty Second Annual General Report and Statement of Accounts*, Cine Musicians Association, Mumbai (2005), pp.4-5.

[183] For those above 70 –a sum of Rs. 2000.

[184] *Fifty Second Annual General Report and Statement of Accounts*, Cine Musicians Association, Mumbai (2005), pp.13-14.

[185] Letters regarding this has been sent by the Association to various authorities and interests in the industry. Fifty Second Annual General Report and Statement Of Accounts published by the Cine Musicians Association, 2005, p.7.

It is conspicuous that despite the changes made in 1994 and the incorporation of the Performers' Rights into the Copyright Act there has not been any influence of this with respect to the rights of the cine musicians. They have not yet been recognized as entities worthy of any additional remuneration if their contracts do not cover the total extent of exploitation that it is put to. This anomaly has been brought to the notice of the authorities including the Indian Performing Rights Society, the Ministry of Human Resource Development as well as their Federation. But no response has come their way. From the correspondence it can even be surmised that they have been made to understand that the law that was passed did not include them within the purview at all.[186] Further the IPRS too did not include them within the purview for the reason that they were only playing the music as directed by the music composer and therefore did not come within the ambit of the performing artist.[187] The letter also exposes the misconception that there exists a Performance Artists Royalty Act.[188] This points to abysmally low awareness and absence of guidance being rendered to the unfairly placed musicians in the industry.

Dubbing Artists

The experience of dubbing and voice over artists appear to be uniform across the country with the western sector of late showing an initiative to take to trends existing abroad. The unionization trend appears to have struck the dubbing sector rather late when compared to other sectors –it seems to be an eighties or nineties phenomenon.[189] The unions face a lot of adversities to claim their rights in the industry on behalf of the members. For instance the outfit in Kerala does not have a mediation council to intervene into disputes. The fact that all the office bearers are also dubbing artists further constrains the enterprise to take up

[186] Letter dated April 25th written by Sri Ashok Jagtap, President of Cine Musicians Association, p.1.

[187] *Id.*,p.2. In counter to this point the association points out that the musicians also render a creative service as most often the music directors only provides a rough sketch, which the musician has to develop in his role as a music arranger. This defensive notion also points to the fact that they are under a belief that an extra creativity has to be proved in order to be eligible for protection.

[188] *Id.*,p.3.

[189] The South Indian Cine Dubbing Artists Association was formed in 1985; the union in Kerala was formed in the year 1995 and Association of Voice Artists was formed in the year 1999 (Western sector).

issues on behalf of the artists, as their opportunities would be affected in the industry. The dubbing artists are also undergoing an identity crisis as they neither falls into the mantle of performing artists nor do they fall within the ambit of technicians in the mould of directors and scriptwriters. Their resolve to strengthen themselves by aligning themselves within either of these has been thwarted by these associations, as they do not consider them to be part of either of these fraternities[190]. In Mumbai or the western sector of the film industry, the Association of Voice Artists represents the dubbing and voice artists in the industry. A subtle distinction is drawn between the two segments by virtue of the work they do. While the voice artists do not provide voice to the artistes onscreen, the voice artists provide voice over to such media work such as commercials and documentaries. The manner of treatment and tariff rates are different for each of these streams. The point of similarity being that both perform the functions of back ground voices. The Association also functions under the umbrella of the federation and is a registered trade union since the year 1999. In the association in Madras, the association through the federation enters into triennial negotiations with the producer bodies and the working conditions and tariff rates are fixed accordingly. It is noteworthy that not all the associations are working with a minimum tariff card. Associations like Associations of Voice Artistes have only recently introduced a rate card with a variety of improvisations making the practices at par with the trends in the western countries. It takes account of the uses and the extent of utilization.[191]

The dubbing artist is not the beneficiary of any welfare scheme from the government. They do not beget any insurance or medical cover either. However the unions formed for the purpose have created provisions to help those in distress and other incapacities from their limited resources. The dubbing artist Association is given a representation in the State Chalachitra Academy and has a say in the consultation with respect to the cinema and television industry.

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[190] Interview with Bhagyalakshmi. The association in kerala does not possess a card tariff rather it is mutually negotiated.

[191] Associations like Associations of Voice Artistes have only recently introduced a rate card with a variety of improvisations making the practices at par with the trends in the western countries. See **Annexure III**.,P.XVI for the *Tariff Card of Voicing*.

Since the year 1985 a union of dubbing artists had been formed in south India. Several dubbing artists in the south Indian film industry also became the members of this outfit. Though the dubbing artists never received recognition but for recent measures initiated by the state to recognize them. There appears to be not much difference between that which was earned by the major artistes and the rated dubbing artistes.[192]

During the seventies the dubbing artistes never received any recognition by way of credit title acknowledgement. Thus an even moral right of attribution to their intellectual effort was not granted to them. The practice of giving titles to the dubbing artists had commenced only in the last 15 years[193]. The fundamental drawback that is being faced by the dubbing artists in the country is that their distinct artistic personality needs to be seriously recognized. Though from the nineties onwards after a tremendous campaign to elicit recognition from the government, the state of Kerala finally instituted the best dubbing artist award in the state award category.

The dubbing artist does not have the right to know the story line or what shape or quality of work the script is going to take shape. There is no connection between the artiste and the script. The artist is not involved with the copy given to him for presentation. The voice artist has to render the script even if it is full of mistakes. There is no time for the voice artist to relate to the script as the exercise takes place in a short period of time. Further there are no practices or norms respecting the involvement of the voice artist or the need to respect his sentiments.

The dubbing artist has not yet been identified as a creative artist whose choices matter in the execution of a film. There is an absence of norms in the film industry to impart respect to the dubbing artist in this regard. The dubbing artist has no right to stop the use of his voice in a work, which he later finds objectionable or distorted from the original version. The dubbing artist has not been incorporated into the curriculum of the film and television schools in the country and this points

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[192] T.R Omana has dubbed for the National Urvashi award winner Sharada for the film *Thulabharam* without any reference or credit for the same. According to her even as a radio artist or dubbing artist there has not been any instance in India where in any body has claimed any royalty.

[193] Interview with Ms Bhagyalakshmi on 25-11-2004 at Trivandrum. Senior dubbing artist and winner of several State and National awards. One can find subtle variations between the trend in this regard in Kerala and other states.

to the dearth of importance imparted to the vocation and those who practice the same and make a difference to fortunes of the characters and the film.

The dubbing artist is at the receiving end as he is never recognized in the feature and in the television serials. (This can be noted, as distinctive from the situation in the south Indian film industry where credits have begun to be provided to the dubbing artists). Despite the fact half the creative work of the artists is accomplished owing to the efforts of the dubbing artiste, they are not provided with even a credit line.[194] This is despite the fact that the law recognizes the proprietary nature of the voice of the artistes but the trends in the industry do not reflect this. There was no assuredness whether after the voice was used it would be retained or not. If it was not found appropriate no compensation was provided to the dubbing artists for their effort. The moral right of the artist is not respected and even when the voice is changed there is no reference or consultation with the prior artist.

Economic rights

With respect to economic rights, there was neither a guarantee with respect to the payments nor were they adequate or commensurate with the efforts. There was a hazard that as the dubbing was to take place at the end of the filmmaking and the producer in most instances would have been in financial dire straits and therefore he would not be able to make prompt and proper payments. No artistic-creator status personality was bestowed on the dubbing artists. They were advised against seeking such recognition as the recognition and the identity of the performing artists would be affected by the credit being shared with them. Though there were also those with extreme sentiments who were opposed to encouraging the use of dubbed voices in films, as that tends to belittle the contribution and also to promote the true skills of the artist nor expose the artist to the true tests of acting. In other words the complete actor is not formed till the he crafts his own voice as well. There was also this opinion, which proposed that those who used a dubbing artiste should not be reckoned for national awards as they are only worth half the credit. It also lent an element of disrespect to the artist who took help of a dubbing artist. However opinions in this regard were not uniform and slowly certain directors of repute began to provide extend credit to

[194] This feature is more apparent in the Bollywood or the western sector.

the artists. This was accentuated by the consciousness by the mid eighties that a disciplined approach to dubbing skills was essential as it was an art form in itself. The importance of this component was realized and a more serious approach to the skill began to be taken both by the dubbing artists as well as the sound-recordists and film directors. It was realized that dialogue delivery required voice modulation and application of a very high standard.

The status of the dubbing artist is nothing more than that of a junior artist. It is through the production executive that the dubbing artist gets the engagement. There is therefore no direct link between the dubbing artist and the producer. This shows or indicates the status enjoyed by the dubbing artist in the production canvas. Therefore if the production executive defaults in the payment then the dubbing artist does not have any relief from the producer as his dealings are only with the production executive. The dubbing artist is totally disjointed from the producer. It is the production executive who has to disburse the monetary benefits to the dubbing artist. There is virtually no communication with the producer who is the person legally accountable for the production.

There has always been a categorization between the dubbing artists on the basis of the category of the artistes to whom their voice is lent. Those who provided voice to the top stars received or could demand a higher remuneration than others. The payment was for the picture and that did not apply for the duration of hours that were put in or the work done.[195] With regard to dubbing rendered for television, the dubbing artists are provided Rs. 1000 per episode for the main performers and Rs. 300 for the others. There is no minimum wage criteria being followed and for payments made in the film industry no voucher is given. In the film industry today there are those who work for top heroines and get paid as high as Rs.15000 to Rs. 20000 per film and those who are paid rs.750. But desperately there are those who work for as low as Rs. 250 also. The payment depends on the status of the artist and those in great demand can enjoy the

[195] During the eighties a sum of 5000 /- was received for a movie if one dubbed for a major star. Sometimes the dubbing assignment for a movie went for over 10 days. The dubbing artist the eighties had to put in much more effort, as it was the loop system technology that was being applied.

perks like a driver, vehicle and a *bata* being provided by the producer for the same.

Formalities of Remuneration

As there was never a written contract there was no confidence to turn to the courts for redress. Recourse to the union for redress was of no avail since they feared that it would provoke the producers to boycott the dubbing artist for any further assignments. The only action of recourse in the hands of the union was to seize the print till the payment was made or the issue settled by the union. But this would invoke the displeasure of the producer community, which no dubbing artist wanted to risk incurring.[196]

With respect to artistes and dubbing artistes too the producers are vested with the freedom to choose anybody to work for them and the artiste can also work with any producer of their choice.[197] The use of the words inherent right is significant in the sense that it means that no other agreement or understanding can waive this freedom. With respect to the remuneration it is specified that the contractual remuneration for the dubbing for the entire picture shall be Rs. 3000(minimum). It is significant that the term used is contractual remuneration and not minimum or call sheet based remuneration. Thus it is irrespective of the hours of work the dubbing artist puts in. There is a further classification between the dubbing artists on the basis of whom they are lending their voice for.[198]

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[196] The bargaining power of the dubbing artists has further waned owing to the fact that the dubbing has diminished in importance with more impetus being given to spot recording. The artists have also become more adept at use of their voice and most if them prefer their own voice being put to use. Further the dubbing artist cannot certainly ask for an equal status with that of the performing artist vis a vis the remuneration nor the effort that is required. Further there is no physical strain in dubbing as much as what the stars have to undergo. All these opinions have been uniformly voiced by the artistes and their organizations in Mumbai. Chennai and in Trivandrum during the interviews and data collection.

[197] *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989),p.48.

[198] For the villain and other important artists it would be Rs. 2000/- for the entire picture. For any one of the other characters it would be Rs. 1000/- and for bit roles Rs. 750/- is the minimum rate. For track changes for giving voice to the hero/heroin the remuneration has been fixed at Rs. 5000/-, for the 2nd hero heroine Rs.2000/-, for any other character it would be Rs.1500/-, for any other bit character roles Rs.750/-.

The general voice for other artists shall be on a daily call sheet basis irrespective of the number of characters to whom the voice has been lent. The remuneration shall be Rs. 120 per call sheet. The wages are to be paid at the end of the day's dubbing. The call sheet time shall be eight hours. While no conveyance allowance provision has been made food allowance has to be paid when the producer does not provide the same.[199]

Two aspects stand out with respect to the fact that any number of characters can be given voice and secondly the duration of the performance would not be taken into consideration. For instance the work on a single character can take over one month but the contractual remuneration would be only rupees 5000/- for the entire picture. On the other hand for those who are working on a daily wage basis they have to work for irrespective of the number of characters that may have to be attended to. Further the remuneration is qualified only with respect to heroes and villains there is no higher remuneration when he does it for a mega star or heroine whose remuneration would be in the order of crores. However in this regard one can notice a distinction between the western and south Indian film industry for in the latter it is important to note that a tariff rate is fixed according to the hours of work rendered by the artiste.

There is no system of royalties being provided to the artiste and no notion of intellectual property attributed to the performance. [200] Besides the wages received for the services there is no separate remuneration fixed for extended exploitation or fresh exploitation in a new media. There is no agreement drawn up for receiving the service of the performing artist. However depending on the application of the recording for diverse uses a separate tariff is provided based on the hours of work put in. That is the shift system. It is significant to note that despite the immense means of exploitation of the performance made available to

[199] *J.A.C.*, Joint Action Committee of South Indian Film Producers, Madras (1989),p.49. If the service of voice artists on daily wage basis were cancelled within 2 hours from the call sheet time then half of the call sheet wages would have to be paid .an additional one-third amount would have to be paid if the artiste works for more than two hours of the call sheet time. If more than 2 hours work is put in then an additional amount of the basic wages per call sheet shall be paid and if it is more than 4 hours an additional full call sheet amount needs to be paid. For any extra dubbing arising out of the censor cuts no payment need be made.

[200] This is a uniform feature in all the three industries analyzed. Further no alternative trend has been reported from any other industry in India. Though in recent times in the advertising sector certain moves have been made in this direction through a monitoring organization called the INTAMM.

all corners of the globe in diverse media other than the tariff wage they are not amenable to receive any thing more. This is made all the more acute with the prevalence of middle men who take immense commission from the producers and also slashes the fees to be paid to the performing artist. There is often no direct interaction between the performer and the producer with the latter having sub-delegated the work to another person for a price. Even foreign television channels that have set up shop in India are making [201]use of the lax legal regulations in India and even if written contracts are in vogue then the provisions in them make it a point to take away or assign away all the rights[202].

The conditions of work in the industry despite this unionization are yet to look organized. [203] Despite the tariff rates in force, the artistes are not paid the standardized fees for their work[204]. There is a distinction between the dubbed voices and master voices. The latter are paid much higher than the former. The dubbed voices receive as low as Rs.200 to Rs.300. In contrast to the master voices in English and in Hindi for advertisements that fetch between Rs. 10000 to 50000, the payments to the dubbing artist are uncertain in other applications like narrations, documentaries, feature films and television serials to which their voice is put to. The payment structure cannot be compared to the treatment received by the voice artists internationally. The prevalence of middlemen who charge 15 to 95% as commission in the industry further drains what the dubbing artist finally receives. The commission is excessive if the artist is a fresh entrant. There is no awareness among the artistes about the amendments made in the year 1994 be it in their services for audio or the audiovisual. There has been no attempt to explore possibilities under the canopy of the Copyright Act. The artistes desire a direct link between the artists and the producers so that the middlemen do not operate. A payment based on the royalty system based on the extent of exploitation. The artist would receive remuneration each time the performance is used similar to the way the system works in western countries

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[201] Dubbing artists are also working in deplorable conditions in that they are often asked to sleep in the studios with a nominal food being provided to them.

[202] Interview with Sri Vishnu Sharma, an ace dubbing and voice over artist on his experience with the Disney Channel. He refused to sign the contract as he found the terms discriminatory.

[203] "The Art of Voice Acting", *USP Age*, October 2004, p.44.

[204] If a client pays Rs.15 to 30 lakhs for a commercial to the producer. The artist receives a pittance. It is never proportional to the value of his performance nor to the extent of exploitation.

based on the copyright model.[205] Commencement of the slap on system where by the artist must be paid for the number of applications to which the voice recorded is put to.[206] A minimum fee for taking into account the different applications of recordings has been propounded in recent times and a tariff card based on that has been released. This is required to be reviewed every 6 months. Even though not in the nature of a residual system nevertheless it aims to take into account a payment based on the time of recorded performance, the medium and the application to which it is put to.[207] A most significant need voiced has been to build unity among the diverse associations spread across the country and bring them under one umbrella as both unity of aims as well as the financial strength to achieve administrative purposes can be realized.

Contractual Practices in the Digital & Web Based Realms

The new convergence media like the Internet and mobile communications have become a major source of exploitation and concern to the entertainment industry particularly to the audio realm.[208] But it is only a matter of time when the digital possibilities become a reality for the audiovisual as well.[209] Already, movies have begun to be down loaded through satellite servers to the theatres.[210] Though there are numerous sites from which movies can be down loaded, the legitimate ones are few and the scourge is yet to hit the Indian movies. The reason for this could be the limited penetration that PC's have had into India and secondly the broadband possibilities being still in a state of development. The

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[205] See "The Art of Voice Acting", *USP Age*. October 2004, p.45.

[206] The data and analyses of the association of voice artists (affiliated to the Federation of Western India Cine Employees (F.W.I.C.E.) is based on Interviews with Jaisheel Suvarna (Hon. General Secretary), Vishnu Sharma, Shivraj Suvarna, Ritu Patel at the Association of Voice Artists office(AVA) on the 10th of August, 2005 at Mumbai. The author was a special invitee at the meeting to take stock of the industry and the changes envisaged. A memento was also presented to the author/research scholar for his participation. Their media advisor, Niranjan Naik also attended and made a presentation about their future plans at this meeting. Significantly he stressed the need for an all India unified body to represent the voice and dubbing artists.

[207] *Tariff Card of Voicing*, Association of Voice Artists, Mumbai (2004), pp.1 to 20. See **Annexure III**.,p.XVI.

[208] Abhilasha Ojha, "what's wrong with India's the music industry?", 5th September 2005, <http://us.rediff.com/money/2005/sep/05spec.htm> as on 5th September 2005.

[209] See, "Film Screening Goes Digital", *The Hindu* (Online Edn.) 4th November 2005. <http://www.hindu.com/2005/11/04/stories/2005110407940300.htm> as on 1st January 2006.

[210] Two films, *Anantha Bhadram* and *Mumbai Express* were screened using this technique ostensibly to check piracy. < http://www.hindu.com/2005/11/04/stories/2005110411180400.htm > as on 1st January 2006.

producers individually license or assign the web casting rights and collective licensing activity has not commenced among them.[211]

A noteworthy feature of the Internet space providing transactions has been that the consumer who is in need of the 'virtual plot' is required to execute no standard agreement with the lessor of the space. There are lots of agencies in India that act as the retail arm of the Internet service providers. These service providers give space and other ancillary facilities on rent for a minimum period of one year. The rate fixed depends upon the amount of space and also for the domain name registration. The domain name is registered through the Internet through the domain name registration service and the space is brought from the Internet service provider. The retailer get a percentage from the ISP for the transaction based upon the rate for the space provided or the domain registered. (Whether a status of agency can be attributed or that of a franchisee can be attributed to the retailer is debatable as also his extent of the liability of the retailer as regards the space provided by the Internet service provider). However it appears as to the guarantee of the space being provided to the user – lessee for the period promised.

The retailer also undertakes to extend the services of developing the website that includes designing and execution but these are only services that he renders as an addition to the function of the letting the space. They charge separately for the website development function. In both these respects from the intellectual property stand point both as the lessee of the space or the website developer, there is no formal guarantee from the lessee to the Lessor that the materials to be used on the web space or content be it literature or the art work are legitimate or properly authorized.[212] Neither does the retailer ask for any indemnity or guarantee nor does the lessor or the Internet Service Provider demand the same from the lessee of the service. Thus prior to the use of the website and even after the up linking there is no scrutiny filtering the space of any unauthorized material. There is not even a guarantee required to be produced by the user that he shall only use legitimate material or that the liability shall be restricted to the user or that he shall indemnify the service provider and the retailer from any legal action

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[211] This is reflected in the advertisements placed in film Journals or in newspapers by the buyer or the seller announcing either their acquisition of rights or sale.

[212] Interview with Sri Vineesh, Website Developer for Flashwebhost.com on 22nd of November 2005 at Kochi.

what so ever. The Internet service provider stalls the use of the site only if any aggrieved person makes a complaint in this regard. The Internet service provider would inform the retailer and steps would be taken to bring down the servers. The same principle and practice applies with regard to those providing space for audio and audiovisual streaming as well. There is no way that the unauthorized audio and audiovisual material can be filtered before hand or can be stalled before its appearance on the site. The Internet Service Provider is situated mostly on overseas soil. It is significant that the complaint is not made or to be made to the local provider of the space that is the retailer but the Internet Service Provider themselves. There fore under the current practice the retailer is not apparently responsible of any infringing material or abetment by providing space for hosting unauthorized material nor is he deemed to have any responsibility with regard to the same.

In this context it has to be noted that the collective licensing by both the IPRS (Indian Performing Rights Society[213]) as well as the PPL (Phonographic Performances Limited[214]) in India has commenced with respect to their repertoire[215]. But relevant for the purposes of this study is the fact that the performer does not receive any remuneration out of the same. Even if rights can be read in under the present statute or in the future, as aforementioned there is no way infringements can be preempted before putting the material into the digital trajectory through a process of prior filtration or standard documentation.

The Television Contracts and the Performing Artist in the Broadcasting Industry

Government Controlled Media- Television and Radio

The history of the growth of the broadcasting through television and radio throws light on the significance accorded to the performers in these media in India.

[213] See, < http://www.iprs.org/tariffdetails.asp?id=16 & http://www.iprs.org/tariffdetails.asp?id=32 > as on 1st January 2006,for interactive and non-interactive tariff details. A categorization is made based on the commercial model employed by the service.

[214] See, for the collective licensing functions of the PPL, the Internet is also covered. <http://www.pplindia.org/aboutus.html > as 1st January 2006.

[215] According to Favio D'Souza, CEO, Indian Music Industries, for instance the Rediff.com and the Sound buzz .Com have been licensed to stream the music until now. This points out the enormity of illegal streaming and copying happening across the web. It has hit the music industry badly. Interview held on 29th of August, 2006.

Doordarshan began its operations in India since the year 1959. In the year 1977 the B.G Verghese Committee had recommended the amalgamation of Doordarshan and the Akashwani into Akash Bharathi as both were dealing with electronic media.[216] The distinction between audio and audiovisual was considered a moot point and just the technical and administrative similarities were considered. Later on the P.C Joshi committee in the year 1979 made four volumes of recommendations. An attempt was made to study the development of software personality for television. The state of the television industry was not considered up to the mark. The succeeding government that came to power chose to ignore the recommendations. The idea was to keep the industry within the government. Privatization was not to be allowed within the sector. There was neither any commercial policy nor any program policy. The department was to continue as part of the Department of Information and Broadcasting. The Doordarshan was to act as an arm of the Central Government. The government fixed no distinct qualifications for the personnel recruited for working in the television medium. It was from a common pool of the Union Public Service Commission. For 45 years both for the Doordarshan as well as the All India Radio the common pool has been the source of work force in the creative as well as other departments. The distinct requirements of the two media have not been taken into consideration. No functional difference has been noted from the government standpoint. Even the technical hands in the television require a creative input distinct from that required in the radio division.

The same logic has been followed with respect to performers in *Doordarshan* too. The patterns of model agreements with performing artists have also been borrowed from the *Akashwani*. The panel of artistes is created both for *Doordarshan* and for *Akashwani* as well. Even in the remunerative pattern the only difference has been that fifty percent more is paid by way of remuneration to the performing artist on the television. The value of the image in the commercial sense of the term has not been acknowledged separately. The value of the visual image of the personality has not been taken into consideration. The total telecast right of the performance is granted to the Doordarshan. It is the largest terrestrial network in the world but it is still ruled by the archaic government rules and the

[216] Based on interview with Sri Anwar, Program Officer and News Producer of Trivandrum Doordarshan Kendra conducted on 28-11-2004 at Trivandrum.

hangover of government undertaking despite the formation of the Prasar Bharathi Corporation. A significant policy shift has not happened nor has any particular policy been formulated to encourage the best talent. Despite the enterprising changes in the constitution the Prasar Bharathi follows the set and staid norms of yesteryears. Without bifurcation into distinct functional entities, the needs of the audiovisual department would continue to languish with revenues being shared by the two departments with AIR being in loss and the Doordarshan making all the profits. While the revenue of Doordarshan was around rupees 18 crores for the preceding year, the Akashwani made only around 40 lakhs. Both continue to have the same official structure thereby working with 10 producers is the habit despite totally different functional and qualitative requirements. Despite far greater reach and technique superior technology being put to use through digital applications as distinct from the analogue mode. There has not been any delectable change in the approach towards the functioning of the Doordarshan[217].

With respect to performing artists who render performances for other organizers, the Doordarshan does not enter into any direct contracts with them. It is only with the organizer that a contract is entered into. Most of the coverage is insisted upon by the organizers who send invitations in this regard. They in turn get heavier sponsorships for the event as the sponsors would get an indirect publicity when the event is telecast. The artist may be quoting rates with the organizer taking into account the audiovisual coverage. There have been instances where in the artist has objected to the coverage and the cameras and recording instrument had to be removed. The understanding appears to be that unless the artist objects expressively the broadcaster or the affixer can record, as the intention to record is discernible for the artiste. With respect to such agreements with the respective organizers, the Doordarshan enters into a memorandum of understanding drawn up especially for the purpose and ratified by the director general of the Doordarshan Kendra. The organizer would also have to submit an indemnification bond that immunizes the Doordarshan from all likely actions infringement. The right to telecast the program that is vested with one Doordarshan Kendra cannot be used by another.

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[217] *Ibid.*

The producer airs independently produced programs on the Doordarshan upon a payment for the time provided by the channel, which works out to rupees 15000/- per 25 minutes. 150 seconds is provided to the producer to bring in the sponsored advertisements that is the main source of revenue for the producer. The producer is to execute an agreement with Doordarshan for the telecast. Only a single telecast right is vested with the Doordarshsan. At times there is a repeat telecast but the producer does not have to incur any additional expense towards the time slot. In fact this is a means to secure greater advertisement revenue for the program that there is also going to be a repeat telecast. The advertiser is enticed in that his product receives exposure twice over for a single payment of a fixed sum. Doordarshan importantly demands an indemnification bond that secures it from all the claims that the producer may have from or against the creative contributors and other rights holders with respect to the film. Thus it is important to note that even the model state television corporation does not exactly scrutinize the contractual terms signed between the creative contributors which includes the performing artist and the producers and whether commitments to the creative contributors have been complied or not.[218] The software rights is retained with the i.e. the ownership right is retained with the producer and after the telecast according to the contract DD does no longer have any rights in the program. The producer is free to use the software on any other channel for further exploitation. It is noteworthy that the performing artist does not receive any additional remuneration in this regard.

Feature films are telecast on minimum guarantee basis and on the basis of out right licensing of the film from the producer for a period of time. In the former instance a minimum guarantee is made to the telecaster and an agreed amount is paid to the producer of the film. This is only with respect to new films. On this basis the producer gains considerably upon each telecast. The ratio between the amount for the film and the producer could be in the ratio of 15: 3. That is 15 lakhs is the amount grossed by way of selling the free airtime on the channel then an amount of 3 lakhs has to be paid to the producer.

[218] Interview with Sri Adam Ayub on the 23rd of November 2004 at Trivandrum. Sri Adam Ayub is a producer, scriptwriter, director and actor associated with the audiovisual industry for well over 25 years since he graduated from the Film and Television Institute of Tamilnadu at Adyar. He is the founder president of the first association representing the interests of those associated with the television industry that includes performers in the medium called CONTACT based in Trivandrum.

The old films- of non-commercial value are bought for a longer period of time like say for 40000 rupees and the producer is provided a royalty amount on a percentage for in the range of say 25% per annum. For new songs from recently released films, the producer has to pay Doordarshan for the songs at the rate of rupees 6000 per song, as it is a promotional initiative. The songs from the old movies are taken for Rs. 6000 or Rs.5000 and telecast any number of times in a year. The telecast can be made only from the concerned Kendra. In all these circumstances the need for an indemnity bond is insisted upon.

The above mentioned study of the avenues of exploitation over the national broadcaster and telecaster points out that the avenue of exploitation of the entertainment software is endless and timeless- subject of course to copyright laws. The producer is the sole beneficiary of these avenues and subsequent exploitation even in media non-existent at the time of the first affixation contract does not provide any additional percolation to the performer or the other creative contributor. Unless the same has been specifically written in the form of a contract, which is rare, and instances might be counted on the fingertips. The state broadcasters, which include the radio and the television, now comes under the canopy of the Prasar Bharathi Corporation – a public sector undertaking from the year 1999. This gives it autonomy to perform and freedom from governmental interference. It also makes it at par with other competitors in the field with no immunity of being a governmental arm. Therefore commercial viability and survival amongst the fiercely competing interests in the media sector is of paramount interest to the corporation. But it must be noted that because of its state character as regards investment and decision-making it retains the character of the state from a constitutional perspective and thus has to conduct itself as a state entity should according to the tenets of the constitutional principles. This characteristic becomes important with regard to the contractual responsibilities of the corporation, as the contracts should exude the qualities of fairness and equity.

Contracts with the Performer for Original Programming

Drama Section

With respect to the original programming rendered by the Prasar Bharathi for the television, written agreements are mandatorily entered with the actor/performer or the producer[219]. The agreement has to be signed by the concerned actor or performer or producer and returned within a stipulated time frame. The agreement states the conditions that the artiste has to subscribe to in order to carry out the terms of the contract. The Station Director intimates to the artist seeking his services with the title of the program, date of broadcast /telecast and time, the duration and place of broadcast /telecast together with the fees for the same.[220]

The artist agrees to attend the rehearsals as are in the opinion of the All India Radio /Doordarsghan necessary for the production of the program[221]. The artist agrees to follow the instructions of the producer or any other officer in charge to be appointed by the Doordarshan /AIR.[222] The artist shall warrant at the time of signing the agreement that he is not under any engagement or (otherwise barred by any contract) precluding him from fulfilling this agreement and that he has not concealed any change of professional name or description.[223] The AIR or Doordarshan reserves the right to record the whole or any part of the program for rebroadcast /re-telecast without payment of additional fees.[224] Notwithstanding any thing contained herein AIR /Doordarshan shall have the right to release or allow any of its agency to release this program or part thereof through discs or tapes and cassettes manufactured commercially by paying an amount not exceeding four basic fees to the author/ talker.[225] Save and except making one-

[219] See, **Annexure IV**.,p.XXI for a copy of the standard agreement between the artiste and the AIR/ Doordarshan.

[220] The attached confirmation sheet has to be returned by the actor, performer or producer within three days from the receipt of this intimation. Source: Doordarshan (Trivandrum) procured on November 2004. Terms as set down in the contract and confirmation sheet for the drama section of the All India Radio/ Doordarshan.

[221] Clause 2 of the conditions of the contract.

[222] Clause 3 of the conditions of the contract.

[223] Clause 4 of the contract.

[224] Clause 5 of the conditions of the contract.

[225] Clause 5(a) of the contract.

time fees as stated aforesaid. AIR shall not be required to observe any other or further formalities [226](it is noteworthy that the specific mention in this regard has been only with respect to the All India Radio and nothing is mentioned with regard to the telecaster or Doordarshan).

In the event of any artist being a government servant, the broadcast /telecast of his program and the payment to him of the fee shall be subject to his obtaining the sanction of the head of his office or department to this effect and this sanction should be forwarded to the station director before the date of that broadcast /telecast.[227] It is important to note that broadcast/ telecast means radiation of the item from one or more transmitters of any broadcasting or telecasting organization.[228] It raises a significant issue whether cable transmissions and other communications to the public would come within the terms of the agreement.[229]

In the event of the artist alleging incapacity to perform by reason of illness or physical incapacity the certificate of a qualified medical practitioner, proving the fact of such medical incapacity shall forthwith be sent to All India Radio /Doordarshan by the artist stating the nature of the illness and that in consequence there of the artist is unable to perform. AIR/ Doordarshan in such an event shall not be liable to pay any fee or remuneration to the artist except for performance actually given by him.[230]

Should the artist for any reason (except for illness or physical incapacity certified as herein before provided or such other unavoidable cause as may be proved to the satisfaction of the station director fail to appear and perform as stipulated in the agreement, he shall pay to All India Radio /Doordarshan as and for liquidated damages a sum equal to the sum which the artist would have received for such appearance and performance in addition to the cost to all India radio/Doordarshan of providing a deputy and any other costs, damages and

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[226] *Ibid.*
[227] Clause 6 of the conditions of the contract.
[228] Clause 7 of the conditions of contract.
[229] Even though till date no one has raised these questions.
[230] Clause 8 of the conditions of the contract.

expenses incurred by All India Radio/ Doordarshan by reason of default to the artist.[231]

It is important to note that the All India Radio/telecaster reserves the right without assigning any reasons whatever to determine the contract. In such an event the artist shall not have or make any claim against All India Radio/ Doordarshan except for the fee, which shall be determined by All India Radio/ Doordarshan proportionate to the work actually done by him under the contract.[232]

Other than the aforementioned set of conditions there is no specific obligation specifically spelt out by the agreement as regards the economic rights or royalty rights other than when it comes to the commercial application of the recorded program other than by way of repeat telecast (four basic fees). Even this is not on the basis of the number of uses of the program. There is no bar to repeated telecast or broadcast of the program by the Kendra or by the national broadcaster and the option is specifically reserved to the broadcaster. Therefore the initial intimation regarding the date, time and place of telecast is rendered superfluous by this clause. There is no specific right spelt out with respect to the moral right of attribution or the right of integrity against distortion or mutilation of the program. The definition of the term broadcast does not seem to take into account the other means or popular means of communication to the public.

Music Section

There is a subtle difference with respect to agreements relating to performance of music for the Akashwani and the Doordarshan.[233] Some of the salient highlights of the agreement of relevance to the topic under study are as follows. The written consent of the artist is essential and the artist has to be intimated about the envisaged performance including details about the place of the performance, the duration of the performance, the character of the program, fee for the broadcast

[231] Clause 9 of the conditions of contract.
[232] Clause 10 of the conditions of contract.
[233] See, **Annexure V**.,p.XXIV for the terms of the Agreement between the performing Artist and the AIR /Doordarshan.

/telecast and the fee per broadcast/ telecast of a mechanical reproduction of the performance.[234]

It is specifically provided with respect to music (but this is absent with respect to drama-discussed earlier), that AIR /DD shall not be liable to the artist or to the legal personal representatives of the artist for any loss, damage or injury to the artists person or property during or in connection with this engagement unless caused by the negligence of AIR/DD or its own officers or servants and recoverable on that ground under the law applicable in India.[235]

Significantly, it is stipulated that the artist shall at all times keep AIR /DD indemnified in respect of the consequences following upon any breach of the aforesaid warranties and undertakings and in respect of all actions, proceedings, claims, demands and expenses whatsoever which may be made or brought against or suffered or incurred by AIR/DD in consequence of any breach of any such warranty or undertakings or on the ground that any such work as aforesaid is an infringement of any rights of any other person or is libelous or slanderous or controversial or obscene or indecent[236].

It is significant that the broadcaster shall be entitled to, without any further payment, to make a mechanical reproduction of any rehearsal or of the performance, broadcast /telecast and to use it for purposes not involving public performance, and to broadcast /telecast extracts there from in documentary and historical programs, and in trailer programs.[237] It is however important to note that specific purposes not involving a public performance is what is allowed.

AIR /Doordarshan shall be entitled upon payment of the additional fee shown overleaf to broadcast/ telecast a mechanical reproduction of the performance or extracts thereof.[238] The additional fee will not be paid if a mechanical reproduction is broadcast /telecast in lieu of the broadcast performance. A similar right exists in the AIR/ Doordarshan for commercial release through tapes.[239]

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[234] Source: Doordarshan (Trivandrum) procured on November 2004. Terms as set down in the contract and confirmation sheet for the music section of the All India Radio/ Doordarshan.
[235] Clause 6 of the conditions of contract in the music agreement.
[236] Clause 7 of the conditions of contract.
[237] Clause 8-a of the conditions of the contract.
[238] Clause 8-b of the conditions of contract.
[239] Clause 8-c of the conditions of contract.

Physical incapacity or illness is a reason that can be adduced for the absence from execution of the contract.[240] Should the artist for any reason (except illness or physical incapacity certified as herein before provided or such other unavoidable cause as may be proved to the satisfaction of the station director fail to appear and perform as stipulated in this agreement, he shall pay to AIR/ Doordarshan as and from liquidated damages a sum equal to the sum which the artist would have received for such appearance and performance in addition to the cost of AIR /Doordarshan for providing a deputy and other costs ,damages and expenses incurred by AIR/Doordarshan by reasons of default of the artist ,but nothing in this clause shall affect the right of AIR/Doordarshan to apply an injunction to restrain the artist from performing in breach of this contract or right of AIR/Doordarshan to determine this agreement under clause 13 below.[241]

When this agreement related to a troupe of two or more performers working under the control or management of the artist, the artist shall at the time the contract is signed, furnish AIR /DD in writing with such names of the performers as the station director may require and shall not substitute a performer for a person so named without the written consent of the station director. The artist shall further secure the written consent of the other member or members of the troupe to the terms of this agreement. The artist agrees to pay to each member of the troupe the proportion of any fee payable to the artist to which the member is entitled.[242] If the artist is removed then pay for work proportionate to that rendered has to be provided to him by the employer.[243]

The employer has the right to forbid or reject the performance if the artist is not sober or in a fit state of health to perform according to the standard expected of him. In such cases the artist will not be entitled to the fees agreed upon or any portion thereof and to any compensation whatsoever.[244]

From an assessment of the terms and conditions pertaining to drama and music section it is intriguing why certain sections in one are found amiss in the other. While there is a specific mention of additional fees in the music section there is none with respect to drama section for the sake of telecast or mechanical

[240] Clause 10 of the conditions of contract.
[241] Clause 11.
[242] Clause 12.
[243] Clause 13.
[244] Clause 16.

reproduction. Though the official's maintain that no such additional fees are in vogue today. Those provisions are cut before being sent to the performers for their ratification and acceptance.

One can deduce that agreements entered into by the state enterprise with the performing artist are in writing. Payment is made according to a pre-set grading and tariff table. There is no discrimination based on the standing of the artist. A grading is provided according to the audition test. The remuneration is laid down and granted accordingly. Only in exceptional cases a higher scale is granted. The payment for Doordarshan artistes is only 50% more than that given to AIR artistes. No greater weight age is given to the audiovisual artist. A wide right of exploitation is granted to the state entity through the conveyance of mechanical reproduction and re-telecast rights. No right to moral credit is provided. There is neither any right to integrity of the performance being preserved; it is left to the discretion of the telecaster without any reference to the need for consent of the performing artist. The artist conveys all the rights upon the receipt of a fee set according to a tariff table. There is also an embargo on artists being employed for more than a specific number of times within a particular period[245].

The All India Radio functions as another wing of the Prasar Bharathi. There is a definite categorization of the artists on the basis of audition tests carried out by the organization. The remuneration is paid on the basis of this categorization according to a tariff table set down. All artists including creative contributors are paid according to this scale. There is no distinction between those who may otherwise command a higher standing commercially or others with a lower standing.

For instance for a drama script of 15 minutes a sum of 1000 Rupees is given to the scriptwriter and for duration of half an hour a sum of Rupees 1500 and for 1-hour script Rs.2500 is paid respectively. This is the same for both AIR as well as the Doordarshan with marginal increase for the latter. The script can be solicited and unsolicited. The scriptwriter can use the script for other purposes. The broadcaster to which the right to broadcast has been granted can translate the same into other languages and broadcast as well. For which no additional

[245] This is to see to it that the performance is not monopolized in a few hands. Based on interview with Rana Pratap, Program Officer of All India Radio, Trivandrum on 24-11-2004.

remuneration would be granted. When the same is telecast as a national program then the rate would be different.

With respect to lyrics, there is an internal committee that decides. Which is in the range of Rupees 1000 to 500. It is not for further use. The lyric writer can publish but cannot broadcast through any other broadcaster. When once he consents the same to be broadcast through the AIR.

For drama artists an audition test is conducted and grading given as B, B- High, A and A- Top. The Delhi committee decides the last grade while the committee of the local Kendra decides the rest. While the artist in B grade gets Rupees 500, the B-High artist gets Rupees 700, an A artist begets Rupees 1000 and an A-Top artist begets Rupees 1500. A uniform T.A and D.A allowance is also provided though those in the higher grade beget higher perquisites like air-conditioned travel. All this is inclusive of the pay for the rehearsals as well.[246]

While for musical performers a similar system is followed, a new grade has been created for accomplished artists. For folk music singers too a similar auditioned grading system is followed. However repeats of the performances are not allowed. A date chart is provided and there should be a gap of at least three months between one performance and another. The contract is sent earlier and the cheque is kept ready as soon as the performance is over. The use of un-auditioned artist is rare. The percussionists are also treated in the same manner. Double the usual rate is provided to the artist only when they perform before an invited audience and when it is twice recorded. Another station would require the permission from other station to use the software or the artist auditioned in one station.[247]

Programs like film music songs and pop albums are also sourced from outside. An agreement based on royalty has been entered into between AIR and the South Indian Film Chamber of Commerce at around Rupees 5 per song. There is also a direct agreement with the film producers who provide the song free of cost for broadcast. A royalty agreement is entered into with the producer of the album on a separate tariff rate with respect to the pop albums. But it is important to note that in none of these agreements is there a need to pay royalty to the performing artist.

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[246] *Ibid.*
[247] *Ibid.*

There is a grading on the basis of positions held like for example Vice Chancellor (Rs.1000), MP's and MLA's (Rs.750) with respect to news programs like invited audience discussions. There is an upper limit for the tariff rate of Rs. 2000. Though the written contracts, which are the relics of an earlier age, do contain provisions, which ordain additional remuneration for the repeat utilization of the recorded performance presently the practice has ceased according to the officials of corporation.[248] The policy in this regard has undergone a change and repeats do not beget any further revenue for the performer, the scriptwriter or any other creative contributor. A fixed one-time payment is all that they are entitled to. The royalty-based remuneration is no longer operational. The officials invoking the contractual clauses or inappropriateness of the contractual undertaking have not noticed a single litigation pertaining to these agreements entered into with the state undertaking. Interestingly the agreements do not show the intent of assignment of the rights being expressly reflected in the agreement rather it would have to be read in impliedly into the contract. Secondly it is difficult to make out from the contract whether the broadcasting and the telecasting right has been exclusively granted to the state entity or only licensed with the right to retain the further right of similar exploitation. That is any further grant of a similar right to any other entity could be infringement of the present transfer. There is ample imbalance between the allowance of repeats and the payment, which is afforded to the creative contributors as remuneration for their services. The ambit of use is not restrictively specified rather it is left unspecified with reference to geography as well as the durational element. This raises a valid question of an unfair bargaining position when seen in relation to the single fixed payment given to the artiste. Further the repetitive use through an infrastructure as huge as that of the Doordarshan and the AIR would very well limit the commercial value in the performance and other channels and avenues may not exude as much interest in the work once telecast or broadcast. Thus the proportion of payment to the exploitation of the work does not seem to be balanced with one another. This is however partly offset by the positive aspect that there is a written agreement and the corporation pays the performer promptly after the recording.

[248] Interview with Rana Pratap, Program Officer of the AIR Kendra at Trivandrum on 24-11-2004.

This agreement when seen in the context of Section 18 and 19 of the Copyright Act will devolve back on the creative contributor at the end of five years and the geographical area of use can only be India unless otherwise specified. But in the face of satellite distribution, the footprint of the satellite would need to be guided if it is not to violate the terms.

With respect to the performing artist in the aural medium of broadcasting, the agreement is a major advancement over the requirement of a mere consent that is required to be elicited from the performer under the terms of Section 38 of the Copyright Act. It is a written agreement and therefore a more credible authorization. Further, consent is provided for the recording, broadcasting and the particular purposes for which these are to be applied are also stated therein. But it can be noticed that there is the need for only a single consent for all these applications and extent of use. From a simple scan of the provisions of the Copyright Act pertaining to performing artists in the aural medium, it can be said that the contract complies with its requirements. But whether the terms are fair or not would be debatable that is particularly with respect to the remunerative adequacy and the extent of exploitation.

The Television Industry

An assessment of performers' status in the television industry can best be realized by sketching the structure of this industry and what it is poised for in the future. The television industry has overwhelmed the media sector since the color transmissions began in 1982 following the Asian games. Until then there were only a few initiatives in this sector from the state enterprise of the Information and Broadcasting Ministry called the Doordarshan. Foreign investments in the media segment was discouraged by the Government of India following a policy decision taken in the year 1955.[249] Following the gulf war in the year 1990, there was a sudden channel explosion with the telecast of satellite television from foreign broadcasters. By 1996 the number of channels had crossed fifty. The software producers enthusiastically responded to this new demand for programs as now the entertainment needed to be beamed 24 hours through 365 days in an year.

[249] <http://www.indiantelevision.com/indianbrodcast/history/historyoftele.htm> as on 1st January 2006.

At the distribution level, the arrival of Multi System Operators (MSO) saw the shakeup among the 60000 odd cable operators who had sprouted up[250]. The MSO's could provide access to more channels at a time. The situation also saw the loss bearing satellite channels switching over to be pay channels.

The Government of India began to brood over the statutory regulation of this rather chaotic industry. The Cable Television Act was passed in the year 1995[251]. However the broadcasting arena was not yet legally streamlined but the government did attempt a broadcasting bill. The present trend to usher in cable less transmissions through Direct to Home (DTH) processes has further run into walls with differences in the government. But with it a new economy transplanting the old would take place within a space of ten years[252] which could further be modified by the broadband availability that would create a convergence of entertainment and information medium through the computer conduit. Television could either be coexisting with the computer or could succumb to its possibilities and advantages.

The television industry promises an increase in the demand for content, increase in programming rates and increasing revenue from television advertising. These is an almost assured trend of consolidation in this industry with integrated Models being the reliable model for consistent production and output in the long run. Content providers would have a presence across diverse media platforms in order to derive maximum value[253]. This would be a playing field of huge players and this is evident from the trend of most corporate entities grazing the unlimited market expanse.[254] The high degree of corporatization is a continuing syndrome even today.

There are two popular revenue models for Television content marketing a, the commissioned programming mode and the sponsored programming method. In the former model the broadcaster commissions the content provider to produce

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[250] *Ibid.*

[251] *Ibid.*

[252] *Ibid.* Though Rupert Mudrochs Ku band has been put on hold, News Corp. is carrying on with a subscription of 20000. But with Doordarshan propelling the Direct To Home (DTH) dish, the future of the next five years has begun in India.

[253] *Indian Entertainment Industry; Envisioning for Tomorrow*, FICCI, Arthur Anderson Report, N. Delhi (2000), p.39.

[254] In the year 2000, five prominent companies accessed the capital markets raised resources through initial public offerings to the tune of Rs. 2.03 billion. There are several listed television companies on the stock market that have consistently sustained market appreciation and remain buoyant by their performance. *Id.*, p.38.

content on a cost plus margin basis. (The margin would be 15- 25% of the costs; the broadcaster picks advertising revenues. The majority of cable and satellite televisions follow this model except for Doordarshan and a few other south Indian channels. In the latter, model the content provider makes an upfront payment to the broadcaster and buys free commercial time (FCT) from it, depending on the duration of the program. (3 minutes for program duration of 30 minutes). The content provider recoups its investment whether by getting program sponsors or by selling FCT to advertisers. The copyright in the content stays back with the content provider and reruns can be hoisted exploited in this regard.[255]

However the trends in the industry have been changing with these models being more flexible. As the demand for quality content increased so in commissioned programming the content provider is now able to participate in the revenue if the performs beyond Expectations on a scale such as ratings based on surveys. The content providers are able to bargain and retain the copyright in the content for further exploitation too. Here the content providers in a more advantage round bargaining position than the broadcaster. It is the content provider that mostly engages the performing artist and other creative contributors but these reruns do not percolate as new sources revenue to them. This is so even in the absence of any written contract or specific oral agreement. However the practices with respect to performing artists in this media does not inspire any confidence as a fallout of professionalism and transparency in practices is not reflected in the engagement of personnel in the creative department

Besides producing for the domestic and the export market new media platforms are also being tried out though the trend is at a fledgling stage. As early as in the year 2000 webcasting was being attempted by media houses such as united television through their portal Sharkstream .com and Pentamedia graphics (NUMTV, a pay platform that hosts a bouquet of regional language channels). The earnings from this sector are negligible as the required bandwidth was not available. But it is poised for a mega leap forward with the mega conglomerates like the BSNL and Reliance info and TATA Indicom laying siege to country by laying down optical fibber across the length and breath of the country.

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[255] *Id.*,p.36.

It was only with the advent of satellite television that the television industry as a source of employment generation and artistic opportunity truly took off. Ever since massive upheaval in the audiovisual mass communications in the country there has not been any policy with respect to the labor employed in the television industry in contrast to the limited attention given in this regard to the cinema industry. Though the industry is hardly in its fifteenth year of functioning nevertheless it has proven itself to be a cultural, commercial and an economic facilitator with immense employment potential. It could be considered by any credible hypothesis to have overtaken the film industry in terms of output as well as regular employment as well as revenue generated. However the Government of India as well as the state governments have not extended any package to the television industry like it has to the film industry. There has been a slow but steady change in this regard with the television industry being organized on professional lines. The television producers have organized in certain states and the artistes have also in recent times organized themselves. But these are in its fledgling stages. Nevertheless they have been able to cast their influence through their represent offices and gain favorable foothold and government attention to their grievances. The efforts are paying off. The gains have been varied from different states but the progress is discernible. The governments too have changed their attitude towards the television industry with the slow effacement of the early-distanced attitude.

Practices in the Television Industry with Respect to the Performer

The artists in the television industry were totally unorganized till the mid nineties. In Kerala prior to 1996 there was no organization representing the creative contributors in the television sector[256]. Even the welfare schemes of the government of India and the state governments were being extended only to the cinema workers and creative contributors therein and the television industry was left outside the purview. Autonomous institutions that had commenced working in

[256] Based on interview with Sri Adam Ayub, on the 23rd of November 2004, he recollected his experience working for several producers for serials including a much popular one that catapulted Manoj.K.Jayan - a character artiste of great repute (he received Rupees 1000 for acting in this popular serial in the early 90's) into stardom –*Gumilagal*. Sri Adam Ayub, the founder President of CONTACT received Rupees 5000 for acting, directing and scripting the serial.

the realm of cinema were also at a formative stage and therefore it too did not cater to the television sector. For example the Chalachitra Academy that came into being around the same time did not include the television industry within its purview. But this attitude was abandoned due to consistent pressure from the newly organized forces in the television industry. The pension and the welfare schemes being operated by the Chalachitra Academy on behalf of the state government were extended to the television industry with the same criteria as exists for the film industry.

Prior to 1996 there was no practice of any written contract being entered into between the artist and the producer. The oral agreements that were entered into were not fulfilled to the full extent of the promises made. But no one could complain because of the uncertainty of the promises and survival in the television industry lest the producer lobby was offended. There was also no organized body to turn to for help. This was the same for both the artist as well as the technician. (There were artists who are major film stars who during this period were paid rupees one thousand for twenty-five episodes) and writers, directors and scriptwriter actors who were paid rupees five thousand for their efforts.[257] There were no litigations with respect to contracts entered into between the artist or any creative contributor and the producers during this period.

However ever since organizational efforts started certain norms have begun to be observed though nothing is as yet in black and white. There is no stipulation either from the organizational side or otherwise what the agreements between the artist and the producer should be written nor is there any understanding with respect to the conditions and terms. However certain norms have come to be observed, at least with respect to the technicians working conditions that their shift shall be considered to be eight hour long and that a minimum of rupees 150 needs to be paid to the technician. Further there is a body to turn to if one is terminated without any explanation or there is a default of payment. Prior to this the artist or any creative contributor could get thrown out without reason by the director or the producer. When the serial becomes popular, the artist tries to raise his wages. But this is resented and his work is terminated. Even the character is continued using a different artist in case he dissents. The

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[257] *Ibid.*

organization does try to resolve issues if the artist makes a complaint to them. The body then would try to call upon the other party and resolve the issue. In case the other party does not cooperate then the legal option is the only recourse[258].

Today the artists do not have much grievance regarding the quantum that is paid to them which ranges from Rupees 500 to Rupees 20000 per day. This is dependent on the standing of the artists and their reputation. The artistes who act in television serials demand the highest remuneration. The junior artistes are paid a minimum of Rupees 150 per day. This is without any collective bargaining agreements and a tariff chart. The junior artists for the cinema industry do not fall within the ambit of junior artists for the television industry the tariff chart arrived at through collective bargaining in the film industry is not applicable to them.

At present the lack of importance granted to written agreements and standard forms is because if these were pressed then there would have been greater discipline in the industry which would impede the flexibility currently being enjoyed with regard to the work and assignments. The artists undertake multiple assignments on one hand and on the other the producers enjoy the freedom of flexibility that suits their convenience and economics. Most of the serials do not have a prior script written which is shown to the performing Artists. The confidence in the performing artist with respect to the deal is on the basis of the confidence in the banner and the continuing opportunity to act. Further when the artist becomes inconvenient or in any way objects to the story line the producer can easily remove him, as there is no prior cogent agreement written down. Further the practices in the television industry have also raised such expectations. The performing artist can be paid on the basis of per episode basis or on the basis of work per day. There is no uniform basis that is followed among all the performing artists. The only recourse is to what has been orally agreed and if there is any default or deviation there is scarcely any standard norm to fall back on. Though after the mid nineties norms are supposedly being practiced impliedly without any expressive pronouncement either organizationally or statutorily.

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[258] *Ibid.*

From the aforesaid narration of the practices in the television industry it can be surmised that there is no practice of the nature reflecting the economic rights in neither the copyright ladder nor are there any rights explicitly recognized in the order of moral rights. Though the right of attribution is practiced, it has not developed into a norm and is therefore avoidable. For instance, in order to provide more space to commercial advertisement or to the program software these formalities are sniped off[259]. Further there is very little hold for the performing artist over the way performance would be dealt with by the director or the producer. The artist does not have any sway over the final product even if it is mutilated or distorted or even completely removed. In case of unceremonious exits there is no compensation provided by the producer to the performing artist. (Though there may be some exceptional circumstances and experiences but these are not the rule[260]).

The oral agreement does not take into account the diverse possibilities of avenues of exploitation. It has not commenced taking into account the new digital pathway through computer-generated transmissions as well. Digital transmission has commenced being used by major players in the satellite television segment. This facilitates access as and when the receiver needs to view the program. The program is permanently accessible for the recipient. It is an interactive arrangement but it does not envisage a single transmission at a time chosen by the broadcaster but envisages a continuous access at the demand of the recipient at the time and place chosen by him. This state of affairs is significant from two standpoints that is to the performing artist well as the producer.

In dealings where in the producer sells the program out rightly on the broadcaster for a price; he should have taken into account the new avenue of exploitation while assigning the rights. If he had taken into account the traditional broadcasting right even if in the digital medium that would not encompass the digital transmission through computers. Unless and until these rights are distinctly stated. But even if these have been conveyed while stating the value for the product, the new form of exploitation has not been taken into consideration till now. Perhaps it is at a fledgling stage.

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[259] *Ibid.*
[260] *Ibid.*

With respect to the performing artist too, the price quoted by them too these new avenues of exploitation has not been taken onto account while arriving upon the single lump sum remuneration. The possibilities of repetitive exploitation perennially and picture perfect reproduction and downloading –storage possibilities are yet to be taken into consideration by the performing artists as factors in the agreement while fixing their remuneration.

There is no social or economic security for the personnel working in television production. There is neither insurance cover nor are there any automatic welfare measures such as a pension scheme from the part of the interests in the industry. The production houses can be relied on to intervene and respond to emergencies of a medical and like nature not because the law demands such an intervention or gesture from their part but on humanitarian grounds[261] and moral premises. While some of the television productions have begun to be insured (like for instance *Kaun Banega Karor Pathi* and some of the test matches in cricket, there is nothing like mandatory insurance of all projects).[262] This is particularly so when the channels are delegating the production to production houses with tight shoestring budget. Though the entertainment sector has been declared as an industry, the provisions under which it has been so declared has no means to protect the labor interests or ensure a proper infrastructure for the same (It is still ambiguous whether it is the entertainment sector or the film sector that has been declared as an industry and whether the film industry can be considered to encompass the television sector). The artistes as well as the employees do not have any statutory or industry initiated protective cover. The employees' organizations do take up the cause of employees in this regard and they have a protective cover in which a contribution of rupees 25 is to be paid per month per member. Most instances of accident on the sets are settled through informal mediations and settlements[263]. The resort to the judiciary or approaching the

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[261] See, "Behind the Scenes, Do Artists Get a Raw Deal in the Television Industry", available on <http://www.indiantelevision.com/special/insurance.htm >Posted on 15 December 2001 7:35 pm as on 1st December 2003.

[262] *Ibid.*

[263] See "Niki Hits Back", available at <http://www.indiantelevision.com/special/niki.htm> (as on January 1st, 2004) says Niki Aneja in an interview to Harsh Khot said, 'that this industry is not worth it. There are hypocrites in this industry. I feel every actor should insist on his/her security.....I still get told, "Don't go to press with this story or they'll bar you. They'll label you as taboo." Niki Aneja is one of the few actors who decided to take on the might of the powerful in the Indian television industry by seeking legal recourse.

police for intervention and resolution of the problem are not part of the ways in the industry. Production houses would be willing to settle the matter out of court by asking for the withdrawal of the files from the courts. Even the association that represents the artistes (Cine and Television Artistes Association) requires that the litigation should be withdrawn.[264] The resort to the police and the judiciary would invite resentment and boycott. Other than on humanitarian grounds there is no legal obligation on the part of the production houses to extend any compensation to the victim.[265] The problem is compounded with the present workmen compensation rules not covering number of unspecified artists engaged by means of a contract.[266] The absence of regularized and standardized contracts lends a large amount of uncertainty to the artists in such circumstances. The performing artists are not isolated in their travails with respect to uncertainty of tenure and economic and social insecurity in the television industry –the other creative contributors like the directors too are plagued by such fears constantly. Their survival depends on a lot of factors including the TRP ratings of the program. Most often the directors are dumped mid way and replaced by another giving scant regard to the contribution given by the former. The contracts do not specify any duration of assignment.

The directors are treated as mere executors and do not have any identity commonly associated with the creator of an artistic work.[267] The position of executives in the industry is not different either with the industry being susceptible

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[264] *Ibid.* For instance, Niki Aneja, a television actor met with a car accident during the shoot and the production houses were hesitant to help her financially nor medically.

[265] See "Shrey Guleri Defends Himself", available at <http://www.indiantelevision.com/special/shrey.htm.>,as on January 1st 2004. Shrey Guleri in conversation with Aparna Joshi, the producer on behalf of Prime Channel said 'this was probably the first time in the industry an artiste approached the police after an accident on the sets. Now, let the court take its course and we will pay up accordingly'. .... 'According to the contracts, I am not liable to pay any compensation in case of any mishaps. Even when a channel asks us to make any specific serial, there is usually no provision of third party insurance. This is the way the industry works'. Shrey Guleri echoes most other production houses in the country when he says that he is willing to offer compensation to Niki on humane grounds, but is not bound by any regulations to do so. For a comparison with the international scene. See <http://www.indiantelevision.com/special/international.htm>. as on 1st January 2004.

[266] *Ibid.*

[267] See Vickey Lalwani, "Are Directors Getting a Raw Deal on Television", posted on 27th March 2004, <http://us.indiantelevision.com/special/y2k4/directoRs.htm> as on 1st January 2005.

to changing trends in the market[268]. Though there is an immense difference between the artistic contributor and the administrator's responsibilities and rights. The foreign television channels too carry only the same rights for the performers in their implied or express contracts as their Indian counterparts with the only added feature that it is more formal and sophisticated. Taking care that no residue of any rights is left with the performing artist, all rights are taken away by an express transfer of rights clause. This is strikingly in contrast to the practices in the west. It is the same treatment with both the performing artist as well as the dubbing or the voice over artist[269]. The common customary notion is that once the oral consent has been granted to the producer to perform and to affix the performance then the rights in the performance passover to the producer.[270] The notions in the television industry are equally disadvantageous to the other creative contributors.

Organizational Preparedness and Work for Performing Artists in the Television Sector

The first organization to come into existence in Kerala representing all the constituents of the television industry was the 'CONTACT'[271] in the year 1995. It has been registered as a charitable society. It was to be a representative organization for the major section involved in the television production industry in the state of Kerala. The personnel who have worked in the following capacities in the television media were eligible to be members of the association. The sections included the directors, producers, artistes, cameramen, sound

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[268] See <http://us.indiantelevision.com/special/y2k4/ex-tv_execs.htm >as on 1st January 2005.

[269] Interview with Ms. Anupama, Assistant Director (Disney Channel) and Vishnu Sharma, dubbing and voice over artist (member of AVA) at Mumbai. Also based on interview with Tripunithara Krishna Das, a performer of the Edakka (percussionist), whose work is much sought after by television channels both Indian and foreign. Interview with Bhagyalakshmi, ace-dubbing artist, also establishes these inferences in the television medium.

[270] Significantly the pattern is uniform all over the country. Even the foreign television production companies in India and channels do not follow any different mindset taking advantage of the absence of the Laws and collective bargaining practices.

[271] The Confederation of Television Artists Commercial Operators and Technicians (Reg. No.t. 1093). See rules and byelaws of the organization in, CONTACT, *Niyamavali*, published by CONTACT.

recordists, makeup men, music directors, art directors, dress designers, graphic technicians, sound effects technicians, production manager and eruptives, script writers, dubbing artists, studio owners, out door unit in charge, stringers, marketing agencies, all assistants in all departments, still photographers and public relations officers. Therefore the Association had a wide array of interests to represent that included the artists and technicians as well as the investing producers. It was to be more of a representative towards the state rather than a self- regulatory body though that too was one of their aims. This is discernible from one of the primary demands put forward by them for extension of welfare benefits to the personnel in the television industry. After the Chalachitra academy was launched and television was also brought within its canopy the state recognized the medium at par with cinema in recognition of talent and also in extending benefits of welfare to the personnel in the television sector such as pension benefits.

Some of the important objectives of this body are to develop the spirit of mutual cooperation, and brotherhood and to create conducive conditions to realize this[272]. The objective is to strive for implementing programs towards the social – cultural and economic upliftment of the members of the society. To create a sense of unity among the members of the society and to settle disputes among them in a peaceful and a conciliatory manner. To formulate programs of action in tune with the financial capacity of the organization to extend help to the artists and other members who are beleaguered by either physical or practical difficulties[273]. The society would strive to protect the rights of the members and to inculcate in the members discipline and a sense of responsibility towards the society. To create partnerships and contacts with likeminded societies in other countries of the world and to affiliate with other organizations working in the field with similar interests and resolve disputes amicably. The society also intends to act in an advisory capacity in this sector for the government.[274]

In Tamilnadu too similar efforts have commenced since November 2003 when *Chinna Thirai Nadigar Sangam*[275] came into being ostensibly for the upliftment of

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[272] *Id.*, p.1.
[273] *Id.*, p.2.
[274] *Ibid.*
[275] Akila Dinakar, "Small Screen, Big Show" , *The Hindu*, Chennai (edn.), November 4th, 2003,p.2.

the economic and labor status of the performing artist in the television industry.[276] The Bollywood has a representative organization for the film and the television artists in the country. The members resort to its help in times of being in distress or any dispute with the industry. Besides representing artists' version before the industry and the government of India, the association holds star shows and other functions to honor its members. The organization also has formulated several welfare measures to help the artists in distress. The organization has not indulged in any collective bargaining practices like that of their southern industry counterparts.[277] There does not seem to be any striking differences between the organizational preparedness with respect to performing artists and that in the south Indian film industry. The workers and technicians are also organized along trade union lines just like their southern counterparts and affiliated to All India Film Employees' Confederation (AIFEC) functioning from Mumbai. The contracts are more or less on the same lines as the practices in films if not cruder and less clear.[278]

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[276] The Research Scholar had the privilege to be present at the inauguration of the association in Madras on the 3rd of November 2003, as it coincided with his visit to the city for material collection. He was asked to attend the inauguration by one of the office bearers, Director Sri Selvaraj.

[277] See, " Veteran Stars Felicitated", *Indian Express (*Bom.), Oct 3rd, 1999, <http://www.indianexpress.com/ie/daily/19991023/ige23073.html> as on February 4th 2003. The Cine & TV Artistes Association (CINTAA),Mumbai, felicitated veteran artistes like Shakila, Anita Guha, Jagdeep, Kalyani Bai, Achala Sachdev, Shammi, Johnny Walker, Jairaj and Nirupa Roy along with newly elected MPs Sunil Dutt, Vinod Khanna and Raj Babbar. The CINTAA has set up a Janata Group Accident Insurance Policy ranging from Rs. 50,000 to Rs. 1 lakh for each of its members, the premium for which was being paid from the interest accrued from the Rs. 2.5 lakh donated by Amitabh Bachchan. The Association has also acquired land admeasuring 1,100 meters where it plans to construct a building.

[278] During the inauguration of the *Chinna Therai Nadigar Sangam* (Small Screen Artists Association), President of the Association Sri S.N. Vasanth said that there were several problems for the actors and actresses working for the mega serials who are caught in locations with no time to rest and with most directors working on a tight budget and they have to take even their own costumes. Akila Dinakar," Small Screen, Big Show", *The Hindu*, Chennai (edn.), November 4th, 2003,p.2.

CHAPTER 10

CONCLUSIONS AND SUGGESTIONS

Conclusions

Performer and the Philosophy of Intellectual Property

It can be safely concluded that the performers' right in the performance fully fits into the four corners of the discourse on the philosophy of intellectual property law. All the reasons sustaining a common law property rights protection for the intellectual creations like literary works and artistic works are equally applicable to the performances too. The theories that have substantiated property rights for intellectual creations are logically and harmoniously applicable to performers' creations as well. The discord and debate in this respect has now been laid to rest and almost all jurisdictions as also international instruments today acknowledge the legitimacy of performers aspirations. The uncertainties are now confined to issues of objectivity and the manner of administering the rights.

Opposition and Unfounded Fears

It can be inferred that the persuasive effect of performers' rights could not be stone walled for long with the interests in the industry and the international opinion realizing the need for conditions to be confidence inspiring. The momentum in the metamorphosis of rights of the performers is still a continuing one and it can never be negated or slowed down. Traditionally the aspirations of new entities to protection under the copyright umbrella have been opposed by entities that have already been provided protection. They feared a dilution in safeguards that they had cherished and gained after much strife. The same opposition and misgiving can be seen reflected in the approach to the rights of the performers as well. However developments and functioning in countries that have accommodated the performers cautiously at some level or the other have shown that performers rights can coexist with other rights without any substantial threat to their rights or to the administration of rights.

Common Law Protection for the Performers

The common law based actions that have been used to substantiate a common law literary property right or based on principles of unfair competition can be found to have its drawbacks. The means resorted to have found a diverse measure of acceptance and success in different countries. However these principles like right to publicity, privacy, passing off and unfair competition mystifies the borders of the property right that can be availed and what the public can legitimately enjoy. The resort can be only to a civil remedy as only a civil action can be resorted to. Because of its angle of commercial exploitation, the onus on the quantum of creativity and originality does not exist. Once consent is provided in the absence of express contract to the contrary, the limits of the transfer are not clear. It does not provide straightforward answers to the duration, the extent of fair use and the circumstances of employer –employee relationships. The uncertainty can be discerned with respect to the appreciation of moral rights as well. Though these principles do provide relief's it has immense differences from the criteria to be fulfilled and relief realized in comparison with the recognition of a common law copyright in performances. Even under actions based on common law literary property questions like what constitutes 'publication' have not found assured answers. In England despite statute making its presence, property rights and civil remedies had to be finally granted despite the presence of a criminal statute by recognizing the private character of the subject matter. This exposed the need for a proper legislation.

Live Performances

It is noteworthy that protection has been accorded to live performances of both audio as well as audiovisuals in these countries with vibrant entertainment industries. This is a major step towards shedding the traditional requirements of the need for fixations, tangibility and writing. Another feature is the equanimity with which both the audio as well as audiovisual performers have been treated with respect to the live performance.

Coverage of Performers

It can be noticed that in all the jurisdictions that have been studied, the performers amenable to protection are qualified and is not open ended. Either

this qualification has been brought about through statutory stipulation or by means of collectively bargained contracts. The discrimination is apparently on the basis of originality and the creativity displayed by the artiste. An important characteristic in this regard is that the notion of returns proportionate to the extent of exploitation has covered almost the entire segment of performers. It also points out why the statutory rights need to be accompanied by collective bargaining contracts in order to impart flexibility and viability to the rights administration.

Residuals

It is important to note that the concept of residuals has brought down the initial financial burden of the investor. It is convenient, as individual bargains need not be negotiated with each performer. For the performer it provides him with a level field in an industry marked with unfair bargaining power. Its prevalence has imparted much more involvement in the artist in giving the best for the production, as the benefits would trickle in if there were greater exploitation and demand for the product. The risk bearing therefore is not the sole responsibility of the producer. It has also proved an effective alternative to welfare based on charity that raised a lot of antagonism prejudice and limitations. It has also demanded the need for a continued association and membership in the unions thereby strengthening the collective organizational and bargaining process. It provides the performing artist with financial security during old age, unemployment and sickness. It facilitates easier exploitation of both the audio as well as the audiovisual as the terms have already been taken into account in the collective bargaining agreements. Even though the residual amount is not proportional to the profits made nevertheless they benefit from the opportunities for exploitation, as the residual is a percentage of the basic pay. Residuals have also brought in the need for collective administration, as the individual would be hard pressed to trace the course of exploitation and remuneration arising from exploitation worldwide. In short the combination of collective bargaining, statutory rights and collective administration has proved to be effective in upholding performers interests against unauthorized and unfair exploitation while at the same time facilitating unobstructed exploitation to the producers.

Equitable Remuneration

A scan of the national and international instruments reveals the recognition of the utility and necessity for equitable remuneration in the absence of a cogent right in the nature of broadcasting and communication to the public of the fixed performances and as an alternative to the rental right in films. The element of compulsiveness has not been brought into this concept and the countries have been vested with the option to apply or deny its application. However the models have been compellingly applied in regional arrangements like the European Union with a fair measure of success. This facilitates the ease of commercial exploitation at the same time making sure that the performer is provided with remuneration though he would not have the right to control the use of his performances as a right is not provided. This has been achieved owing to the coordination between statute, statutory bodies, collective organizations – bargaining and administration. It can be discerned that countries are being circumspect in the application of this right. However in most of these countries the idea of remuneration from these exploitations has already been in vogue through the means of collectively bargained contracts. Therefore the concept is not alien. However there is bound to be differences when the remuneration is a statutory right and another when it is part of the mutually bargained contract. Nevertheless the idea is an antidote to unfair exploitation of the performers labor at the same time safeguarding the ease of commercial exploitation. The characteristic of non-waivability and restricted transmissibility expressed about the right in certain jurisdictions like United Kingdom particularly makes it free from outright assignment clauses.

Threat Perception to Performers

It can be noted that the threat perception from different forms of exploitation varies from country to country though the need to protect the performer has been uniformly recognized. Distinctions are made between analogue and digital transmissions and subscription and non-subscription transmissions. However the digital media has come to be recognized as a threat for the creator in all jurisdictions. It is significant that there is a total preparedness in the structure of governance in the digital realm. Not only rights such as right of fixation, reproduction, distribution, the right of rental and lending, the right of

communication to the public and broadcasting (equitable remuneration) but also the right of making available has been extended to the performer. The future modes of delivery have been taken into consideration. Together with the grant of these rights it can be noticed that provisions have been made for the cover of the secondary infringements and also exceptions to the liability in the course of the digital traffic. Thus the provisions cover issues such as intermediary liability of service providers and that of ephemeral transmissions. This has been further buffeted by the administration friendly mechanisms for collective administration and state scrutiny of its functioning.

Narrowing Differences Between Copyright and Related Rights Entities

From the critique of the law provided in Chapter 7, it follows that the nomenclature or status of 'special rights' does not apply to the performer any more in various parts of the world. Most entertainment producing countries have always recognized the Copyright quality of the performer though the kind of treatment has matured slowly from its starkly neighboring rights features. But since the late eighties there has been unanimity to the momentum at according authorization rights to the performer the world over. The WPPT (The WIPO Performances and Phonograms Treaty) to which India is not a signatory as yet but in which India was a keen participant demands the grant of positive rights of authorization to the performer. Even though countries such as United Kingdom and France have treated the performer a wee bit (neighboring rights status) distinctly from the copyright protected traditional entities particularly in matters related to duration and enjoyment of certain rights (United Kingdom for instance has treated them in a distinct part-II and has also divided the rights into property and non-property rights with no moral rights cover). In this context though a distinct treatment might not be inconsistent with the specific characteristic of performer and his performance[1], nevertheless what was granted was never suggested as a lesser right to that enjoyed by copyright protected entities. All the jurisdictions have moved towards granting independent and near equivalent

[1] The non-property rights were with respect to the live performance and its direct or indirect exploitation. This was ostensibly done to protect the performer against outright exploitative assignments.

rights to the performers while incorporating a copyright safeguard clause. This is in keeping with the attitude in the international instruments as well.

Narrowing Differences between the Audio and the Audiovisual

A scan of the jurisdictions reveals that differences between the treatments of performers in the audio and the audiovisual have never existed or if there was any it has considerably narrowed down. Rather the difficulties in administering the rights have evoked the application of legal mechanisms such as 'work for hire' laced by collective bargaining or presumptive transfer with remuneration rights. Though one cannot find uniformity in the preferences in this regard. It is evident in almost all jurisdictions that the special characteristics of the audiovisual industry had been taken into consideration for enabling a hassle free exploitation of the cinematograph owing to the incidence of performers' rights. This has been recognized in the Berne Convention with respect to joint authorship in films. It can be noted that such mechanisms have not affected the benefits emanating from the rights. Even if broadcasting, communication to the public and the performance rights have not been granted to the performer in the audiovisual in United Kingdom, it can be noticed that these have been made up in the collective contracts.

Advantageous Features

Among the several features of the British protection of performers rights it is the grant of positive rights, the concept of equitable remuneration and collective administration societies, the role of the copyright tribunal and bargaining practices that firmly secures the performers' rights without jeopardizing the interests of the producers. The three-pronged protection afforded by the French system through intellectual property code, labor law and collective bargaining and administration is a worthy system that protects the performer further. This is particularly so with due emphasis on written agreements and presumed labor law protection.

Mandatory Collective Administration

A noteworthy development in performers' rights administration particularly in the European realm would be the recent Directive prescription for compulsory

collective administration for rights in the field of satellite and cable retransmission. It can be noticed that the retransmission rights through the cable can be exercised only through the collective administration without even the right of individual licensing of rights or administration of rights. This makes the role of the collective societies inevitable where trans-border broadcasting and cable retransmission have assumed a predominant dimension unless technology and economy popularizes another method of distributing the programs to the consumers. It has been realized that legal innovations such as the cable retransmission Directive requires to be adopted in order to make sure that the accessibility of the public to the programs as well as administration of rights of the performers is not impeded by requiring rights clearances on an individual basis for cable retransmission which is a natural corollary to broadcasting. Though these moves can be considered as likely to shrink the individual autonomy in the administration and authorization of rights nevertheless it promises an avenue of easier exploitation as well as a prudent mechanism to gain profitably from the rampant exploitation of their works.

Positive Rights of Authorization

Both in the national law regimes as well as in the international instruments express endorsement of the need for positive authorization rights to the performer has been reflected. In contrast to the caution with respect to recorded performances, substantial rights have been granted to the live performances of both the audio as well as the audiovisual. It can be noticed that the right of affixation, broadcasting and communication to the public has been provided. The rights have generally included the right of reproduction, distribution, rental, making available. It can be noticed that with respect to the right to rental and also communication to the public or broadcasting from the recorded performances, the mechanism of equitable remuneration has been used supported by collective administration measures. With respect to live performances there has been no discrimination between audio and the audiovisual performer, with respect to fixations albeit some more effort, the audiovisuals as envisaged in the Protocol would be covered as well. It is only in certain jurisdictions that the use of the word 'consent' of the performer has been used with respect to ' live performances' and recorded performances. Though this does dilute the notion in

contrast to the use of the term authorization with its impact on formalities like writing, this has been ostensibly to help in easier exploitation. It is noteworthy that increasingly in different jurisdictions and even within the context of the Model Law based on Rome Convention, it is the term 'authorization ' that has been used.

Moral Rights

The only point on which the national jurisdictions do not show equanimity is with respect to moral rights of performers. The belief has been on common law principles and contractual guarantees. Though norms with respect to credit and use is reflected in the collectively bargained agreements. But the international instruments (WPPT) have all endorsed the same with qualifications and exceptions. The continental systems have also endorsed the same without many hiccups in administration. In the proposed audiovisual treaty too the issue was finally resolved with exceptions appended to the rights. The onus appears to have been on the need for a clearer and more precise enunciation of exceptions. This could offset the handicap of the lack of equanimity with moral rights provided to the authors as under the aegis of the Berne.

Audiovisual Sector and Performers' Rights

A point of common agreement that can be discerned among the diverse jurisdictions and international instruments has been the special position granted to the film industry or the audiovisual industry when it comes to the question of implementation of the performers rights. It is carefully balanced taking into account the essentiality of administrative convenience regarding the exploitation of the audiovisual. Some of the reasons for this special treatment have been the capital-intensive nature of the industry and the risk that it bears. Secondly, there are a lot of performers and other contributors who contribute to the making of the audiovisual due to which the authorization of each performer for any further exploitation of the audiovisual would make the exploitation difficult and time consuming as well as cost prone. Much of this can be found in the debates in the international conclaves and in the national discourses on the subject. The notion of presumptive transfer is varyingly applied but nevertheless it is a sustaining concept used wholesomely or marginally in different prolific film producing countries. Even in author centric countries where in creators rights are deified

presumptive transfer has been endorsed but subject to rights of the creators being made remuneratively gratifying. In the United States of America, despite the shadow of the 'work for hire principle', through collective bargaining contracts the transfer has been tempered with residual benefits for the performer. In the United Kingdom though presumptive transfer has been applied only to rental and lending of films and not reproduction, distribution –collective bargaining in conjunction with the limited rights granted make the rights work. But it is to be noticed that in the United Kingdom though the presumptive transfer is applicable to the lending and rental rights alone several rights are not granted at all like the right of communication to the public of the affixed performance, the broadcasting right of the affixed performance nor has a mere remuneration right been granted in this regard with respect to the performer in the audiovisual. Thus it is a restricted access to remunerative channels for the audiovisual performer. But this has been counterbalanced by collective agreements. The commitment to rights in the audiovisual has been a qualified in all jurisdictions but the commitment to procure remuneration for the performer has not been sacrificed.

A total stress on collective bargaining contracts without rights being expressly spelt out statutorily has the danger of the performer being left to the vagaries of market forces. But minimum rights being qualified with presumed transfers and equitable remuneration tempered by collective bargaining and minimum tariffs provide a greater security to the performer as those rights would have to be bargained for rather than contractually created and bargained for.

Consent, Written Authorization and Work for Hire Principle

Even though it can be noticed that variations are there in the manner of eliciting consent from the performer nevertheless a written authorization has been preferred both for initial fixation as well as subsequent rights transfer even in countries where a presumption of transfer has been practiced. In the United States, which has a 'Work for Hire' principle with respect to the audiovisuals, a written contract is essential to point out the 'Work for Hire' relationship. This is a safeguard against unfair bargains. In France each form of intended exploitation needs to be expressly written down. Thus the performer retains rights unless

specifically expressed as transferred and safeguards him against unauthorized exploitation.

Advantage of 'Work for Hire'

The formalities and the need for express intent in the application of work for hire principle regarding the endorsement of the employer-employee relationship saves the performer and other contributors from implied attribution of employee status and consequent loss of rights. It can be noticed that such an express method of symbolizing employer –employee or commissioned work relationship is absent in copyright systems like the United Kingdom and India.

Collective Organizations- Bargaining and Administration

The state of affairs points out to the prevalence of a mature collective bargaining process either aided by state laws and administrative machinery or in spite of it . It points to the systemic and meticulous manner in which periodic exercises in negotiating fresh agreements are held by the performers' representatives and producer interests in the entertainment industry. It also indicates the benefits of organizing into stable trade unions recognized under the labor legislations of the respective countries.

It can be discerned that affixation had led to a spread of consciousness about the intellectual value of performers contribution to the audio as well as the audiovisual. The presence of a unionized movement representing the interests of the artists in the unfixed era helped in responding to the challenges of the affixed environment. In other words the presence of these organizations helped in advocating and spreading awareness about the problems facing the performers. This has evidently aided the collective bargaining contracts and standardization of industry practices and also immensely contributed in influencing early legislative formulation in these countries. The presence of collective organizations and bargaining practices also kept the state from interfering into the realm of free enterprise in some countries. Collective bargaining made it a point to take or make the performers valuation depend on the extent of exploitation both in different media with further sub classifications and characterizations. Contracts were without any presumptions as to producers right to exploitation in

all possible technological means and any new technological means required specific formal literal expression in the contract.

The collective bargaining agreements drawn up reveals the significance attributed to fair practices in the production of films and other audiovisuals and the care taken balances the interests of both sides to secure and safeguard either of them from unfair exploitation and inhospitable working conditions. It can be perceived that the minimum guarantees and limits are firmly laid down leaving no circumstance to arise that has not been articulated or taken into account. The immense value that has been attributed to the performers' contribution is explicit in the incorporation of provisions that invokes compensation and damages for any unfair exploitation against the terms of the contract. Even the latest technological means of communication has been or intended uses on media like the Internet have been taken into consideration. Besides original use on these new media, care has also been taken for the situations wherein the old affixations would be reused on these new media platforms. All imaginable prospects of exploitation has been thought of and care taken to meet these eventualities. It is important to note that both the extent of use as well as the medium of use has been taken into consideration in order to arrive at the remuneration and the residual amount. These have been further sub classified according to the commercial and non-commercial character of the medium. It can be noticed that both broadcasting as well as communication to the public provides residual remuneration. In short it points out how collective organization and administration are indispensable to work a rights regime.

Categorization of Performers in Collective Agreements

Collective bargaining agreements have also categorized performers and classified them as being eligible and not eligible for certain payments such as basic pay and residuals that corresponds to a system of benefit that licensing of intellectual property would otherwise facilitate when statutory rights are granted. Though subtle variations can be found in this respect in collective bargains in the countries analyzed, nevertheless it can be inferred that the quantum of creative contribution by the performer is the rationale and measure for the categorization. Collective bargaining and constant supervision by organizations have seen to it that the benefits intended by the statutory rights is not negated by unfair assignments and licensing arrangements that monstrous market forces impose.

The insistence on minimum formalities and safeguards such as minimum tariffs proportional to the hours of work and the extent off utilization further safeguards the performing artist.

Distributors of Income

Collective organizations have not stayed confined to the mere forging of contracts alone rather they have acted as distributors of remuneration of the performers. They have been adroitly following up on the diverse exploitations keeping a tab on the revenue in flow. Collective administration has provided the performers with great relief in their risk prone careers as the residual income cushions them against misfortunes. This can be seen both in countries that have a statutory regime and also where only collective bargaining exists. It can be inferred that collective bargaining has entered into those areas in which even statutory rights have not been granted. Residual payments were already percolating to the performers from the avenues of broadcasting and communication to the public much before the consideration of the grant of these rights. The increase in membership of these organizations and the increase in the earnings of the members of these unions and societies is a pointer to the efficiency and effectiveness of these offices. Collective bargaining has also been aided by the governmental supervision and intrusion where the contractual initiatives have been unable reach an agreement and where law and collectively bargained contracts coexist or when monopolistic practices are practiced by the unions or collecting societies. Besides being distributors of income, the bodies have acted as social security mechanisms by providing otherwise for old age pensions and medical assistance.

Disciplined Unionization – Only Gains

It shows that that the endowment of these rights either through the means of law or means of collective contracts has not deleteriously affected the entertainment industry in those countries and on the contrary has inspired confidence among the performers' and the aspirants in those countries. This is testified by the increase in memberships and in the earnings dispersed. Both the Global Rule One and the compulsory membership stipulation have not yet been seen as disturbing the principles of restraint of trade. In order to safeguard the rights of its

performers' and the integrity of the purpose of the organization it keeps vigil to see that the performers' don't contract out of the rights that they have realized by either signing up nonmembers or contracting out.

Issues and Gains from International Instruments

The contribution of international instruments in pioneering the performers' rights and facilitating the seeding of the same need not be overemphasized. The fairly large leeway provided by the Rome convention and the less ambitious nature of its provisions can be seen to be result of this. It can be seen that it was this broad mindedness that serves the purpose of creating a fairly large following paving the way for a more conducive environment at the time of WPPT. The TRIPS consolidated much of the sentiments of the Rome convention though it remained confined to phonograms with respect to fixations and also extended the duration but it was silent on several fronts. The grant of positive rights of authorization taking into account the niceties of the digital environment is a major gain for the WPPT. The provision of digitally adapted definitions, anti circumvention measures, rights management information further secures the performers digital market place. However gray zones still exist with regard to the issues of temporary copying, fair use applicability in the face of anti-circumvention measures and liability of intermediaries in the like of Internet service providers. The realization of moral rights is carved with to suit the exploitation of performances. Though deficient in comparison to the treatment of moral rights in the Berne nevertheless it marks a stride ahead of the Rome Convention. The earlier stubbornness in the coverage of the performers with its appendage to literary and artistic works has also softened. The optional sentiment nursed with regard to broadcasting and communication to the public and equitable remuneration flowing from the same is a setback to the performer that needs to be addressed. The agreement on the need to think in terms of an audiovisual treaty has also a marked an improvement over the exclusion of the same from the purview of the rights in Rome. The inclination to bid for a Protocol indicates the desire to use the convenience of the appeal of the existing WPPT rather than go in for a separate instrument. The misgivings as to any overlapping interpretations are unfounded. The provisional agreement on eighteen articles is an optimistic sign. The optional character on equitable remuneration and right to

broadcasting and communication to the public makes this exploitation vulnerable to mutual and collective bargained contracts. In the absence of these the performer would not receive any remuneration. The nude presumptive transfer of rights provision would essentially negate the very essence of the rights granted particularly in developing countries where neither a vibrant collective bargaining nor customary practices exist to this end. The European proposals and the Indian proposition for a written transfer have to be valued in this respect. The definition of audiovisual fixation poses the danger of audio performers receiving diminished protection, as it would be prone to interpretation, which could be disadvantageous to the performer. Despite greater clarity brought into the moral rights protection it remains still lesser than Berne entities and subjectivity overwhelms the exceptions to the rights. While the Protocol has envisaged for realistically molding a protective regime for the audiovisual performer, the present instrument still carries features that can be said to provide a realistic protection for the performer however it betrays the intent to inadvertently protect the producer.

Common Law Protection for Performances in India

In India, cases resorting to common law literary property for performers rights protection have not been reported. However the courts in a few cases have expressed the endorsement of personality rights that is the right of publicity, unfair competition as well as the right to privacy. This shows an endeavor much beyond that accommodated by the British. Therefore the unconventional path trodden by the Indian judiciary in adopting principles that suits the end of justice makes it suggestive that both property and moral rights of the performer would have found a common law umbrella in India. In the context of legal history and circumstances, it can be seen that the common law literary property right (copyright) in performances does have possibilities of legitimate existence in India, as statutes in India have not occupied the space regulating the copyright in the performances. Therefore a property right in the performers creation could very well be resorted to as a means of relief though no instance of this has been reported. The Indian courts have ruled of the possibility of a copyright being read into the Copyright Act, 1957.

The Performing Artist and the Law in India

The digital indulgence of the Copyright Act in India has been patchy on the whole and with regard to the performer it has to be strained to read in a reliable protection on this medium. From a total perspective of the Act, it speaks expressively about the electronic environment only in relation to reproduction of literary works. It is silent about the exemption if any to be granted to temporary copying even with respect to these. The Act is deficient in provisions regarding anti circumvention as well as rights management information measures. Further intermediary liability of Internet service provider has been untouched by the Act leaving it to the traditional confines of interpretation and liability arising from secondary infringements. The right of making available, which defines the means of digital delivery, is apparently laced into the definition of communication to the public, which is not extended to the performers.

Besides the aforementioned deficiencies afflicting both the authors of works as well as the performing artist, the Section with its present intent of providing the limited redress to the performer is deficient in terms of clarity both in terms of definitions, the rights granted as well as the exceptions (the detailed critique in Chapter 7 provides ample support to this). Apparently, Section 38 of the Copyright Act, 1957 does not provide any positive rights akin to authorization rights as provided to copyright protected entities. It is considered an infringement if without the consent of the performer live performances (specified uses) and reproductions of records (qualified by purpose) is rendered. There is however no right to grant either consent or a proper elucidation of what is the composition of performers' rights. The provision of infringement is construed as indicating the rights and this lends considerable ambiguity with respect to composition and extent of rights.

The nomenclature of a 'special right' indicates the lack of parity with the copyright entities however this has not been expressed anywhere. The enumeration of infringements point out to the endorsement of the possibility of prevention (the minimum guarantee of the Rome convention) and non-attribution of positive authorization rights. However the grant of explicit assignment and licensing rights show the resolve to move further than the minimum along with the grant of civil and criminal remedies. The common provisions of the copyright

entities applicable to the performers' further narrow the distinctiveness of the 'special rights'. There is an element of subjectivity with respect to the application of fair use as application of fair use provisions under Section 52(1) of the Copyright Act are allowed according to the circumstances. The exclusion of cinematograph from the purview of rights is total and this reflects the sentiment of the Rome convention though interestingly performances in visual recordings have been given preventive rights. There is a total absence of any reference to the moral rights of performing artists. In short there is much to be done if the Act is to appropriate itself to the standards of the WPPT and address the issue of protection of performers in the audiovisual.

State Film Policy and Welfare Legislations for Film Workers

In India, it can be found that the film or audiovisual policy of the state has not had a perspective of performing artists as a creator to be recognized under the intellectual property canopy. Even in the committees that have gone into issues in the film industry generally, a specific concern has not been expressed with respect to the welfare of the artists though the need for workers labor security has been emphasized. The welfare legislations passed in the eighties provide benefits only to those below a particular remuneration limit.

Industry Status and Its Impact on the Indian Performer

The grant of the industry status to the film industry has given way to a lot of speculation regarding the status of the film worker and also the status of the performing artist in it. However till date there has been no positive policy initiative clarifying neither either the repercussions of the newfound status nor any striking deviation from the status enjoyed in the past. While several incentives have been provided and barriers have been taken away by the government to ease the pressure on the industry and invite Indian and foreign investments a concomitant planning for the labor and particularly the performing artist is missing in India. This is particularly glaring since the number of co productions in which Indian performing artists are signing up and shooting and resources are being mobilized in India has gone up making huge savings for the foreign film industry. However the performer and his rights are still traditionally Indian and do not reach out to the levels of the protection granted both through labor law methods as well as the

framework of intellectual property rights. Therefore the Indian artists while being exploited for the world market do not beget the protection accorded to artists in their countries. This points out to the need for parity internationally as well as extension of protection nationally to performances of the performing artist in the audiovisual medium. Though of late of insurance schemes have been operated both by certain production companies as well as certain associations representing the performers as well as technicians, there is no compulsion that the same ought to be compulsorily subscribed to in order to produce films. In short an overall assessment of the economic, legal and the social status enjoyed by the performer points out to the fact that currently the provisions are woefully inadequate to meet the expectations of the performing artist. It can be safely surmised that while the economic, social and legal status of the performer in the audiovisual industry is weak under the currently available canopy of legislative and welfare oriented policies. This is further compounded by unsophisticated collective organizational practices leaving them unprepared to face the challenges of the new communication world order. An intellectual property paradigm of protection would go a long way to help the performing artist to enjoy both the economic as well as moral rights at par with counterparts in other parts of the world but this calls for a massive preparation of infrastructure, legal as well as organizational.

Functioning of Collective Organizations in India and Performers' Interests

The functioning of the collective organizations in India leave much to be desired. Other than function as something that is a little better than clubs there has not been any activity keeping up with the trends world wide with respect to the audiovisual industry. While almost all the technical and creative labor in the audiovisual industry is organized along the trade union lines, the performing artists in majority of states have been registered as charitable societies. This shows that the resolve is not to function as an able partner in a dynamic and pressure-ridden industry. In the aftermath of the sector being declared as an industry, the non-registration as a trade union would seriously debilitate the bargaining power of the artists. As of now the labor department would not be able to have much leeway with respect to the grievances of the artists, as they are not

registered as a trade union. Further the issue whether the artist is a worker or not should not be a reason to avoid unionization as several other creative contributors like the musicians, the directors, cinematographers and scriptwriters have all been registered as trade unions. It can be noticed that there is no pan Indian common front for the performing artist in films or audiovisuals. They are regionally disparate and are not recognized to bargain on an all India basis. This weakens their stand and also their potential to handle situations in order to beget more bargaining space.

It can be seen that neither the unions nor the societies have a system of continuous monitoring to see that the standardized contractual terms are put into practice and norms are observed. They only mediate upon a reference of a grievance of a member. This does not inspire confidence and tends to inhibit, as most of the workers and performing artists are wary of a unified boycott from the powerful producer coterie. They are further skeptical of even referring a grievance to the committees of the respective unions, as the union office bearers are themselves earning their bread and butter from the industry.

At present collective organizations in the film industry are mere fronts that represent the industry in its interaction with other sections of the industry and safeguard the working conditions and the wage security of the film worker. However there are no assured welfare schemes. It can be noticed that the union does not take a proactive role in seeking the adherence of the members to the observance of the accepted norms in the industry. Rather only in case of a complaint the union decides to swing into action. Thus the unions display a very restrained role. The members are free to enter into any kind of contract provided the minimum prescriptions are observed. It is significant to note that there is no regular scrutiny fro the organization whether this is being adhered to but rather the issue is raised only when the members raise a complaint. The union does not play a role in the actual distribution of the payment except in the case of few unions that disburse the amount or rather sees to it that the bill slips are provided to the union. This shows that the union is not obsessed with the contractual formalities being observed and find no need for the contracts to be screened by them before its execution in order to see that the norms are adhered to.

The practices in this regard across the country are variegated. The only common trend being that there is a marked tendency towards collective efforts from the

constituents of the film industry. While some of the contributors to the industry follow the union method of representation there are regions in the country that do not follow the same and work as societies. While minimum tariffs are fixed in some regions one can see no such prevalence in others. While in some states the government has intervened or the state does dispense with the role of a mediator in most regions the state role is not favored. In other words a uniform film worker based initiative and policy cannot be seen either at the collective organizational level or at the policy making level for the country as a whole. The problems are further compounded by the limitations of self-generated funds and the lack of proper infrastructure to proactively look into the problems of the members.

Blunt Edged Welfare

The welfare activities indulged in by the artist's associations and the unions do not impart a certainty and assuredness of protection to the performing artist. The process of filtering the applications for help and the need to show financial impoverishment and disabilities in order to be entitled to financial aid makes the process unhelpful to the majority. There is virtually no time frame within which the applications need to be processed and the no certainty that the applicant would beget the welfare benefits. The funds are all dependent on contributions, which require either governmental support or charity of private members or fundraising initiatives by the association in order to cater to a larger number and different situations. Therefore it falls short of providing complete and assured social and economic security to the performer. The queue of the applicants far outpaces the actual disbursal by way of pension and other schemes. India should learn from the way in which charity has been disfavored by trade organizations in other countries.

Residuals in India

The concept of residuals has not yet seeped into the domain of Indian contractual relationships in the audio and the audiovisual industry. The practice in the former has been discontinued generally. Only those with immense individual bargaining power would be able to get their contracts to contain a residual payment clause and that is a rarity. Here the distinction should be pointed out between residuals

flowing out of a contractual practice and that emanating from the recognition as an intellectual property. In both instances the recognition is absent. In India one can discern no unionized movement either in the non-fixed era or the fixed era responding to the recognition of the performers labor as one demanding protection akin to intellectual property. In fact even in the little scattered unionization that one can discern in India the valuation is not on the basis of extent of exploitation or from the perspective of performer as a creator of intellectual property but as a provider of a service of labor. Even among the creative contributors of the high class there has been no custom of taking into account residuals or reference to the ingredient of intellectual property. There has been no element or custom of residual payments to the contributors to the film in the collective bargaining process. The intellectual property element has been left to the individual bargaining of those recognized by the copyright realm that is the authors, the composers and the lyricists. The only realm collective bargaining has impacted on the exploitation by the producers and their licensees with respect to the contributions of the lyric writers and the music composers has been in the performance rights which is administered through the IPRS. A perusal of the functioning of the television sector and the radio segment under the state control also points out to the prevalence of practices where the residual system of remunerative contracting is non-existent. This is despite the fact that, particularly in radio broadcasts there had been practices that did provide additional remuneration for the repeat broadcasts. Thus even the contractual practice that was followed by the state run department of communications never gave credence to remuneration upon repeated exploitation even though the norms of a written contract was observed. In short there is a total absence of any trace of practices mirroring the model of intellectual property scheme of distribution of revenue in India with respect to performing artists in the audiovisual sector or contracts taking into account the extent of exploitation. Even with regard to mutual contacts such arrangements concerning the audiovisual artist is a rarity.

Right to Credit and Right Against Distortion

There is no confirmed right to a credit though the practice of providing credits has been prevalent but this has been left to the producer. In other words the customary practices do not provide a certain clue as to a confirmed right

regarding the incidence of these rights. The practice of providing credits to the artistes has been in vogue since the thirties, however, there is nothing that can be termed as a right in the artiste as neither the sample contracts nor the call sheet agreements contain any clause to this effect. Therefore the moral rights of attribution cannot be said to be ingrained in the system either with respect to television or with respect to cinema industry. The practice has been normally to acknowledge the credits of the top artists. But gradually following western influences there has come about a culture that names of all the artistes are provided but the trend varies region to region. When the artist is removed from the film there is an option before him whether to have the credits for the film or not for the portion of the work rendered by him. (However this mostly pertains to background artists rather than the foreground actors). But this is not a pointer to the fact that there is a right to credit in the artists. Even in the standard agreements one cannot notice any reference with respect to the same). In the standard form contract under the Welfare Act too this necessity has not been rigorously laid down. Therefore even though the practice has been there from the beginning, any presumed right to credit lines in the cinema couldn't be discerned.

Similarly there is no hint as to any right to integrity in the performance for the cinema or the television artist. This can be noticed from the outset in the lack of a completed script or a story line. Therefore the commitment of the artist is not to the story or the essence of the contract is not the commitment to act in a particular story but to the commitment to act according to the instructions of the director. They can be removed at any time. There is no right to be continued with the only condition usually being that they ought to be paid for the efforts they have put in. There is no say for the artist with respect to the manner in which the performance must be treated or utilized in the film. Even with respect to the use of the double or the voice over the artists need not be consulted or there is no need to be consulted. There is no mention with respect to these issues in the collective bargaining agreements and neither in the standard form contract envisaged by the statute. Even if the role or the script is insisted upon, there is no mention about the right of the artist to influence the treatment of the work nor are there any specific right in him to ask for an adherence to a script or role as mentioned. Though contractually it can be considered a violation if there is a

deviation from the same. But few artistes if not negligible number of artistes have endeavored to protest against a change in the storyline for fear of future opportunities being lost. Though there have been instances where in the artists have protested against a manner of depiction nevertheless there is no absolute right in the artist, as it would depend on the storyline and several other subjective elements. Further there is a distinction between treatment at the moment of affixation and after affixation. In the latter instance the recognition of any such right is almost non-existent, as the artist has no control over the process of editing and the final cut. . The artist can only depend on the right of defamation or on the indecent representation that are dependent on several imponderable factors (for instance reputation) unconnected to the issue of intellectual integrity of the artiste. Therefore the prevalence of moral rights consciousness can be considered negligible from the legal perspective. The notion of the performing artist as an intellectual creative contributor in the like of a writer or music composer has not percolated into the audiovisual industry. The performing artist is looked upon as a service provider for a fee in the mode of contract for service. An analysis of the contracts and customary practices reveals that there is no practice of the script being provided to the artiste before hand and therefore the performer has no control over the misuse of his performance other than bid to do as the director or the producer demands. Other than among those who do have the star value to demand a script or to probe into the manner of presentation there is no right recognized in the artistes generally. There is no practice of consultation with the artiste in case of any change in the script or treatment. The issues are contentious even with respect to the stars.

Industry

Even though the formal application of the appellation 'industry' to the film sector or entertainment sector has been accomplished, since the past four years there has not been any striking changes to the status of either the performing artist nor the cinema film worker. The traditional framework still continues to rule over him and no signs of any delectable policy change can be made out. Though the changeover has brought out a lot of avenues of opportunity in the finance sector and a wholly dependable and transparent source of funding has been opened up, the change appears confined to that alone. Even though the funding agencies

such as the IDBI (Industrial Development Bank of India) have been demanding standardized practices and information hitherto not asked for pertaining to contracts of the artists and other creative and managerial contributors, the onus has been on film companies alone. In case of non-adherence to these norms, other than the fact that these would not be amenable to finance provision, there is no other consequence. It is only to test the credibility of the project and for greater security that these written agreements are called for. That too the onus is only on the details of the principal cast and singers.

State of Institutional Lending and Corporatisation

It can be found that recourse to black money and usurious moneylenders is the norm in the film industry as institutional funding is a rarity and is fraught with immense technicalities and formalities. This has led to a resort to vague and arbitrary practices in the industry with an adverse impact on transparent standardized practices and quick fly by night operators. This has had an adverse impact on the economic and labor security of the performer. If delayed payments based on residual uses and payments are to be introduced, practices must be standardized and certainty assured. This can happen only if the incidences of quick money makers are diminished and trust worthy producers come to the fore with clean money from accountable banking institutions. This could spur corporate houses with better credit and trust worthiness to enter into the fray. This can create an ideal environment for standardized transactions, which are well documented.

Unorganized

The one word in which both foreign as well as Indian punditry on the film trade in India have described the industry is "unorganized". It forewarns the application of a rights regime where in everything from big investments to contracts with artistes do not run according to professional standards but are based on crude haphazard practices in contrast to the practices that are demanded by a secure legal regime.

Lack of Transparency

Currently the entire chain cinema production, distribution to exhibition suffers from a lack of transparency in accounting. This system would need to be rectified if the system of copyright based licensing and residual practices need to be introduced.

Administrative Preparedness

Another reason for different perception about the grant of rights has been the institutional and administrative unprepared ness to administer the rights in real time. The total absence of collective organizations and if present the lack of wherewithal to handle the responsibility.

Disdain for the Judicial Process

Judicial recourse is abhorred and the committee's litter with the disputes commonly resorted to as alternate dispute resolution. This further reveals the low confidence in the law of the land and the institutions as a means of providing relief. Disputes with respect to contracts that have also involved the copyright are all thrashed out of the court. The delay and the time consumed are considered reasons for this reluctance to turn to the courts for relief. With the adversities innumerable for a statutory and judicial relief, many of the entities including copyright empowered entities either do not complain or do so through means outside the courts. However there is no assured resolution with in this alternate as well or in the right created by the unions rather there are innumerable instances of delays in the resolution of the matter. Further other than non-cooperation and such other measures there are few other means to effectuate the defaulter to make good the default.

Lack of a Legal Framework

There is a total absence of any entertainment industry specific legal framework in the country. From the working conditions, welfare to the copyright issues, it is the general framework of labor law and intellectual property that is applicable to the entertainment industry that includes both the audio as well as audio visuals in India. There is no legal framework taking into account the niceties of the entertainment industry particularly the rights and obligations of those who are

creatively contributing to the film industry. Further always a line of demarcation is drawn for those earning above a particular limit and they are disentitled to labor security and other benefits as of right. The said legislation is observed more in breach than in kind. There has been no concrete move to implement the legislation and make it function through viable institutions. There is no scrutinizing mechanism to preempt non-adherence to the law if any. The lack of litigation on these points is not because there are no complaints in this respect but rather that individuals cannot and do not have the strength to move against the powerful forces in the industry.

Wary About Rights

In the circumstances prevailing in the industry it can be inferred that that when the provisions granting separate rights come into force, the Performing artists would be made to transfer all the rights at the time of signing the contract. Therefore all the tall measures would be nugatory unless and until some other mechanisms in the like of non-waivable equitable remuneration were evolved to protect the performer.

The Prevalent Notion of Performance as an Intellectual Property in India

At the ground level there is no recognition of the performers' labor as an intellectual property. This is despite the fact that all acknowledge the creative nature of a performers work. However the customary notion on the film industry is that of personnel rendering a service for the consideration of a sum of money. It is just like any other service being rendered for a sum of money. Therefore generally there has never been a notion of continuing rights in the performance rendered in the audio and the audiovisual industry in India. Even if in law such a notion could be considered to exist through the prevalence of personality rights nevertheless its formal recognition and practice has never been discerned. The customary notion has been that once the performer consents to perform and renders the performance for a sum of money then the performance is transferred to the ownership of the producer who has the rights of full exploitation perpetually. This notion is signified by the silence that the litigation scene has witnessed in India for so long that despite the feature films shot in black and white being used on the television, video or other formats not a single actor has

come forward to claim the additional remuneration than what the original contract stipulated. This is in stark contrast to the scene in the United States of America and other countries where television uses and even colorization has witnessed litigation.

Transfer of Rights and the Performer

There is no reference to common law property rights in the implied or general forms of commerce in performances. As can be discerned from the aforementioned study that the contracts do not mention a word about intellectual property rights of the performer or about the personality rights of the performer nor is there any hint about rights being vested in the producer absolutely or non – retention of any right in the performer. Such a notion does not seem to have been a concern at all. There is no word either in the collective bargaining contracts. However the practices in the film industry suggest an unquestioned use of the performance by the employer or the producer of the performance unless provisions to the contrary are provided in the contract. It may be noticed that the use of the performance has been restricted by practice to the particular film in concern. That is the producer does not have the right to use the footage for any number of his films. If the producer of a film agrees to grant the right to use the footage of the film in another medium like television program or the footage in another film, to another producer for a price then the practice is unclear, but the right of the producer has not been questioned. Even though it can be said that the performer is not precluded from questioning such a disposition till now nobody has questioned in litigation such an indulgence by the produce. This could also be due to low legal awareness and the insecurity in the industry compounded by the customary practices in the industry.

It can be inferred from the written agreements analyzed that in case of ambiguity the customary trade practices takes over. In the absence of contract to the contrary, the producer is privy to all uses of the film. Further there has been no instance in a vast majority of performer –producer agreements or customarily practiced where in separate remunerations have been specified for additional modes of exploitation. Though certain top stars are supposed to benefit from such an arrangement. Even this is supposed to be fallout of the inability of the producer to meet the lump sum commitment and not the result of any practice

being resorted to. This unbridled practice of unquestioned exploitation by the producer has led to the creation of customary notions of right of the producer to use the performance in the cinematograph or audiovisual to any extent. Thus unless and until restricted or qualified by specific provisions in the contract between the producer and cinema artiste, the producer is endowed with all the right to exploit the performance in any manner and in any medium.

In legal jargon it can be said that presumption of transfer of rights in the performance is in operation in India. There is no doubt that personality rights have existed in the country and this has been endorsed by the Supreme Courts and the High Courts as well as in the several treatises in the tort discipline.

The welfare laws passed in the eighties lead to the inference that statutory intent wanted to be at variance to the customary practices. It not only demands that a standard form agreement has to be entered into between the performer and the producer which contains clauses that makes one think otherwise but also significantly mentions that the work of the artiste shall be used for that project/production alone. Therefore a total transfer of the performance cannot be accepted as the standard form from the statutory standpoint in India. But these statutory devices are applicable only to a restricted segment of extremely poorly paid artistes and therefore the major segment cannot be considered as being affected by this practice. In short it can be inferred that the artist is vested with the economic right to receive a payment for the use of his services as a performer. The performer has no further rights in the film or affixed performance unless the contract implies otherwise. There is no mention of any continuing right even in the collective agreements that have been entered into by the unions and the associations representing both the technicians as well as the performing artists.

Lack of Awareness

There is a lack of awareness about laws and legal possibilities as regards contracts and practices in the film industry. There is little discussion with respect to policy matters and statutory changes. Both at the organizational level as well as the individual level the legal regime is looked upon with skepticism and distrust. There has not been much involved discussion regarding these issues at

any of the tiers in the film industry. Even the 94' amendments incorporating Section 38 into the Copyright Act have not been noticed or if noticed its possibilities have not been endeavored to be understood.

Disparate and Fragmented Nature of the Industry

One can infer that in the context of an audio visual industry fragmented on the lines of language, regions and reach, the industry requires a unifying bond in order to survive the daunting challenge of global exploitation. This would require permanent institutional infrastructure that would incur expenditure and render official duties. The absence of any other film specific legislation or efficient schemes for protecting the performer economically and socially is enough reason for an intellectual property framework that could provide the performer an appropriate avenue to secure these without being dependent on the charity of either individuals or the state.

Reasons for Apprehension for Any Rights & Residual Model

It can be surmised that the while the artists do feel that the model of copyright remuneration would enable them to reap rewards in the future based on the exploitation of the work, however in the light of the aforementioned circumstances any idea of a delayed payment in the like of remuneration by means of residuals based on statutory right or collectively bargained right would not inspire trust and confidence in the performers, as there is no certainty as to the system working efficiently and securely. An assured down payment would provide them much more security than remuneration from the future profits.

Corporatisation

It can be noticed that corporatisation is another hope that has been sounded for the personnel in the entertainment industry that would heal much of their economic and labor insecurity and there has been considerable enthusiasm with more corporate entities producing movies. Practices such as payment by cheque, standard written contracts, proper schedules of work have begun to be observed. But corporatisation is heavily dependent on the corporate entities taking over the entertainment industry and finding it worthy of investing and surviving. This is particularly so since the entertainment industry is one of the most risk prone

industries. Several corporate entities have in the recent past faced losses and near bankruptcy in an industry where no one is sure of a sure fire formulae to success and profits. Therefore to put all the eggs in the corporatisation basket for affording salvation to the ills plaguing the performing artists or the labor front might be foolhardy. However as has been proved it is definitely a safe bet that the professionalism that is ushered in by the corporatisation of the entertainment industry would surely pave the way for more professionalism and accountability in the industry. The question will still remain whether the performer would be in a fair bargaining position despite the minimum safeguards like a written agreement being practiced. The standard contractual practices would help in the administration of rights if performers in the audiovisuals were granted rights in the future.

In short, it can be safely inferred that the state of the industry demands an overall reform and from the performers' perspective, looking at the present state of legal regulation, welfare initiatives, labor and contractual security, an alternative model of economic security would be most appropriate. To this end the grant of performers' rights would be most beneficial to a secure future and an acknowledgement of the performers' creative prowess. Under the present state of law, contractual practices, level of collective organization and bargaining, state institutions and policy, the environment in India is not conducive to work a rights regime for performers effectively. But this is not to deny the fact that these institutions, organizations and practices could very well rise to the occasion when the rights regime comes into force.

SUGGESTIONS

Drawing strength from the preceding study the following suggestions are put forth to effectively implement a performers' rights regime in India.

1. *Need for Statute*: Even though the notion of protection through personality rights can be found in the jurisprudence of diverse systems nevertheless the performers concerns in particular have been found to suffer in certain circumstances for which these general principles do not provide relief. Diverse jurisdictions do not have uniform loyalties with regard to these common law actions and in a globalized communications environment this

could aggravate certainty of relief. It can be seen that practices of trade and implied general covenants have further confused decisions in this regard. Instead of an uncertain dependence on these premises, a statutory prescription would diminish the course of conjectural jurisprudence and assuredly define the substance and limits of protection.

2. *Less Impetus on Charity:* The state nor voluntary agencies need to struggle to indulge in charity and consequent inequitable distribution but can help the performer from benefiting from the profits of the exploitation of his performances with the grant of positive rights and the application of such methods such as equitable remuneration and collective administration. A percentage of these collections can also be used to beget or create a pension fund or provident fund and medical insurance for the performer of a perennial nature. This would go a long way in inspiring confidence in the audiovisual industry and trust in the future generations to invest time, resources and talent in this vital segment of the culture industry.
3. *All India Union Needed*: There is the need for a single union for each sector in the audio-visual industry for the entire country. The region and language wise fractions weaken the organization structurally and financially. The greater is the number of organizations more is the chance for infighting and disunity and vulnerability to compromise the interests. Though there is one single umbrella organization for workers, it would be better to have a single umbrella organization in the country for each section of the workers including performers. Trade unions need to be formed rather than charitable organizations that seem to cater to benevolent impulses of certain well to do members alone. As in a democracy there cannot be any coercive formation of unions, the way forward would be to exhibit the utility of the unionization by providing a valued platform to it as being representative of the performers and secondly to provide institutional assistance to it to take over greater functions of administration.
4. *Need to Involve the Performer and the Unions:* There is a need to involve performers at all levels into this debate of rights rather than confine it to merely eliciting opinion and information from the leadership alone.

5. *Need to Introduce the Concept of Residuals*: It would be ideal to introduce the concept of residual in the tariff decided by the negotiations between the workers and artists in the film industry and the producers. But that would require infrastructure, finance and manpower to administer the proceeds there by arising. In the absence of certain and comprehensive labor and economic security, the residuals would surely aid the worker and artist in distress.
6. *Need for Collective Administration Societies:* Taking into consideration the lack of a voluntary helpful infrastructure on behalf of the performers in India conducive to administering the intellectual property rights in India the state should come forward to establish a collective administration society on their behalf in India for both audio as well as audio visual performers. The other alternative would be that the state should financially aid the performers to form their respective societies and in the administrative planning and execution till such time that the concept is firmly entrenched in the country. This is important considering the fact that other than in the audio (IPRS) or music-publishing (PPL) field such a body for collective administration does not exist in the audiovisual realm. Even the producers do not have a body of this nature in the cinematograph industry and the licensing is rendered individually. Therefore the audiovisual industry today stands without any speck of any organized collective administration activity and the performers do not have any model in the country to look forward to. This necessitates State initiation and support for at least a substantial time till performers are able to unify and organize towards administering the rights in their performances on their own.
7. *Establishment of a Common Clearing House:* The establishment of a common clearinghouse would ease the burden of multiplicity of rights being an issue as well as economize administration. This would be so both with regard to the audio as well as the audiovisuals.
8. *Scrutiny of Collective Administration*: Most importantly provision on collective administration in the Copyright Act needs to be specifically extended to the performers and scrutinized like the law does at present for the copyright protected entities. The Copyright Board must oversee the functioning of the society.

9. *Positive Rights can Change Attitudes and Practices in India:* An express grant of statutory authorization rights would essentially change the way rights in performances are looked at within the frame of the present provisions. It would no longer be something that can be brought as a commodity or service of labor to be exploited at the will of the producer. There would no longer be any presumptive transfer of property right in the performance upon the payment of money agreed upon on the other hand each of the different rights would have to be separately traded. In the absence of the formal assignment or licensing, the rights would be treated as being retained in the performer. In the event of rights of authorization being granted consent to record or any other consent as provided under the Act at present would not provide the producer the apparent right to indulge in all the collateral exploitation that follows from the affixation.
10. *Need to Change the Present Law:* As has been analyzed, the present grant of a preventive remedy does not fully empower the performer. It only provides him recourse upon violation and does not recognize the presumptive right of ownership over the intellectual creation and the right to authorize its various uses like the rights granted to the literary, artistic and other entities protected under the copyright. The performers' aspiration to be recognized by the intellectual property law has been acknowledged by various jurisdictions that have been as prolific in the productivity as the entertainment industry in India has been.
11. *Prior Definitions and New Rights*: Several terms need to be defined and others need either to be redefined or an affirmation needs to be made that the very same meaning as is appended to then in the general definition clause would continue to hold good against the new rights as well. For instance under the current prevalent scheme there is no definition of the term 'visual recording' in the Act however it has been referred to in the definition of the term 'cinematograph'. Endowing rights on the subject matter without providing any clue as to what it means makes the Act and its applicability confusing. There is no clue whether the definitions under Section 2 of the Copyright Act would be extendable to the 'special rights' granted under Section 38 of the Copyright Act. This needs to be clarified.

12. *Copyright Law Needs to be Complemented by Labor Law:* Not only the copyright law but the labor law too needs to be changed or altered when it comes to the task of making the rights work in the entertainment industry. Though a specific legislation in this sphere would be welcome encompassing both the labor law that includes minimum contractual aspects and those relating to the working conditions and the copyright law. A combination of both these should provide the performer and the other film workers with great social and financial security and remove theoretical objections to the categorization of creative performers as 'workers'. A combination of the British and the French models could provide a balance between the freedom of contract and presumptive status as a worker that would make the performers derive benefits of both welfare as well as returns from exploitation. Amendments need to be made in the Industrial Disputes Act and in other labor enactments in order to recognize the performing artist as an eligible category.
13. *Need for Institutional Grievance Redressal:* A grant of rights to the performer either under Copyright or labor law need not improve matters for the performer unless the institutional grievance redressal is firmly put in place. This should change the attitude of disdain for the judicial process in the entertainment industry. In other words, a tribunal for the entertainment industry is most essential. Though this was envisaged in the year 1984 it was never put into place. The Tribunal must also deal with the copyright disputes that includes performers' rights and must be an integrated redressal mechanism to deal with the problems plaguing the contributor in the entertainment industry in the country. A time frame should be granted within which the disputes must be disposed of. Representative actions should also be entertained.
14. *Need for Transparency:* While none of the entities (be they producers, distributors, directors, institutional investors or actors) are averse to a residual or copyright-based remuneration model, they point out that a system of total transparency and accountability is essential. The unreliable model of exploitation has been cited as the reason for delayed corporatisation as well as institutional banking. The string of exploitation contains numerous factors, which finally lead to the release of the

performance to the public and retrieve the profits. The distributor and the exhibitor, video distributors, cable and Internet distribution are all avenues that would need to be accountable and transparent in their functions if the true value is to percolate back to the performer and the producer. Standardized practices and scrutinizing mechanisms like collective organizations and administrative bodies are required to check malpractices and see to it that transparent practices are followed.

15. *Encourage Institutional Lending and Corporatisation:* If delayed payments based on residual uses and payments are to be introduced, the industry should be manifested in an organized manner and practices must be standardized. This can happen only if the incidences of quick money makers are diminished and trust worthy producers come to the fore with clean money raised from accountable banking institutions or corporate producers. This could spur corporate houses with better credit and trust worthiness to enter into the fray. This can create an ideal environment for the residual model of remuneration or the rights model of remuneration of delayed payments.
16. *Need to View the Industry Holistically:* The copyright issue cannot be seen in isolation and it should be placed in the context of the interconnected nature of the industry. The optimum efficient implementation of a copyright model for the performer can only be realized if the practices in every distinct sphere of the industry is standardized and vice versa.
17. *Marginalized State Role in Regulation and Administration Needs to be Reversed:* It is evident that state has always played a marginalized role in the affairs of the audiovisual industry in particular and the entertainment industry in general. This docile approach has to change if the benefits of the 'industry' status are to be harnessed for all sections in the film industry and the entertainment industry. The issue of performers' rights should not be confined as a copyright issue alone but must be seen in the larger context of policy towards the entertainment industry, as the administration of the same requires a total overhaul.
18. *Need for Mandatory Application of Written Agreements:* The lack of any standardized format to execute agreements between the performing artist and the audio visual media be it in films or other audio performances

creates a virtual opportunity for exploitation of the performers trust. Either the consent or the authorization must manifest itself in written form and subscribe it to formalities that copyright protected entities currently demand.

19. *Deficiencies in the Present Indian Statutory Provision:* Even within the context in which the Act is placed today with its limited vision of granting rights only to non-audiovisual recordings, the following changes need to be made in the statute. The appellation of a 'special right' should be done away in Section 38(1) of the Copyright Act. Such a nomenclature is neither in keeping with either the TRIPS to which India is a signatory nor to national and international trends. It is relevant to note that a separate status (Neighboring Rights) has only been preferred in other jurisdictions to meet the necessities of administration of rights or for the better protection of the performer. Therefore the use of the term 'Special Rights' is a misnomer.
20. *Safeguard Clause*: It is an anomaly that at no place is a safeguard clause incorporated with respect to literary and artistic works or other entities and therefore this needs to be incorporated and the unspoken fear of these entities should be assuaged at the outset. This would instill the confidence to extend additional and more extensive positive rights to the performers. This could also take away the categorization as special right.
21. *Durational Term*: While the durational term is at parity with that of the international trend, that is for a period of fifty years, there is a need to increase the duration as the creativity of the performer cannot be considered akin to the status of the producers of the sound recording or that of the film producer but more intellectually akin to those for the authors. The need for the benefit of protection to percolate to heirs of the performer needs to be appreciated with same verve as those for the authors of works. The young artist would never be able to savor the benefits of his performance in his old age. That could be the period when their efforts reach its pinnacle of demand and old age might necessitate the need for a monetary compensation. The international treaties –the WPPT, the envisaged Protocol - as well as the European Community Directives have only specified a grant of a minimum period of fifty years

but the countries are free to increase the duration of the term. Further the E.C .has also introduced the concept of rights commencing from performance as well as upon publication. Taking into account the rich heritage of music in the country contributed by the disciplined virtuosos of the art form who have toiled immensely through hardships in their initial years, the performers should be amenable to enjoy the fruits of their labor in their old age as well as make life comfortable for their kith and kin. Even though a similar provision is not provided for the sound recordings. It can be seen that it is specifically provided that upon the expiry of the term of protection in the film, the underlying copyright entities with surviving rights can continue to clamor for their rights. The same rationale ought to apply for the creative performer as well. Besides in a digital age if the duration is not increased, with widespread abuse it remains to be seen whether benefits of royalty would percolate as heavily as it previously used to so an increase in the duration would certainly garner more benefits that what it previously could gross in a shorter term. It should be recollected that Justice Sri V.R Krishna .Iyer also demanded a protection for the performing artists not lesser than that enjoyed by the copyright protected entities. His call, it might be recollected was for an extension of the same treatment to them. Therefore India is at liberty to grant equal or more than an equal protection to its artists particularly those in the classical genre. It should be recollected that the reason for classifying the performer along with the phonogram producers and broadcasters was only for the ease of regulation owing to the common concerns they shared.

22. *Consent:* The term 'Consent' has not been defined or explained in the Section. It is noteworthy that the copyright entities do not authorize the doing of any act of exploitation by means of mere 'consent'. It has not been specified whether the consent has to be oral or written or express or implied. This lack of formality compounds the situation further as a lot of consequences follow or possibilities follow the grant of the consent to affix. The onus to prove or disprove consent would be burdensome for the performer. It is relevant to note that the word 'Consent' has not been used even in the Model law drafted for the Rome Convention rather the term 'authorization' is used. Though the term authorization has not been

defined nevertheless it exudes a more formal character than the term "consent". It would be unfortunate that in a developing country rights are to be bartered upon mere consent, either implied or express. It would be appropriate to lay down a format to be complied with in order to sanctify consent.

23. *The Need for Right of Authorization:* At present, if the user begets the consent to record, there is no control over the uses to which the recording is put to, as regards reproduction (qualified by the need to be applied to purposes specified at the time of recording) communication and broadcasting of the record is concerned. This is a serious deficiency, as the diverse rights of authorization have not been provided to the performer and the Act is unclear as to the extent of control over the performance by the performer. The Act is ambiguous about the possibility whether only the person to whom the consent to record has been granted can use it for all other purposes including broadcasting or communication to the public, or whether any body who is possessed of a recording for which primarily consent had been given to some one can use the same for the rest of the purposes.
24. The right of making available with its characteristic of regulating the process of accessing the protected subject matter at a place and time chosen by him has not been distinctly granted under the Indian Act. Rather it is read into the definition of the term "communication to the public". This indirect reliance can prove cumbersome in the long run as right of communication to the public does not obviously carry this form of access. Further with respect to recorded performances most jurisdictions are hesitant to grant an authorization right of communication to the public or broadcasting from recorded performances. Reliance on communication to the public will not work under the present circumstances because it covers only 'works ' and not special rights. This needs to be amended and also a separate right of making available in line with the definition in WPPT should be incorporated into the Act.
25. *Compulsory Licensing*: As such the provision is silent with respect to requirement of compulsory licensing. This means that at present the performers' rights do not exempt the use for compulsory licensing. It can

be noticed that such a circumstance has been addressed in countries like United Kingdom by clearly specifying the circumstances in which compulsory licensing would be applicable.

26. *Provision & Scrutiny of Collective Administration*: The Section does not mention any thing regarding the application of collective administration provisions for the performer. This is a serious anomaly and deficiency since; it is evidently perceivable that the recourse to easy commercial exploitation of both audio as well as audiovisual performances in all, these countries have been through this machinery recognized by the law. This lacuna has to be filled in the statute. Further the statutes in these countries have provided either through the Librarian of the Congress or the *Counseil d'etat* or the Copyright Tribunal to scrutinize and intervene in order to safeguard against anti monopolistic practices by these collective bargaining and administering bodies. Either existing offices such as the Copyright Board should expand their powers or new offices need to be created to execute these functions.
27. *Non-Waivable Equitable Remuneration*: Complementary to the need for these bodies, the mechanism of non-waivable equitable remuneration as endorsed and propositioned by the international instruments and adopted by almost all analyzed national jurisdictions would provide commercial convenience as well as safeguard rights in the long term for the performer in India. As it is evident, the rationale of applying this in the European union has been made expressly clear. It acts as a security against outright transfer provisions of the most lucrative rights such as broadcasting and communication to the public and functions also as an alternative to the substantial authorization rights. The present European trend (with respect to cable retransmission) by which the administration of equitable remuneration rights have to be compulsorily handed over to the collective administration societies need to be followed in India taking into account the low state of empowerment of the artists.
28. *State Support*: The state should come forward to finance and support these units or aid substantially the present organizations from preparing to meet the challenge of the legislation. This is relevant as can be inferred from the preceding study that collective organizations in India are not well

equipped to meet this challenge at present. A grant of rights to be individually dealt with would be superfluous as an out right transfer would be effected in an industry where the performer is placed in an unfair bargaining position. Therefore until commercial administration and bargaining has accepted the notion of intellectual property or residuals into its discourse, an individual grant of rights in India would have no meaningful impact.

29. *More Beneficial*: It should be statutorily mandated that the individual agreements must always contain terms more beneficial than the terms mandated by the collective agreements rather than leave it to conventions of collective organizations. An agreement that has terms less beneficial should be termed null & void statutorily.
30. *Performance Right*: Together with the grant of a substantial right to the communication to the public and the broadcasting right, a performance right should be granted to the performers in the audio as well as the audiovisual. This can be with an alternative in the form of a right to equitable remuneration. Considering the incessant use it can be considered to be beyond the individual bargaining and only to be collectively licensed by a collective administration society.
31. *Joint Clearing Houses*: The producers and the artists would have to set up joint clearing houses as it would ensure multiplicity of rights not being an impediment for administration. It has to be noted that even the producers of audiovisuals do not have a joint copyright clearing house in India. This should be attempted both with respect to audio as well as audiovisual segments. This would be economical in operations as well as convenient for administration.
32. The term 'visual recording' has not been defined under the Act. Either it is a superfluous appendage to a vague notion or it is a qualified cinematograph. Such a term or distinction has not been used in any of jurisdictions comparatively studied nor has such an entity sprung up in any of the international instruments. Either the term requires to be defined or the term appears to be of no relevance.
33. *Temporary Copying*: The circumstances where in temporary copying needs to be legitimized have not been mentioned in the Copyright Act or in

the section pertaining to the performers. This is a serous lacuna considering the fact that there can be in the usual course considerable inadvertent temporary storage in the digital realm while innocently harnessing the same with no intent of copying or storing the same permanently for infringement. Exceptions on the lines of DMCA in the United States and the European Directives need to be carved out in the Act.

34. *Intermediary liability:* Intermediary liability needs to be qualified to exempt innocent service providers who merely act as conduits for the transfer of the software. The circumstances of innocence must be defined or presumed knowledge must be defined. The traditional premises of liability under the existing Act cast an onerous presumptive liability on the intermediary. It would be instructive to follow the path taken by the European and the American Regime in this respect.
35. *Anti-circumvention & Rights Management*: There is a total absence of the need for rights management information and anti circumvention measures under the Indian Act. These needs to be crafted in with a delicate segregation of instances where in circumventions must be allowed taking into account the requirements of fair use. Particularly in a developing country, the use of such circumvention controls could shut out fair uses unless norms of exceptions are streamlined and defined. The issues of temporary storage, intermediary liability and that of the circumvention and rights management information are issues that need to be addressed with respect to all entities under the copyright umbrella.
36. *Fair Use*: There is an element of uncertainty with regard to the exact limits of fair use to be applied to performers. This needs to be removed and an assuring framework needs to be formulated. The interconnected nature of performance does not leave much scope for the separate elucidation of fair use. This has been the pattern followed in most of countries analyzed.
37. *Fair Use Remixes*: There is the need to amend the fair use provisions that allows version recordings and remixes of a sound recording after a period of two years (52(1)(j) of the Copyright Act, 1957) but at present this does not require the consent of the performer nor is the performer eligible to receive royalties. This needs amendment by making the consent of the

performer as essential as that of the producer or eligibility to receive royalties in the same terms as received by the producer.

38. The importation of illegal unauthorized recordings and its copies need to be checked by a specific provision in the statute leaving no room for speculation.
39. *Suggestions Specifically for the Audiovisual Performer*: In the light of the international developments, the legislations in other countries both following rigid copyright notions and the authors rights regimes and the law and circumstances in India that has been analyzed, it is evident that the audiovisual performer in India suffers dereliction by the statute. The major drawback of the displacement of the audiovisual performer from the regime of protection can be seen to be a result of apprehensions in the face of huge investments, a multitude of contributors in the making of the film and a lack of infrastructure to work the rights if ever granted. However these have been found to be addressed in other countries with equally cost intensive, prolific and vibrant industries by creating legal and administrative mechanisms to work the rights without jeopardizing commercial exploitation. The record of minimal litigations and smooth functioning show that these have worked efficiently in these countries. Collective bargaining and administrative mechanisms have worked well alongside state institutions and state supervision.
40. The following propositions emerge for a copyright-based remedy to performers in audiovisuals in India. The performers in audiovisuals have always been treated distinctly from the rest of the performers in respect of their rights in fixations taking into account the peculiarities in the exploitation of the audiovisual. The Indian conditions are no less different and therefore concepts need to be applied that ensure rights of the performer's and at the same time assure hassle free exploitation of the audiovisual. However while doing so the best interests of the performer have to be taken into account in the context of the general lack of proficiency in legal and contractual matters compounded by unfair bargaining conditions.
41. Upon an assessment of the nature of protection in countries such as U.S., U.K and France and the developments in the European union, the WPPT

and the nearly successful Protocol in all of which India was a keen and earnest participant, it demands that economic rights for the performer in the audiovisual along those lines need to be prescribed taking into account the special conditions prevailing in India. The rights are the right to authorize affixation of live performance, the right to authorize the broadcast and communication to the public of the live performance, the right to authorize the reproduction of the affixations, the right to distribute the affixations, the right of rental of the affixation with the right of equitable remuneration in the alternative, the right of authorizing the making available of the affixed performances, the right of communication and the right of broadcasting the affixed performances with the alternative right of equitable remuneration from the use pf the performances.

42. *Statutory Rights of Authorization*: The audiovisual performer in India should be vested with statutory rights of authorization. This would change the way rights are viewed presently where in the absence of express contracts the rights are presumed to pass over to the investor/producer. The grant of rights would change this presumption as in the absence of a formal transfer the rights would continue to vest in the performer and any use would be tantamount to infringement. This would shield him against unlimited exploitation that the performer is vulnerable to under the guise of customary trade practices. However a grant of rights in an unfair playing ground where in the majority of the performers are placed in an unfair bargaining position would result in an outright assignment of rights through written instruments. This would not improve the status of the performers under the copyright regime. Further there also fears that commercial exploitation could be cumbersome if the performers either conditionally licensed or failed to grant rights for future exploitation. Therefore a way out of this imbroglio would be the concept of 'presumptive transfer' that has been mooted at both national and international forums for managing rights in the audiovisual.

43. *Presumptive Transfer*: The option of presumptive transfer of rights is best suited to Indian conditions, as it has proved that the mechanism has worked well either through statutory mechanisms or collective bargains in other countries particularly considering special characteristics of the

audiovisual and the difficulty of individually managing rights by the performers. Further mere endowment of rights would essentially result in outright transfer contracts unless qualified by collectively bargained agreements. In India with the collective contracts yet to seriously contain residuals and performers yet to form part of the process, that would not be beneficial. The notion of an unqualified 'presumptive transfer of right' would also be hit by this disadvantage. Therefore the statute should specify a presumptive transfer of rights with rights to remuneration from its exploitation. The rights should include the reproduction, distribution and rental, making available, broadcasting and communication to the public. This would protect the performer from unfair outright transfer of rights and a fixed payment. The statute should prescribe that any agreement of engagement of the performer with a production company or individual producer should be solemnized through a written agreement and registered with a body established for the purpose or in the absence of the same with the union representing the performer or the labor office or the copyright office. Uses to which the performance would be applied and the rights granted, including the various technologies and purposes should be separately mentioned and in the absence of specification, the rights for the specific use can be considered not to have been transferred at all. The agreement should also mention the rates for the separate uses or in the alternative the usual collectively bargained tariffs would apply or and in its absence or the actor being a non-member, the rates fixed by the labor or copyright regulatory office for the different rights and uses would be applicable.

44. *Salary Distinct from Residual or Equitable Remuneration*: The statute should specify that the agreement should stipulate that the salary of the performer would be distinct from the remuneration from the uses mentioned earlier. In the absence of a salary being mentioned either the collectively bargained minimum tariffs would begin to operate that would be dependent on the hours of work put in by the performer. The rates of both the salary as well as the remuneration agreed upon must always be equal or higher than that stipulated by the minimum tariffs stipulated by the collective agreement or by the state fixed remunerative structure. The

agreement should also specify the duration of the engagement as well as the nature of the role and a copy of the complete script. It must also indicate a fair estimate of the nature of treatment. Any change to the clauses of the written agreement must be ratified by the performer and the reviewed agreement should be subject to the same process as the original.

45. *Copyright Law & Labor Law*: Both the provision of the copyright law as well as the labor law should acknowledge the sanctity of either provision and should be read as complementary and not as overriding or as an alternative to one another. The salary on no account must be considered as encompassing future residual payments or in lieu of rights. Further the presumed status of 'worker' should in no way be considered to extinguish the rights bringing in the conventional employer employee relationship. However residual payments distinct from the salary may be allowed to be paid in advance for exploitation for a period of time. But this should be specified in the statute and documented with the aforementioned scrutinizing checks conducted. This could considerably ease the pressure of continuous monitoring of exploitation on collective administration units. It must be noticed that both the concept of salary as well as residual payments based on exploitation must be ingrained into the Indian system. As has been mentioned earlier to this end an amendment of the labor statutes recognizing the performer as a 'worker' under the statute would open up labor law protection to the performer. Though this can be achieved through collective agreements, this besides being dependent on market forces, it would also be denying those artists who are not members of the unions. Thus the French model of three-pronged protection through labor law, copyright as well as collective bargains would be best suited to Indian conditions. The non-waivability of the rights and the statutory provisions must be specified in these statutes and this should strengthen the performer generally in an unfair bargaining position.

46. *Categorization*: While the written agreement should be essential in respect of all classes of performers, it should be left to the decision by the collective bargaining bodies whether rights and residuals should be applicable to certain categories alone. In the absence of collective bodies

deciding on the same, it should be the state regulating body that lays down the categorization on the basis of the degree of creativity required in the performance. The statute should indicate this provision of qualifying the eligibility of performers by indicating the freedom to subcategorize, proportionate to originality and creativity. (As a distinct categorization has already evolved in the audiovisual industry, the customary ways can determine this issue with fairly definable criteria. The regulating body in deciding these matters must be composed of those in the industry along with permanent officials of state. The practices in the industry need to be taken into consideration while deciding on these eligibility factors in the absence of any collectively bargained agreements coming to an agreement on the same.

47. *No Waiver*: It has to be statutorily stipulated that at no instance should there be an individual waiver of these rights. This would secure the performer against outright transfer clauses. The statute should stipulate a presumptive transfer of rights of the performer in the audiovisual that can work subject to the specifications afore mentioned. (The idea of presumption is not to be considered as an affront to the freedom of contract in the artist but one taking into account the lopsided bargaining positions in the industry. While there can be a contract to the contrary against the presumption of transfer for retaining rights). The producer is free to apply the work to the uses mentioned and the rights provided. Any deviation from the same would require the express contract for the same as otherwise it would be considered as an infringement. The salary should be distinctly paid separate from remuneration from the exploitation. This secures the performer from the evil of future payment promises based on returns alone.

48. *State Function & Supervision*: The statute should specify either in the provisions or must delegate to a state appointed authority like the copyright Board or Tribunal in the U.K. or the *Conseil d' Etat* in France or the Librarian of the Congress in U.S., the right to take a decision regarding the uses and the rates for the same depending on the contemporaneous commercial utility and larger public interest. This should enable a positive discrimination between those services more commercially demanding like

for instance fee based interactive communication or broadcasts and free to air broadcasts.

49. *Minimum Guarantees*: It should be specified in the statute that the rates can be deviated from if more beneficial provisions are included in the agreement than the minimum laid down in the collective agreements or the minimum fixed by the regulatory authority or state.
50. *Non-Transmissible*: The right to remuneration must be made non transmissible and only to be transferred to collective administration societies or to be administered individually.
51. *Collective Administration*: The salary as well as the future payments should be routed through the collective administration office set up for the purpose. In the absence of collective bargaining agreements, minimum rates for the salary must be prescribed by the state as well the rates for the returns from repeat uses. The law should recognize and scrutinize the functioning of collective administration societies.
52. *Regulatory Authority*: The statute should prescribe a regulatory authority that would fix and arbitrate upon the minimum rates taking into account the changing financial prospects of the industry and contemporary market demand. A regulatory authority must render this with members from all sectors in the audiovisual industry to periodically advise and fix the rates. This becomes all the more important considering the developing nature of the economy and the lack of maturity of the collective bargaining institutions in the country.
53. *Broadcasting & Communication to the Public*: No discrimination need be shown to the audiovisual performers with respect to the remuneration from broadcasting and communication to the public, as it constitutes a major segment of the exploitation. Instead of leaving the same to the collective bargaining forces and vagaries of the market a right or an equitable remuneration right would go a long way to help the performer. As there is already a presumption of transfer right in operation, the performer would not be able to obstruct the exploitation of the right.
54. *Rights Against Third Parties*: Any transfer of the rights in the audio visual by the owner of the rights to third parties should protect the rights of the performer with respect to remuneration from repeats as well any other

remuneration as stipulated by statute or by the terms of the agreement. This should be specifically stated in the statute. This would prevent treatment based on privity of contract as a reason for non-honoring the contract.

55. *Non Property Rights*: The rights to record, to broadcast or to communicate to the public in the live performances, taking a leaf from the British framework, must be made a non-property right transmissible only through testamentary dispositions or by law. This would secure the performers who might lose all rights by losing the right to affix, broadcast and communicate the live performance. (An agreement to affix the same in an audiovisual would operate the presumptive right of transfer subject to remuneration).
56. *Labor Law Benefits*: Specific amendments need to be brought in to labor legislations in the country recognizing the performing artist as a worker and extending to the worker the benefits of the film production being declared as an industry. This would entitle him to welfare benefits in the like of provident fund, gratuity etc. (The prevalence of these three means of protection under the French law and other jurisdictions dispels the fallacy nurtured in India that creative artists cannot be classified as workers while at the same time harnessing the benefits of the residual or intellectual property protection). It must be specifically provided in the copyright Act that the labor law provisions and vice versa would not have any adverse on the protection of the performer. While collective organizations should be strengthened and conditions created so that performers would feel the compulsion to be a member of the unions as it would beget benefits for him. A statutory compulsion to be a member of the trade union would be against the tenets of fundamental rights. Nevertheless the labor law provisions complemented with copyright support would cover members and non-members alike.
57. *Record of Uses*: It must be specifically laid down in the statute that the producer should intimate the performer or his collective organization or the regulatory authority about the chart of exploitation of the product periodically. Penalty must be imposed in case of failure to do so.
58. *Representative Deals:* The statute should recognize representative deals in case of group performances. This should be permitted, provided all in

the group have acknowledged the representative by observing mandatory documentary formalities.

59. *Moral Rights*: There has to be a statutory grant of the right to paternity and integrity subject to exceptions for the sake of the exploitation of the performance in the audiovisual. Lack of specificity with respect to the exceptions to the moral rights have always led to problems about the allowable exceptions to rights of paternity and integrity. This can be resolved by firstly the legislation providing a detailed specification about the kind of circumstances and uses rather than use terms like 'manner of use' etc. If through a collective bargaining mechanism this can be achieved then that should suffice. Further the written authorization agreement must carry a specification about the role, the screenplay script with intimation about the possibilities of use. Any deviation from the same must require a consultation and concurrence of the performer. Remixes and version recordings covered by statutory licensing under fair use provisions must cover performers in audio-visuals in its soundtrack. Either the consent of the performer or the remuneration as stipulated should percolate to the performer as well.
60. *Moral Rights Safeguard:* The right to preview before the release of the film or publication must be specifically granted to the performer. The Copyright Board or the broadcasting authority can conduct the preview at the moment of the film certification or before certification. It would be incumbent on the producer to produce the certificate whether the cast has agreed to the final version either prior or post production of the film before publication. Though there is no parallel provision in any other countries, this would alleviate the lot of women performers who are normally exploited in the manner of depiction without them having any clue of the intent and the effect.
61. *Employer-Employee*: Circumstances of employer –employee relationship of a continuous nature like in a broadcasting organization can be considered as an exception taking into consideration, the terms of engagement in the like of a monthly salary etc but a stern set of criteria has to be evolved so that it is not used to circumvent the rigor of the rights granted. It must be borne out of a specific prescription in the contract in

writing of the intent of such a relationship. The 'Work for Hire ' pattern followed in the United States could be a useful guidance. While this may affect the rights vested in the performer, the earlier mentioned statutorily imposed status of 'worker' for labor security benefits should not be confused as a relationship of employer-employee thereby extinguishing the rights of the performing artist.

62. *Control Over Foreign Production Houses*: Production units that arrive in the country for shooting using performer capital from India should render themselves amenable to these laws and render accounts of the exploitation chart worldwide. A specific statutory provision should mention the need for foreign production houses to be amenable to the Indian provisions and assure that if more favorable conditions exist in their country those must find expression in the contract with the Indian performer.
63. *Broadcasting, Communication & Performance*: The positive rights of authorization granted in some jurisdictions have stopped short of authorization rights for use of affixed performances in broadcasting and communication to the public & the right of remuneration for broadcasting and communication to the public or for the performance of the audiovisual. However this has been made up for by the prevalence of collective bargaining agreements. It is important to have a provision in this regard in the Indian law particularly in the absence of a collective bargaining contracts.
64. *Making Available*: The right of 'making available' being a serious threat to traditional modes of delivery in the future, a specific right of making available should be formulated to suit the Indian digital market in audiovisuals as the broadband essentially ushers in possibilities of an on-demand-Interactive audiovisual entertainment.
65. *Audio and Audio-visual Fixations*: There is a need for clearer delineation between the definitions of audio and audiovisual fixations. Under the Indian law the terms representing these have been sound records and cinematographs respectively. While the word cinematograph does encompass the sound track as well, it can be noticed that the sound

record does not exclude the sound track in the cinematograph[2]. This can create scope for speculation where in the sound track performers could either qualify for sound record performer protection and vice versa. The clear-cut enunciation would be important considering the fears raised at the international conclaves by performers particularly since the audiovisual performer would be treated separately from the treatment of audio performer. The difference between a pure audiovisual fixation of sound and a reproduction incorporated into an audiovisual would need to be maintained to this end.

It follows from the study that the application of the copyright framework with aforementioned safeguards is essential both for the economic and moral right's security of the performer and the overall regulation and organization of the entertainment industry in general and audiovisual industry in particular. However, the study reveals that the current state of contractual practices, collective organization, bargaining and the statutory application are not in a highly credible state nor prepared to handle the responsibility in the country. This however should not be reason for not granting the rights but it should be stressed that only when the collective organizations, the collective administration establishments and state institutions work in tandem to administer the rights that true realization of the performers' rights can take place in a land of rich cultural heritage and promising cultural exports. It can be hoped optimistically that the grant of rights would ignite and activate the performer at the individual level, the producer interests, the collective organizations, the state institutions and policy makers to harness the right's regime positively to the advantage of the performer and the investor in the industry.

[2] Section 2(f) and Section 2(xx).

Annexure - I
(Chapter 9 Footnote 63)

QUESTIONNAIRE USED FOR INTERVIEWS - PERFORMER'S RIGHTS IN INDIA - A STUDY WITH SPECIAL REFERENCE TO THE AUDIO VISUAL INDUSTRY

1. Category of professional: Artist/Producer /Organization:
If artist whether leading ---------, supporting-------- or otherwise---------- if Dubbing artist only or both----------, technician---------- background Performer----------play back singer----------, dance artist----------, Stunt performer or double or extra or others.

2. What was the nature of contractual understanding in the film industry?
Oral written or both or customary

3. How was it settled?
Direct through an agent informal contacts

4. Was there any stipulation with regard to the duration of the assignment?

5. What was the understanding regarding the extent of exploitation the product?

6. Were there any separate agreement regarding the different ways of exploiting the product?

a. Theatre
b. Video
c. Television
d. Cable
e. Digital Internet
f. All exploitations permitted

7. What is the usual customary practice with regard to these agreements?

8. What is the reason for the nature of the agreement entered into?
9. Do you get separate remuneration for each and every exploitation – is payment one time based or is it according to the nature of the exploitation? Is there a notion of copyright or intellectual property recognized with respect to performances of the Actor?

10. If the agreement was based on exploitation at different places and different times then what was the understanding with regard to the remuneration?
11. What was the percentage of the collections that you were entitled to?

12. Are you concerned about the manner of exploitation if yes or no what are the reasons for the same?
13. Are there any social security arrangements?
Insurance during the shoot
Any welfare fund
Unemployment doles.
14. If there is a failure in performance on either side then what happens
15. How do you settle disputes?
Through professional bodies

Through mediators
Courts

16. Are you satisfied with the present industrial set up.
With regard to the nature of production
Nature of agreements
Nature of exploitation of the film
Working conditions
Nature of payments

17. Are you a member of any professional organization and if so are you satisfied with the organizational work and unity? ----------. Have these aforementioned problems been discussed at the organizational level and has there been any attempt at collective bargaining to resolve these problems.

18. Do you think that you should have a right in the commercial exploitation of your performance? Enumerate.

19. Are you aware about the law governing these rights?

20. How would you like to transfer these rights?

Total transfer. Transfer to different people for different exploitation Only licensing*

22. Do you agree with the automatic transfer of all your rights to the producer? If yes then why if no then why?

23 Would you agree to the idea of joint ownership in he film with the producer, if yes – are you willing to share the risk. Do you wish for an alternative system of remuneration and what would be your suggestions? Why not a system based on the manner of exploitation and on the way the product fares in the market.

24. Do you think that distortion and mutilation is taking place of the film. Substantial changes without your consent is being made. Do you think that it is affecting your reputation? . Have you used your voice or was it dubbed? Have you used a body double for performing, if so was it with your approval or not? Do you feel that the extras are receiving a fair deal?

25. Do you approve of any legal mechanisms to prevent this?

26. Do you have concerns about your future? If yes is it
Financial reputation health old age any other

27. Do you have any suggestion regarding government policy? Are you happy with the policy of the state government and the central government towards the industry? With reference to
Financing
Relationships- built in revenue sharing- is it good model of exploitation
Lack of legal provisions and enforcement

Annexure –II

(Chapter 9 Footnote 112)

Agreement entered into this.....day of ..... 200... between Messrs. represented by its propreiterix herein after called the producer and Sri..... residing at..... hereinafter called the Artiste /Technician.

Where as the producers have agreed to utilize the services of artiste /technician as..... for the production of motion picture titled ..... Now under production to be produced in the languages Tamil/ Telugu/ Hindi/ Malayalam in the 35MM or any other gauges or in any color in cinemascope or in any device.

Where as the artist /technician has agreed to render his/her services in the said picture and in the versions, color gauges and devices as aforesaid. /including assistants.

NOW THIS AGREEMENT WITNESSETH:

1. The artiste /technician undertakes to render services under the contract till the completion of the picture on a consolidated total remuneration of Rs'.....

Only and today the producer have paid Rs..... By Cheque/ Cash as advance against this contract and the balance shall be paid in suitable installments according to the progress of the picture and the last and final of such installment be payable as soon as his /her role in our picture is completed in all respects before the release of the picture.

2. The artiste /technician shall attend rehearsals, recordings and shooting etc. as and when required by the producer in time on his/her part.

3. The artiste /technician agree to give the following call sheets for shooting and including Dubbing

Dates Payments

The call sheet dates of our above said film should not interfere with Call Sheet of the other producers in any manner. The dates of call sheets is the essence of this arrangement.

4. If agreed person is an artist the remuneration fixed includes their costumer, makeup man, assistant's remuneration. If agreed person is screen play writer and director the remuneration includes all dubbing and remake rights of other languages. If agreed person artiste /technician attending from outside Madras they have to take care of their boarding lodging.

5. The artiste /technician should attend the indoor /outdoor shooting according to call sheet dates, without any interruption and they should be provided the traveling facilities boarding and lodging accommodation for the outdoor shootings.

6. The costumes for the entire film should be according to the discretion of the producer and director. They should not demand costumes according to their will and pleasure.

7. The agreed person should adhere to the instructions of the producer and the director at the time of acting in the film and they should not interfere in the work of the film.

8. If the agreed person is a technician/artist not cooperating or doing things to the unsatisfaction of the producer, they are liable to be dismissed from services after payment of proportionate remuneration.

9. In case any dispute arises out of this arrangement the Tamil film producer's council is the final authority for suitable arbitration.

10. You have signed this letter of arrangement for your acceptance agreeing to the above said terms and conditions.

All other terms and conditions should be followed as per the practice of trade.

Courtesy FEFSI.

Annexure- III

(Chapter 9 Footnote 191 & 207)

TARIFF CARD OF VOICING

AVA members who are already well established will continue to charge their fees based on their experience & expertise they have acquired in the field of voicing and the quality of the individual voice. However as an attempt to curb the malpractice and to free the voicing artistes from the exploitation, AVA through this tariff card recommends the minimum rates for various categories of voicing work.

The rates / professional fees mentioned in the tariff will be reviewed by the wages sub committee of AVA every six months and will be open for revision and alterations by the Managing Committee of AVA on a yearly basis. Also, in case of disputes where contracts are not available, this tariff card rates will be taken into consideration.

I. **TV Commercials :**
(5,10,15,20,30,45 & 60 Seconds duration)

MVO or FVO	: Rs. 2,500/-
Character Voice	: Rs. 2,000/-

(For all slap – Ons' and Edits, an additional 50% will be charged.)

II. **TV Serials :**

(Hindi Language Dubbing)

a) For 23/30 minute episodes – per episode

Main roles	: Rs. 1,000/-
Character roles / Supporting cast	: Rs. 750/-
Incidental roles / Crowd scenes artiste	: Rs. 500/-

b) For 45/50 minute episodes – per episode

Main roles	: Rs. 1,500/-
Character roles / Supporting cast	: Rs. 1,000/-
Incidental roles / Crowd scenes artiste	Rs. 500/-

III. **TV Serials :**

(Regional Language Dubbing)

For 23/30 minute episodes – per episode

Main roles	: Rs. 750/-
Character roles / Supporting cast	: Rs. 500/-
Incidental roles / Crowd scenes artiste	: Rs. 350/-

IV. **TV Serials :**

Recap Announcements, & Announcement during the programme etc. per episode	: Rs. 1,500/-

V.a) **Video programmes / docu dubs for channels like Discovery, National Geography, Animal Planets etc.**

	(30mins.)	(45mins. to 1 hr.)
Narration / Commentary / Voice Over	3,000/-	4,000/-
Main Host (Lip Sync)	4,000/-	5,000/-

Character / Bank Voices (Lip Sync)	1,250/-	1,250/-
Character / Bank Voices (Para Sync)	1,000/-	1,000/-

b) **Animations from English to Hindi & other regional languages- per episode**

Main roles	: Rs. 1,000/-
Character roles / Supporting cast	: Rs. 750/-
Incidental roles / Crowd scenes artiste	: Rs. 500/-

VI. **Corporate films, Video van publicity films, tele product sales films, demo films, pesticides & fertilizer sales films & all agricultural products films etc. of 20-minute duration.**

(For each slap on & edit an additional 50% will be charged)

Narration / Commentary (Voice Over)	: Rs. 3,000/-

Main Host / Company representative(Lip Sync)	: Rs. 3,000/-
Character Voice	: Rs. 1,000/-
Incidental role / Crowd scene artiste	: Rs. 750/-

Promos of TV - SATELITE CHANNELS PROGRAMME : (Hindi / English)

MVO / FVO - (per promo)	: Rs. 750/-
Or	
On a contractual basis a total of 50 promos per MVO / FVO	: Rs. 25,000/-

Promos of TV - SATELITE CHANNELS PROGRAMME : (Regional Language.)

MVO / FVO - (per promo)	: Rs. 500/-
Or	
On a contractual basis a total of 50 promos per MVO / FVO	Rs. 17,500/-

IX. AUDIO CASSETTE PUBLICITY - (Promos of VIDEO PROGRAMME)

For Hindi (male or female voice)	: Rs. 2,000/-
For Regional Language (male or female voice)	: Rs. 1,500/-

X. DOCUMENTARIES & AUDIO VISUALS

AV'S / DOCU'S upto 10 mins.

MVO / FVO	: Rs. 4,000/-
Character Role	: Rs. 2,000/-

XI. RURAL VIDEO & FILM VAN PUBLICITY

MVO / FVO'S (up to 20 mins.)	: Rs. 4,000/-
Character Role	: Rs. 2,000/-

XII. RADIO COMMERCIALS & PROMOS

MVO / FVO'S	Rs. 2,000/-
Character Role	: Rs. 1,250/-

(An additional charge @ 50% of total payment will be charged on each slap-on's and Edits)

XIII. RADIO - SPONSORED PROGRAMMES (ANCHOR BASED)

Per - artiste, per programme : Rs. 500/-

XIV. RADIO - SPONSORED PROGRAMMES (DRAMA BASED)

Major Role	: Rs. 500/-
Parallel Role	: Rs. 300/-
Incidental Role & Crowd scene artistes	: Rs. 150/-

Web-radio & fm-radio achoring are yet to take-off in a full fledged manner. These could be taken into consideration in the subsequent reviews.

XV. RURAL AUDIO VAN PUBLICITY

MVO / FVO'S	: Rs. 2,000/-
Character Roles	Rs. 1,250/-

XVI. AUDIO CASSETTE PUBLICITY - AUDIO PROMOS:

Hindi (per artiste)	: Rs. 1,500/-
Regional Language (per artiste)	: Rs. 1,000/-

XVII. SLIDE CUM SOUND

MVO / FVO'S	Rs. 1,000/-
Character Role	Rs. 500/-

XVIII. PRE - RECORDED NARRATION FOR AWARDS FUNCTIONS

Per Narrator Rs. 5,000/-

(This consists of announcing nominees, lifetime achievement award recipients, introducing sponsors, performing artistes etc.)

XIX. TELEPHONIC / VOICEMAIL PROMPTS

For Banking Services and cellular services etc. This is a new, upcoming and specialized arena. Mostly all prompts are recorded in bulk and consume a lot of time. AVA recommends a nominal fee of Rs. 10,000/- per hour of recorded time, per FVO / MVO.

XX. CINEMA -

FEATURE FILM Dubs - FROM HINDI TO HINDI

(a) Feature films "A" Grade

Hero / Heroine	: Rs. 1 Lac.
Parallel hero / heroine	: Rs. 60,000/-

Main Villain		Rs. 60,000/-
Comedian	:	Rs. 50,000/-
Character role / Supporting role	:	Rs. 25,000/-
Incidental role and Crowd (per 8 hour shift)	:	Rs. 3,000/-

(b) Feature films "B" Grade

Hero	:	Rs. 10,000/-
Heroine	:	Rs. 7,500/-
Villain	:	Rs. 5,000/-
Character role / Supporting role	:	Rs. 1,500/-

(if the production cost of the film is more than one crore, then it will be treated as "A" grade film.)

XXI. CINEMA -

PARALLEL CINEMA Dubbing from any language to any other language.

(NFDC, CFSI, FD FEATURETTS, ETC.)

Lead & second lead roles like hero / heroine / parallel hero or heroine	:	Rs. 15,000/-

Main villain / main comedian Character role / Supporting cast	:	Rs. 7,000/-
Incidental role and Crowd scene artiste (per 8 hour shift)	:	Rs. 1,000/-

XXII. CINEMA -

FEATURE FILM Dubs - FROM ANY INDIAN LANGUAGE TO HINDI

(For A GRADE FILMS)

Lead & second lead roles like hero / Heroine / parallel hero or heroine	:	Rs. 20,000/-
Main Villain / main comedian Character role / Supporting cast	:	Rs. 7,500/-
Incidental role and Crowd scene artiste (per 8 hour shift)	:	Rs. 2,000/-

(For B GRADE FILMS)

Lead & second lead roles like hero / Heroine / parallel hero or heroine	:	Rs. 10,000/-

Main Villain / main comedian / Character role / Supporting cast		Rs 5,000/-
Incidental role and Crowd scene artiste (per 8 hour shift)		Rs. 2,000/-

XXIII. CINEMA -

FEATURE FILM Dubs - FROM ANY INDIAN REGIONAL LANGUAGE TO ANY OTHER INDIAN REGIONAL LANGUAGE

(For A GRADE FILMS)

Lead & second lead roles like hero / heroine / parallel hero or heroine	:	Rs. 10,000/-
Main Villain / main comedian Character role / Supporting cast	:	Rs. 5,000/-
Incidental role and Crowd scene artiste (per 8 hour shift)	:	Rs. 2,000/-

(For B GRADE FILMS)

Lead & second lead roles like hero / heroine / parallel hero or heroine		Rs 7,500/-
Main Villain / main comedian Character role / Supporting cast		Rs. 3,500/-
Incidental role and Crowd scene (per 8 hour shift)		Rs. 1,500/-

XXIV. CINEMA -

FEATURE FILM Dubs - FROM FOREIGN FILM TO ANY INDIAN LANGUAGE

Lead role	:	Rs. 25,000/-
Second lead role		Rs. 15,000/-
Character role / Supporting cast		Rs. 8,000/-
Incidental role and Crowd scene artiste (per 8 hour shift)		Rs. 3,000/-

XXV. CINEMA - COMMERCIALS

MVO / FVOs	: Rs. 2,500/-
Character role	: Rs. 2,000/-

XXVI. COMPERING ROAD SHOWS

(Per day, per Compere)	: Rs. 10,000/-

XXVII. ANNOUNCER - STAGE SHOWS

(Per 3 hrs. Show)	: Rs. 3,000/-

MANDATORIES

1. **Conveyance :-**

   a) In addition to the above mentioned remunerations on this tariff card, an amount of Rs. 200/- to be paid as conveyance in cash to the voice artiste on the spot for all kinds of recordings/dubbing.

   b) If the recording/dubbing finishes before 9.00 pm, the voice artiste for all kinds of recording/ dubbing is entitled to a conveyance of Rs. 200/- only in cash and if the recording/ dubbing finishes after 9.00pm the voice

artiste is entitled for Rs. 400/- only in cash as late night conveyance.

   c) For all auditions the Voice Artiste is to be paid a token of Rs. 200/- only in cash to cover conveyance and incidental expenses.

2. **Scratch Recordings :-**

   For all kinds of scratch recordings 100% will be charged. When it is approved and is Recorded / Dubbed by the same artiste for the final recording, then 75% will be charged.

3. **Correction Jobs / Re-Dubbings :-**

   a) If the voice artiste has to visit the studio again, to re-record / re-dub to carry out the corrections / alterations, in the case of TV / Radio / Cinema Commercials, then the voice artiste must be paid 100% of the rate which was paid earlier.

   b) In case of TV serials, the voice artiste is to be paid proportionately for the correction jobs.

   c) In case of TV serials for re-dubbing the voice artiste is to be paid 100%.

   d) In case of any correction which is required to be made by the voice artiste, in the script during the dubbing / recording, the voice artiste will be paid an additional sum of Rs. 500/-

   e) In the case of feature films, for correction and re-recording, the voice artiste has to be paid proportionally as per the number of reels he/she has done the correction or re-dubbing. The proportionate payment has to be worked out considering the total payment artiste has received for the original work & number of reels.

4. **Dubbing for censor copy:-**

   Same charges mentioned in the CINEMA category. will be applied for dubbing of the censor copy.

5. **Cancellations, Postponements & Rejections :-**

   a) In case of commercials and Ad Films, after the artiste reaches the studio, If the recording

is cancelled for any reason, the artiste is entitled for full payment of the job.

   b) If a recording of commercials & Ad Films is cancelled on the day of the recording before the artiste reaches the studio, cancellation charges of 50% of the remuneration is to be paid.

   c) In the case of Serials, Documentaries and Feature Films, the cancellation charge to be paid to the voice artiste is as under :-

      1. If the intimation of cancellation is given before 48 hours - No Compensation.
      2. If the intimation of cancellation is given between 24 hours to 48 hours - 10% of the total contracted / committed amount has to be paid.
      3. If the intimation of cancellation is given within 24 hours - 25% of the total contracted / committed amount has to be paid.
      4. If the intimation of cancellation of the feature film dubbing is given on the same

day / during the dubbing then compensation amount of Rs.1000/- is to be paid to the artiste.

d) If the recording is cancelled due to power failure, then a nominal amount of Rs. 200/- towards the conveyance should be paid by the producer to each voice artiste, who reaches the studio.

e) If the voice of an artiste is rejected at the studio, in the event that the Producer / Director / Dubbing director feels that the voice is unsuitable or inappropriate for the role, then the voice artiste is to be paid 50% of his or her rate. If the dubbing work is completed and then the decision is taken that the voice is unsuitable, then the producer is liable to pay 100% of the Voice Artiste's rate.

f) In case of postponements, if the intimation of the postponement is given is less then 24 hours period, then an additional amount of 20% will be charged. If the same voice artiste is subsequently not called for the said recording / dubbing, then it will be treated as cancellation, and the cancellation rule no. 5-c-3 will be applicable.

6. Waiting :-

If the voice artiste is made to wait in the studi for more than 1 hour to begin the recording the the voice artiste's additional fees is to be paid b the producer as per the table mentione below :-

Waiting Period	Additional % of the amount of the Contractual Committed rate
1 Hour to 2 Hours. -	10%
2 Hours to 3 Hours. -	20%
3 Hours to 4 Hours. -	30%
4 Hours to 5 Hours. -	40%
5 Hours to 6 Hours. -	50%
After 6 Hours. -	100%

7. MULTIPLE VOICING

If a voice artiste is required to dub / record fo more than one character, then the voice artist is entitled to get the payment for each characte separately.

Note:

- Every member should write and submit the bill to the producers, for all the voicing jobs done in the studio itself.
- Bill will contain Bill/Receipt No., Date, Time of recording, Name of the studio, Name of the product, producer and the amount charged. The member, the recordist and the producer's representative should sign the Bill.
- The member should retain duplicate copy of the bill, which may be useful in case of dispute settlements.

All the voice artistes should be paid on the spot in the studio on the day of the recording itself.

THE FOUNDER MEMBERS OF AVA MANAGING COMMITTEE (1999-2001)

1.	Pt. Raj Joshi	- President
2.	Mrs. Leela Ghosh	- Vice-President
3.	Mr. Surendra Bhatia	- Vice-President
4.	Mr. Pradeep Bhide	- Gen. Secretary
5.	Mr. Shivraj Suvarna	- Joint Secretary
6.	Col. Trilok Kapoor	- Joint Secretary
7.	Mr. Rajesh Jolly	- Treasurer
8.	Mr. Jaisheel Suvarna	- Member
9.	Mr. Brij Bhushan Sahwney	- Member
10.	Mr. Pankaj Kalra	- Member
11.	Mr. Harjeet Walia	- Member
12.	Mr. Viraj Adhav	- Member
13.	Mr. Ankur Javeri	- Member
14.	Ms. Ella Castellino Atai	- Member
15.	Ms. Prabha Sharma	- Member
16.	Ms. Kajol Mukherjee	- Member
17.	Ms. Mitul Bhattacharya	- Member

XXI

Annexure - IV

(Chapter 9 Footnote 219)

प्रसार भारती/Prasar Bharti

तार : "आकाशवाणी"
Telegram : 'AKASHVANI'

आकाशवाणी-कार्यक्रम—5
(पैरा 5-5-6 और 11-7-2 देखिए)
AIR – P – 5
(See Paragraphs 5-5-6 & 11-7-2)
DD – P – 5
(See para 4-8-1)

आकाशवाणी/दूरदर्शन
ALL INDIA RADIO/DOORDARSHAN

..... केन्द्र / Station

नाटक अनुभाग
Drama Section

दिनांक
Dated ..... 20 .....

प्रिय
Dear

हम आपको नीचे लिखे बिवरण के अनुसार प्रसारित / टेलिकास्ट होने वाले नाटक में इस पत्रके पीछे लिखी शर्तों पर अभिनेता/पूरक कलाकार/प्रस्तुतकर्ता की हैसियत में भाग लेने के लिए निमंत्रित करते है । कृपया संलग्न पूष्टि पत्र को विधिवत भर कर, इस पत्र की तारीख से तीन दिन के भीतर, हस्ताक्षर करके लौटा दीजिए । इसके लिए हम आपके जाभारी होंगे :—

We invite you to take part in the capacity of Actor/Performer/Producer in the production to be broad cast/telecast as detailed below upon the conditions printed overleaf. We shall be obliged if you will kindly SIGN and RETURN the attached confirmation sheet, duly completed, within three days of the date of this letter :—

शीर्षक
Title .....

प्रसारण/टेलिकास्ट की तारीख
Date of Broadcast/telecast .....

प्रसारण/टेलिकास्ट का समय
Time of Broadcast/telecast .....

प्रसारण/टेलिकास्ट की अवधि
Duration .....

प्रसारण/टेलिकास्ट का स्थान
Place of Broadcast/telecast .....

शुल्क
Fee .....

स्टेम्प शुल्क सरकार द्वारा वहन किया जाएगा ।
The Stamp duty will be borne by the Government.

भवदीय
Yours faithfully

निदेशक/केन्द्र निर्देशक
Station Director/Director
आकाशवाणी/दूरदर्शन
All India Radio/Doordarshan
भारत के राष्ट्रपति के लिए और उनकी ओर से
For and on behalf of the President of India

पीछे पत्र में निर्दिष्ट शर्तें AIR/DD – P-5

CONDITIONS REFERRED TO IN THE PRECEDING LETTER

1. यदि उल्लिखित तारीख तक हस्ताक्षर किया हुआ स्वीकृति-पत्र प्राप्त न हुआ तो आकाशवाणी/दूरदर्शन को यह अधिकार होगा कि वह प्रस्ताव वापस ले लें ।

In the event of a signed acceptance not being received by the date stated, All India Radio/Doordarshan reserves the right to withdraw the offer.

2. कलाकार सहमत है कि वह उन पूर्वाभ्यासों में शामिल होगा जो आकाशवाणी/दूरदर्शन की राय में इस कार्यक्रम प्रस्तुति के लिये जरूरी होंगे ।

The artist agrees to attend to such rehearsals as are in the opinion of All India Radio/Doordarshan necessary for the production of this programme.

3. कलाकार सहमत है कि वह आकाशवाणी/दूरदर्शन द्वारा नियुक्त प्रस्तुतकर्ता और/अथवा इस कार्यक्रम के किसी भी प्रभारी अधिकारी की हिदायतों का पालन करेगा ।

The artist agrees to follow the instructions of the Producer and or any other officer-in-charge of this programme to be appointed by All India Radio/Doordarshan.

4. कलाकार यह प्रमाणित करेगा कि इस करारनामे पर हस्ताक्षर करते समय वह ऐसे किसी आबन्ध के अन्तर्गत नहीं है (अथवा किसी अन्य अनुबन्ध के कारण अवरुद्ध नहीं है) जो उसे इस करार को पूरा करने से रोकता हो और उसने व्यवसायिक नाम या विवरण में किसी परिवर्तन को छिपाया नहीं है ।

The artist shall warrant that at the time of signing this Agreement he is not under any engagement for (otherwise barred by any contract) precluding him for fulfilling this agreement and that he has not concealed any change of professional name or description.

5. आकाशवाणी/दूरदर्शन का यह अधिकार सुरक्षित है कि वह इस समस्त कार्यक्रम को अथवा इसके किसी अंश को अतिरिक्त शुल्क दिये बिना पुनः प्रसारण के लिए रिकार्ड कर सकता है ।

All India Radio/Doordarshan reserves the right to record the whole or any part of the programme for re-broadcast/re-telecast without payment of additional fees.

5(क) संविदा की अन्य शर्तों में जो कुछ तय हुआ है, उसका साथ-साथ आकाशवाणी/दूरदर्शन को यह भी अधिकार होगा कि वह इस कार्यक्रम या इसके किसी अंश को डिस्क/टेप अथवा केसेट के जरिए स्वयं या अपनी किसी एजेंसी के द्वारा व्यापारिक रूप से जारी कर सकते है और इसके लिए वह वार्ताकार/लेखक को चार मुल फीस देंगे । आकाशवाणी/दूरदर्शन की चार मूल फीस देने के अलावा वार्ताकार/लेखक से और कोई प्रकार की अनुमति लेने की आवश्यकता नहीं होगी ।

5. (a) Notwithstanding anything contained herein All India Radio/Doordarshan shall have right to release or allow any of its agency to release this programme or part thereof through discs/tapes and cassettes manufactured commercially by paying an amount not exceeding four basic fees to the author/talker. Save and except making payment of one time fees as stated aforesaid. All India Radio shall not be required to observe any other or further formalities.

(Inserted vide D.G., AIR. Memo No. 23/7/86-PII (Vol II) dated 6.10.88)

6. यदि कलाकार सरकारी कर्मचारी हुआ तो उसके कार्यक्रम का प्रसारण/टेलिकास्ट और उसे शुल्क का भुगतान इस शर्त के अधीन होगा कि वह अपने कार्यालय या विभाग के अध्यक्ष से इस आशय की मंजूरी प्राप्त कर ले और यह मंजूरी केन्द्र निदेशक को प्रसारण/टेलिकास्ट की तारीख से पहले भेज दी जाए ।

In the event of the artist being a Government servant, the broadcast/telecast of his programme and the payment to him of the fee shall be subject to his obtaining the sanction of the head of his office or Department to this effect and this sanction should be forwarded to the Station Director before the date of the broadcast/telecast.

7. इस अनुबंध में प्रसारण/टेलिकास्ट का अर्थ है किसी प्रसारण/टेलिकास्ट संगठन के एक से अधिक ट्रेंसमिटरों से कार्यक्रम का विकिरण ।

In this contract broadcast/telecast means radiation of the item from one or more transmitters of any broadcasting/telecasting organisation.

8. यदि बीमारी या शारीरिक अक्षमता के कारण कलाकार नाटक में भाग लेने में असमर्थता प्रकट करता है तो वह कलाकार किसी अर्हता प्राप्त चिकित्सक से प्रमाण-पत्र लेकर आकाशवाणी/दूरदर्शन को भेजेगा जिसमें उक्त असमर्थता को प्रमाणित किया जाएगा, बीमारी की किस्म का उल्लेख किया जाएगा और यह भी लिखा जाएगा कि उक्त बीमारी के कारण कलाकार नाटक में भाग लेने में असमर्थ है । ऐसी स्थिति में आकाशवाणी/दूरदर्शन कलाकार को कोई शुल्क या पारिश्रमिक देने का दायित्व नहीं होगा, किन्तु उस अवसर के लिए शुल्क दिया जाएगा जो उसने वस्तुतः इस अनुबन्ध के अन्तर्गत किया है ।

In the event of the artist alleging incapacity to perform by reason of illness or physical incapacity the certificate of a qualified medical practitioner, proving the fact of such incapacity shall forthwith be sent to All India Radio/Doordarshan by the Artist stating the nature of the illness and that in consequence thereof the Artist is unable to perform. All India Radio/Doordarshan shall in such event not be liable to pay any fee or remuneration to the artist except for performance actually given by him hereunder.

9 बीमारी या शारीरिक अक्षमता की स्थिति को छोड़कर जिसकी उपयुक्त विधि से प्रमाणित करना होगा, अथवा ऐसी किसी अनिवार्य कारण को छोड़कर जिसके सबूत से केन्द्र निदेशक संतुष्ट हो यदि कलाकार किसी भी अन्य कारण से ईस करार नामे में किए गए अनुबन्ध के अनुसार उपस्थित न हो सका या नाटक में भाग न ले सका तो वह आकाशवाणी/दूरदर्शन को परिनिर्धारित नुकसानी के रूप में तथा उसके लिए उस रकम के बराबर रकम अदा करेगा जो वह कलाकार इस प्रकार की उपस्थिति अथवा अभिनय के लिए प्राप्त करता; साथ ही वह आकाशवाणी/दूरदर्शन को एवजी कलाकार की व्यवस्था करने की रकम और ऐसी किसी लागत नुकसान और खर्चों को भी भरेगा जो आकाशवाणी/दूरदर्शन ने कलाकार की चूक की वजह से उठाए हों ।

Should the artist for any reason (except illness or physical incapacity certified as hereinbefore provided or such other unavoidable cause as may be proved to the satisfaction of the Station Director) fail to appear and perform as stipulated in this agreement he shall pay to All India Radio/Doordarshan as and for liquidated damages a sum equal to the sum which the artist would have received for such appearance and performance in addition to the cost to All India Radio/Doordarshan of providing a deputy and any other costs, damages and expenses incurred by All India Radio/Doordarshan by reason of default to the artist.

10 आकाशवाणी/दूरदर्शन को यह अधिकार होगा कि वह कोई भी कारण बताए बिना अनुबन्ध को समाप्त कर दे । ऐसी स्थिति में कलाकार केवल इस शुल्क के अलावा जो कि अनुबन्ध के उद्देश्य इसके द्वारा वास्तव में किए गए कार्य के अनुपातमें होगा और जो आकाशवाणी/दूरदर्शन द्वारा निर्धारित होगा, आकाशवाणी/दूरदर्शन के खिलाफ और कोई दावा नहीं कर सकेगा ।

All India Radio/Doordarshan reserves the right without assigning any reason whatsoever to determine the contract. In such an event the artist shall not have or make any claim against All India Radio/Doordarshan except for the fee (which shall be determined by All India Radio/Doordarshan) proportionate to the work actually done by him under the contract.

आकाशवाणी-कार्यक्रम-5
AIR – P-5
DD – P-5

यह स्वीकृति फार्म है । यदि आपको प्रस्ताव स्वीकार न हो तो कृपया इस उत्तर-पर्णी पर यह बात लिख दें अथवा हमको अलग से लिखें ।
This is an acceptance form ; If you are unable to accept, please say so on this Reply Sheet, or write to us separately.

उत्तरपर्णी
REPLY SHEET

सेवा में,
To
केन्द्र निदेशक,
आकाशवाणी/दूरदर्शन,
THE STATION DIRECTOR,
ALL INDIA RADIO/DOORDARSHAN,

.. ..

प्रिय महोदय,
Dear Sir,

आपके तारीख ..... के पत्र के उत्तर में निवेदन है कि मैं निम्नलिखित विवरण के अनुसार कार्यक्रम में भाग लेने का वचन देता हूं ।

in reply to your letter dated . . . . . 20 . . . . . I undertake to take part in the programme detailed below :

शीर्षक
Title .....

प्रसारण/टेलिकास्ट की तारीख
Date of Broadcast/telecast .....

प्रसारण/टेलिकास्ट का समय
Time of Broadcast/telecast

प्रसारण/टेलिकास्ट की अवधि
Duration .....

प्रसारण/टेलिकास्ट का स्थान
Place of Broadcast/telecast .....

शुल्क
Fee .....

इस पृष्ठ के पीछे शर्तों के अनुसार ।
Upon the conditions printed overleaf.

मैं सरकारी कर्मचारी हूं/नहीं हूं ।
I am/am not a Government Servant.

भवदीय,
Yours faithfully

हस्ताक्षर
Signature. . . . . .
तारीख
Date . . .

Annexure - V

(Chapter 9 Footnote 233)

तार : "आकाशवाणी"
Telegram : 'AKASHVANI'

आकाशवाणी-कार्यक्रम-
(पैरा 5-5-6 देखिए)
AIR – P – 3
(See paragraph 5-5-6)
DD – P – 3
(See paragraph 4-8-1)

प्रसार भारती/Prasar Bharti

आकाशवाणी/ ALL INDIA RADIO
दूरदर्शन/ DOORDARSHAN

.... केन्द्र / Station

भारतीय संगीत
INDIAN MUSIC

महोदय / महोदया,
Dear Sir / Madam,

दिनांक
Date ..... 20 .....

निम्नलिखित कार्यक्रम के प्रसारणार्थ आकाशवाणी / दूरदर्शन को आपके सहयोग और सेवाओं की आवश्यकता है । इस हेतु यह प्रस्ताव-पत्र प्रेषित है ।
We offer you an engagement to broadcast/telecast and to perform as follows :

तारीख
Date .....

समय
Time .....

स्थान : आकाशवाणी / दूरदर्शन
Place All India Radio / Doordarshan

कार्यक्रम की अनुमानित अवधि
Approximate duration of performance .....

कार्यक्रम का विवरण
Programme .....

प्रसारण / टेलिकास्ट फीस
Fee for broadcast / telecast .....

यदि अधिक रूप में कार्यवस्तु की प्रसारण / टेलिकास्ट फीस
Fee per broadcast / telecast of a mechanical reproduction of the performance .....

उपरोक्त प्रस्ताव (आफर) इस बात पर सामाश्रित है कि नीचे लिखे निबन्धनों तथा अगले पृष्ठ पर शर्तों का अनुपालन किया जाए ।
The above offer is contingent on your compliance with the following terms and with the conditions printed on the next page :—

1. समस्त आवश्यक विवरणों के साथ आपका हस्ताक्षर किया हुआ स्वीकृति पत्र हमारे पास तारीख _____ तक पहुंच जाना चाहिए ।
That your signed acceptance together with all necessary particulars, is in our hands by .....
2. यदि और जब भी आप से अपेक्षा की जाए आप पूर्वाभ्यास के लिए उपस्थित होंगे / होंगी ।
That you shall attend rehearsals if and when required.
3. आप कार्यक्रम संबंधी प्रपत्र को इसके साथ संलग्न है, भरकर (और उसके साथ उन सब गीतों, बोलों और सामग्रियों की जिन्हें प्रयोग में लाने का आपका विचार है, मुद्रित या टंकित प्रति) आकाशवाणी / दूरदर्शन के केन्द्र निदेशक को अनुमोदनार्थ भेज देंगे ।
That you shall complete return and submit for approval in the programme form which is attached hereto (together with a printed copy of typescript of all songs, words and material you propose to use) to the Station Director, All India Radio / Doordarshan .....
4. स्टेम्प शुल्क सरकार द्वारा वहन किया जाएगा ।
The Stamp duty will be borne by the Government.

भवदीय
Yours faithfully

नाम
Name.....

पता
Address.....
.....

केन्द्र निर्देशक
Station Director
भारत के राष्ट्रपति के लेए और उनकी ओर से
For and on behalf of the President of India

(2)

आमंत्रण के प्रस्ताव पत्र में निर्दिष्ट शर्तें AIR – P-3

Conditions Referred to in The Offer of Engagement

1. कलाकार इस करार के दौरान किसी गीत या संगीत-रचना को स्वयं गाने, प्रस्तुत करने या प्रस्तुत कर चुकने या प्रस्तुत करने या गाने का वचन देने के लिए अथवा तत्पुरस्कार स्वरूप अथवा किसी विशेष गीत या संगीत रचना को प्रस्तुत करने से विरत रहने के लिए कोई फीस या अन्य मूल्यवान प्रतिफल आकाशवाणी / दूरदर्शन को छोड़ अन्य किसी व्यक्ति से ना तो मांगेगा और नही प्राप्त या स्वीकार करेगा । इसके अलावा कलाकार इस करार के अनुसार प्रसारण करते समय कोई ऐसी बात नहीं कहेगा जो आकाशवाणी / दूरदर्शन के प्रतिनिधि के मतानुसार किसी गीत या संगीत-रचना की ओर अनुचित रुप से ध्यान आकृष्ट करे । आकाशवाणी / दूरदर्शन के प्रतिनिधि की सहमति के बिना, और उसके द्वारा अनुमोदित भाषा में कही जाने से अन्यथा यदि कोई बात कही जाएगी, तो यह संविदा तत्क्षण पर्यवसित कर दी गई समझी जाएगी और कलाकार का यह कार्य वहां दी गई शर्तों को निश्चित रुप से भंग करने वाला माना जाएगा । यह कथन कि कोई गीत या संगीत-रचना विशेष अनुरोध पर प्रस्तुत की जा रही है अथवा इसी प्रकार के सामान्य आशय वाली ऐसी ही कोई उद्घोषना संबन्धित गीत या संगीत-रचना की ओर अनुचित रुप से ध्यान आकर्षित करने वाली समझी जायेगी ।

The Artist shall not solicit, receive or accept any fee or other valuable consideration from any person other than All India Radio/Doordarshan for or in recognition of the Artist singing, performing or having sung or performed or promising to sing or perform any particular item, song or musical work or for refraining from singing or performing any particular item, song or musical work during this engagement. Moreover, the Artist shall not in the performance of this engagement broadcast/telecast any remark which in the opinion of All India Radio/Doordarshan representative will draw undue attention to any particular item, song or musical work. Should any such remark be made, save with the consent of All India Radio/Doordarshan representative and except in the exact form approved by him, this contract shall be considered as terminated forthwith and the Artist's action shall be considered a definite breach of the terms and conditions herein laid down. A statement that any particular item, song or musical work is being performed, "by special request" or a similar announcement to the same general effect shall be deemed to be calculated to draw undue attention to the item, song or musical work concerned.

2. कलाकार अपने अधिकाधिक कौशल तथा योग्यता के अनुसार पूर्वाभ्यास करेगा तथा कार्यक्रम प्रस्तुत करेगा और आकाशवाणी / दूरदर्शन के प्रतिनिधि द्वारा दिए गए समस्त उचित अनुदेशों का पालन करेगा ।

The Artist shall rehearse and perform to the best of his skill and ability and carry out all reasonable instructions given to him by the representative of All India Radio/Doordarshan.

3. केन्द्र निदेशक की पूर्व अनुमति प्राप्त किये बिना कलाकार कोई विज्ञापन या विज्ञापन जैसी कोई भी सामग्री प्रसारित/टेलिकास्ट नहीं करेगा ।

The Artist shall not broadcast/telecast any advertisement or matter of an advertising nature whatsoever without first obtaining the permission of the Station Director.

4. कलाकार यह आश्वासन देगा कि इस करार पर हस्ताक्षर करने के समय वह किसी भी ऐसे करार से अनुबन्धित नहीं है (अथवा अन्य या किसी भी संविदा द्वारा वारित नहीं है) जो उसे इस करार को पूरा करने से प्रवारित करता है और उसने अपने व्यावसायिक नाम अथवा विवरण में से किसी परिवर्तन को नहीं छिपाया है ।

The Artist shall warrant that at the time of signing this Agreement he is not under any engagement (or otherwise barred by any contract) precluding him from fulfilling this Agreement and that he has not concealed any change of professional name or description.

5. कलाकार द्वारा प्रस्तावित मनोरंजन के समस्त कार्यक्रम या उसके किसी भी भाग को अस्वीकृत कर देने का आकाशवाणी/दूरदर्शन को पूर्ण अधिकार होगा और इस अस्वीकृति के कारण बतलाने को उसके मांग नहीं की जा सकेगी । जब कभी केन्द्र निदेशक मनोरंजन के ऐसे सारे कार्यक्रम या उसके किसी भी भाग को अस्वीकृत कर दे तब कलाकार इस अस्वीकृत कार्यक्रम/सामग्री के स्थान पर अन्य सामग्री आकाशवाणी/दूरदर्शन के अनुमोदनार्थ शीघ्रा तिशीघ्र प्रस्तुत करेगा ।

All India Radio/Doordarshan shall have the absolute right of rejection of all or any part of the entertainment submitted by the Artist and shall not be called upon to give any reasons for any such rejection. Should the Station Director reject all or any part of such entertainment the Artist shall with all despatch submit other matter or material in place of that rejected for the approval of All India Radio/Doordarshan.

6. इस करार के दौरान या उसके सिलसिले में यदि कलाकार के शरीर या उसकी सम्पत्ति को किसी प्रकार की हानि, नुकसान क्षति हो तो उसके लिए कलाकार या उसके वैध या व्यक्तिगत प्रतिनिधि के प्रति आकाशवाणी/दूरदर्शन इसके सिवाय जिम्मेदार नहीं होगी की वह क्षति आदि आकाशवाणी/दूरदर्शन की अथवा उसके अधिकारियों या कर्मचारीयों की उपेक्षा से हुई हो और भारत मे प्रयुक्त विधि के अधीन योग्य हो ।

All India Radio/Doordarshan shall not be liable to the Artist or to the legal personal representative of the Artist for any loss, damage or injury to the Artist's person or property during or in connection with this engagement unless caused by the negligence of All India Radio/Doordarshan or its own officers or servants and recoverable on that ground under the law applicable in India.

7. कलाकार पूर्वोक्त आश्वासनों या वचनों के भंग के कारण होने वाले सब परिणामों के लिए और किसी भी प्रकार की उस सब कार्यवाहियों, नुकसानी दावों, मांगों और व्ययों की बाबत जो ऐसे किसी आश्वासन या वचन के किसी भंग के परिणामस्वरुप अथवा इस आधार पर कि कोई ऐसी कृति, जैसा कि पूर्वोक्त है, किसी अन्य व्यक्ति के अधिकारों का अतिलंघन करती है या अपलेखात्मक, या अपचनात्मक या विवादजन्य या अशलील, या अभद्र है, आकाशवाणी/दूरदर्शन के विरुद्ध लाए या लाई जाए या आकाशवाणी/दूरदर्शन द्वारा सहन या उपगत किए जाए, आकाशवाणी/दूरदर्शन का सर्वदा पूर्णरूपेण क्षतिपूर्ण करेगा ।

The Artist shall at all times keep All India Radio/Doordarshan fully indemnified in respect of the consequences following upon any breach of the aforesaid warranties and undertakings and in respect of all actions, proceedings, claims, demands and expenses whatsoever which may be made or brought against or suffered or incurred by All India Radio/Doordarshan in consequences of any breach of any such warranties or undertakings or on the ground that any such work as aforesaid is an infringement of any rights of any other person or is libellous or slanderous or controversial or obscene or indecent.

8. (क) आकाशवाणी/दूरदर्शन को यह हक होगा कि कोई अतिरिक्त फीस दिए बिना वह किसी पूर्वाभ्यास या प्रस्तुतीकरण के समय कार्यक्रम का यांत्रिक ध्वन्यंकन कर ले तथा उसका प्रसारण/टेलिकास्ट और उपयोग सार्वजनिक आयोजनों को छोड़ अन्य सभी प्रयोजनों के लिए कर ले तथा उसके उद्धरणों को वृत्तात्मक या ऐतिहासिक कार्यक्रमों तथा इसको के कार्यक्रमों में प्रसारित/टेलिकास्ट कर लें ।

(a) All India Radio/Doordarshan shall be entitled without further payment to make a mechanical reproduction of any rehearsal or of the performance, broadcast/telecast and to use it for purpose not involving public performance, and to broadcast/telecast extracts therefrom in documentary or historical programmes, and in trailer programmes.

(ख) आकाशवाणी/दूरदर्शन को यह हक होगा कि इस पृष्ठ के पीछे उल्लिखित अतिरिक्त शुल्क देकर वह कार्यक्रम या उसके उद्धरणों के यांत्रिक ध्वन्यंकन प्रसारित कर ले । यदि ध्वन्यंकित वस्तु का प्रसारण/टेलिकास्ट मूल प्रसारण के स्थान पर किया गया है तो अतिरिक्त शुल्क नहीं दिया जाएगा ।

(b) All India Radio/Doordarshan shall be entitled upon payment of the additional fee shown over-leaf to broadcast/telecast a mechanical reproduction of the performance or extracts therefrom. The additional fee will not be paid if a mechanical reproduction is broadcast/telecast in lieu of the broadcast performance.

(ग) आकाशवाणी/दूरदर्शन को ये अधिकार होगा कि वह स्वयं या अपनी किसी एजेंसी के माध्यम से कार्यक्रम को संपूर्ण रुप से अथवा उसके किसी अंश की व्यापारिक रुप से डिस्क टेप अथवा केसेट के माध्यम से जारि कर सके और उसके लिए अधिक चार मूल फीस दे । आकाशवाणी/दूरदर्शन को एक बार चार मूल फीस देने के अतिरिक्त कलाकार से अनुमति लेने अथवा और कोई संविदा आदि करने की आवश्यकता नही होगा ।

(c) All India Radio/Doordarshan shall be entitled to release or allow any of its agency to release this programme or part thereof through discs/tapes and cassettes manufactured commercially by paying an amount not exceeding four basic fees to the artist. Save and except making payment of one time fees as aforesaid, All India Radio/Doordarshan shall not be required to observe any further formalities.

9. इस संविदा में प्रसारण/टेलिकास्ट से कार्यक्रम का वह विकिरण अभिप्रेत है जो किसी प्रसारण/टेलिकास्ट संगठन के एक या एक से अधिक प्रेषित्रों (ट्रेंसमीटरों) से किया जाता है ।

In this contract, broadcast/telecast means the radiation of the item from one or more transmitters of any Broadcasting/Telecasting Organisation.

10. यदि कलाकार बीमारी या शारीरिक असमर्थता के कारण कार्यक्रम प्रस्तुत करने में अपनी असमर्थता प्रकट करे तो किसी अर्हताप्राप्त चिकित्सक ऐसी असमर्थता को साबित करने वाला एक प्रमाणपत्र उसे आकाशवाणी/दूरदर्शन को तत्काल भेजना होगा जिसमें उसकी बीमारी का पूरा हाल दिया गया होगा और यह लिखा होगा कि उसके फलस्वरुप कलाकार अपना कार्यक्रम प्रस्तुत करने में असमर्थ है । ऐसी स्थिति में उन कार्यक्रमों के लिए पारिश्रमिक या फीस देने के सिवाय, जो उसने इसके अधीन वास्तव में किए हों, आकाशवाणी/दूरदर्शन कलाकार को किसी भि प्रकार का पारिश्रमिक या फीस देने की जिम्मेदार नहीं होगी ।

In the event of the Artist alleging incapacity to perform by reason of illness or physical incapacity, the certificate of a qualified medical practitioner proving the fact of such incapacity shall forthwith be sent to All India Radio/Doordarshan by the Artist stating the nature of the illness and that in consequence thereof the Artist is unable to perform. All India Radio/Doordarshan shall in such event not be liable to pay any fee or remuneration to the Artist except for performances actually given by him hereunder.

11. यदि कलाकार (एतस्मिन-पूर्व उपबन्धित रुप से प्रमाणित बीमारी या शारीरिक असमर्थता के अलावा या किसी अन्य अपरिवर्जनीय कारण, जिसे केन्द्र निदेशक को संपाधान प्रदान करने वाले रुपमें साबित कर दिया जाए, के अलावा) किसी और कारण से उपस्थित न हो सके या कार्यक्रम प्रस्तुत न कर सके जैसा कि इस करार में अनुबंधित है तो वह आकाशवाणी/दूरदर्शन के उस खर्च के अतिरिक्त जो कि उसके बदले किसी को प्रतिनियुक्त करने में आकाशवाणी/दूरदर्शन का हुआ हो, और किन्हीं अन्य खर्चा, नुकसानों और व्ययो के अतिरिक्त, जो आकाशवाणी/दूरदर्शन को कलाकार को चुक के कारण उठाने पडे हों, परिनिर्धारित नुकसानों के रुप में और मद्धे उतनी रकम आकाशवाणी/दूरदर्शन को देगा कि जितनी वहा उपस्थिति के लिए और कार्यक्रम प्रस्तुत करने के लिए आकाशवाणी/दूरदर्शन से उस कलाकार को मिलती । किन्तु इस खण्ड को कोई भी बात, इस संविदा को भंग करके अन्यत्र कार्यक्रम प्रस्तुत करने से कलाकार को रोकने वाले व्यादेश (इंजंकशन) के लिए आवेदन करने के आकाशवाणी/दूरदर्शन के अधिकार पर या इस करार को नीचे के खंड (१३) के अधीन पर्यवसित करने के आकाशवाणी/दूरदर्शन के अधिकार पर कोई प्रभाव नही डालेगी ।

(4)

Should the Artist for any reason (except illness or physical incapacity certified as hereinbefore provided or such other unavoidable cause as may be proved to the satisfaction of the Station Director) fail to appear and perform as stipulated in this Agreement, he shall pay to All India Radio/Doordarshan as and from liquidated damages a sum equal to the sum which the Artist would have received for such appearance and performance in addition to the cost of All India Radio/Doordarshan of providing a deputy and any other costs, damages and expenses incurred by All India Radio/Doordarshan by reasons of default of the Artist, but nothing in this clause shall affect the right of All India Radio/Doordarshan to apply an injunction to restrain the Artist from performing in breach of this contract or the right of All India Radio/Doordarshan to determine this agreement under clause (13) below.

12. जहां इस संविदा का संबंध कलाकार के नियंत्रण या प्रबंध के अधीन कार्य कर रहे दो या दो से अधिक कलाकारों की मंडली से हो, वहां कलाकार संविदा पर हस्ताक्षर करते समय केन्द्र निदेशक के कहने के अनुसार कलाकारों के नाम आकाशवाणी/दूरदर्शन को लिख कर देगा और जिस कलाकार का नाम उसने दिया है उसके स्थान पर केन्द्र निदेशक की लिखित सहमति के बिना किसी और को नहीं रखेगा । इसके अलावा कलाकार इस करार की शर्तों के बारे में अपनी मंडली के सदस्य या सदस्यों का लिखित सहमति भी प्राप्त करेगा । अपनी मंडली के प्रत्येक सदस्य को कलाकार अपने को देय शुल्क का वह अंश देगा जिसका वह सदस्य हकदार है ।

Where this Agreement relates to a troupe of two or more performers working under the control or management of the Artist, the Artist shall, at the time the contract is signed, furnish All India Radio/Doordarshan in writing with such names of the performers as the Station Director may require and shall not substitute a performer for a person so named without the written consent of the Station Director. The Artist shall further secure the written consent of the other member or members of the troupe to the terms of this Agreement. The Artist agrees to pay to each member of the troupe the proportion of any fee payable to the artist to which the member is entitled.

13. आकाशवाणी/दूरदर्शन ने अपने पास यह अधिकार रख लिया है कि वह कोई भी कारण दिये बिना इस संविदा को पर्यवसित कर दे । ऐसी स्थिति में इस संविदा के अधीन अपने द्वारा वास्तव में किए गए काम के लिए आनुपातिक शुल्क के (जो कि आकाशवाणी/दूरदर्शन द्वारा तय किया जाएगा) दावे के सिवाय कलाकार का किसी भी प्रकार का दावा न तो आकाशवाणी/दूरदर्शन के विरुद्ध होगा और न वह करेगा ।

All India Radio/Doordarshan reserves the right without assigning any reason whatsoever to determine the contract. In such an event, the Artist shall not have or make any claim against All India Radio/Doordarshan except for the fee (which shall be determined by All India Radio/Doordarshan) proportionate to the work actually done by the Artist under the contract.

14. इस करार के अधीन कलाकार को किसी भी नोटिस के तामिल उसे उसके पिछले ज्ञात पते पर अथवा उस अधिकर्ता को, जिसके माध्यम से यह करार किया गया है, डाक से भेजकर की जा सकेगी ।

Any notice under this Agreement may be served upon the Artist by posting the same to his last known address or the agent through whom this contract is made.

15. यदि कलाकार सरकारी कर्मचारी है तो उसके कार्यक्रम का प्रसारण/टेलिकास्ट और फिस की अदायगी, उसके द्वारा अपने कार्यालय या विभाग के अध्यक्ष को इस संबंध में मंजुरी प्राप्त करने पर ही की जाएगी और केन्द्र निदेशक के पास यह मंजुरी प्रसारण की तारीख से १० दिन पहले पहुंच जानी चाहिए ।

In the event of the Artist being a Government servant, the broadcast/telecast of his programme and the payment to him of the fee shall be subject to his obtaining the sanction of the Head of his Office or Department to this effect and the sanction should be in the hands of the Station Director 10 days before the date of the broadcast/telecast.

16. आकाशवाणी/दूरदर्शन को यह अधिकार होगा कि यदि केन्द्र निदेशक की राय में कलाकार इतना संयत-चित्त नहीं है अथवा उसका स्वास्थ्य इतना अच्छा नहीं है कि वह अपेक्षित स्तर का कार्यक्रम प्रस्तुत कर सके तो वह उसे माइक के सामने आने से रोक दे और उसके प्रस्तुतीकरण को अस्वीकृत कर दे । ऐसी स्थिति में कलाकार इसका हकदार न होगा कि तय पाया गया शुल्क अथवा उसका कोई अंश अथवा किसी भी प्रकार का प्रतिकर उसे दिया जाए ।

All India Radio/Doordarshan shall have the right to forbid the appearance of an Artist before the microphone and to reject his performance, if in the opinion of the Station Director, the Artist is not sober enough or in a fit enough state of health to perform according to the standard expected of him. In such cases the Artist will not be entitled to the fees agreed upon or any portion thereof or to any compensation whatsoever.

विशेष ध्यान देने योग्य :

(1) कलाकार को शुल्क या तो प्रसारण के समय ही चेक द्वारा दे दिया जायेगा, या ऊपर दिये गये उसके पते पर भेज दिया जायेगा । डाक द्वारा भेज दिये जाने के पश्चात चैक का पूरा जोखिम कलाकार को उठाना होगा ।

Fees will be paid by cheque either at the time of the broadcast/telecast or sent to the Artist's address above stated ; cheques sent by post shall be at the risk of the artist in all respects after posting.

(2) २० रुपयों से अधिक की अदायगी के लेये आवश्यक है कि रसीद पर २० पैसे की रसीद टिकट लगा हुआ हो । शीघ्र अदायगी करने के लिए या तो आप कृपया २० पैसा नकद रसीदी टिकट अपने साथ लाए ।

For payment exceeding Rs. 20 it is necessary that a revenue stamp of 20 P. should be affixed to the receipt. In order to enable prompt payment, you are requested to bring with you either 20 P. in cash or a revenue stamp.

(5)

आकाशवाणी-कार्यक्रम-3
AIR – P-3
DD – P-3

उत्तरपर्णी
REPLY SHEET

केन्द्र निदेशक,
आकाशवाणी/दूरदर्शन,
Station Director,
All India Radio/Doordarshan,
.....

प्रिय महोदय/महोदया,
Dear Sir/Madam

आपके तारीख ..... के पत्र के उत्तर में निवेदन है कि मैंने आपके प्रस्ताव (आफर) की शर्तों को ध्यानपूर्वक देख/समझ लिया है और मैं नीचे लिखे अनुसार वह आबन्ध स्वीकार करता हूं / करती हूं ।

In reply to your letter of the ..... I have carefully noted the conditions of your offer and I accept the engagement as under :

तारीख
Date .....

समय
Time .....

स्थान : आकाशवाणी / दूरदर्शन
Place : All India Radio / Doordarshan

*कार्यक्रम की अनुमानित अवधि
Approximate duration of performance .....

* कार्यक्रम का विवरण
Programme .....

प्रसारण / टेलिकास्ट फीस
Fee for broadcast / telecast .....

ध्वनि अंकित रूप में कार्यवस्तु का प्रसारण / टेलिकास्ट फीस
Fee per broadcast / telecast of a mechanical reproduction of the performance .....

आपका संलग्न कार्य-फार्म सम्यक्रूप से भर दिया गया है ।
Your Programme Form attached has been duly completed in all particulars.

बीमार पड़ जाने के सिवाय या ऐसी अन्य अपरिहार्य कारण के सिवाय जिसे आप संतोषजनक मानते हों, बाकी सभी स्थितियों में इस आबन्ध को पूरा करने का तथा सभी पूर्वाभ्यासों में उपस्थित रहने का वायदा करता / करती हूं ।

I undertake to fulfil this engagement, including all rehearsals, except in case of sickness or such other unavoidable cause as you may accept as satisfactory.

मैं आपके पत्र में दी गई आकाशवाणी/दूरदर्शन की शर्तों का पालन करने का वायदा करता / करती हूं ।

I undertake to observe the conditions of All India Radio/Doordarshan as set forth in your letter.

मैं सरकारी कर्मचारी हूं / नहीं हूं ।
I am / am not a Government Servant.

भवदीय
Yours faithfully.

हस्ताक्षर
Signature. .....
तारीख
Date. .....

---

* इसके बारे में यथासम्भव सविस्तार लिखी जाए ।
*This entry should be as detailed as possible.

(6)

आकाशवाणी/दूरदर्शन कार्यक्रम फार्म

(केवल भारतीय संगीत के लिए)

All India Radio/Doordarshan Programme Form

(For Indian Music Only)

केन्द्र निदेशक — The Station Director

आकाशवाणी/दूरदर्शन ..... — All India Radio/Doordarshan .....

फोन नं ..... — Telephone No. .....

नाम
Name .....

स्थायी पता
Permanent Address .....
.....

आबन्ध की तारीख — समय — बजे
Date of engagement — 20 ..... at ..... O'clock.

आवश्यक जानकारी
IMPORTANT

*शीर्षक * Title	*बोलों का रचयिता *Author of the words	*धुन का रचयिता *Composer of the Tune	राग Raga	ताल Tala	प्रत्येक कार्यक्रम की प्रस्तुत करने में लिया गया समय Time taken to perform each item

तारीख
Dated. 20

हस्ताक्षर
Signature. .....

*(क) कलाकारो से यह विशेष अनुरोध है कि प्रकाशित सामग्री के संबंध में वे छपी हुई प्रतियों अनुसार निश्चित रुप से सही और पूरी जानकारी दे और उक्त सामग्रीके मूल प्रकाशित शीर्षक दीदिए जाए ।

*(a) Artists are particularly requested to ensure that these details are correct and complete in the case of published items according to the printed copies and that original published titles of items are given.

(ख) यदि कोई कलाकार किसी पांडूलिपि-सामग्री से प्रसारित करना चाहता हो तो उसे यह स्पष्ट रुप से बतलाना चाहिये कि उसने उक्त सामग्री के प्रतिलिप्यधिकार के स्वामी से उक्त प्रसारण में उपयोग करने का प्राधिकार प्राप्त कर लिया है या नही ।

(b) An Artist desirous of broadcasting a MS item must state clearly whether or not he has obtained from the owner of the copyright the authority to utilise the item for broadcasting/telecasting.

Forms Centre, Calcutta-54/Ph : 37-9326.

TABLE OF CASES

TABLE OF STATUTES

1. Code du Travail-The Labor Code, France.
2. The Copyright Act, 1957.
3. Copyright Act, 1976 title 17 of the U.S.A. Code.
4. Copyright Designs and Patents Act, 1988
5. Digital Millennium Copyright Act, 1998.
6. Digital Performance Right in Sound Recordings Act, 1995.
7. Intellectual Property Code, France.
8. The Cine Workers and Theatre Employees Act, 1981.
9. The Cine Workers Welfare Cess Act, 1981.
10. The Cine Workers Welfare Fund Act, 1981.
11. The Civil Code, France
12. The Constitution of India, 1951.
13. The Copyright Act, 1911
14. The Indian Copyright Act, 1914.
15. The Dramatic and Musical Performances Act, 1925
16. The Performers Protection Act,1963.
17. The Factories Act, 1948.
18. The Industrial Disputes Act, 1947.
19. The Payment of Wages Act, 1936.
20. The Performers Protection Act 1963.
21. The Sound Recordings Act, 1971.
22. The Statute of Anne, 1709.
23. The Uruguay Round Agreements Act, 1994.
24. The Minimum Wages Act, 1948.
25. The Workmen's Compensation Act, 1923.

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1. Agreement on Trade Related Intellectual Property Rights (TRIPS) 1994.
2. Berne Convention for the Protection of Literary and Artistic Works (Paris Act of July 24, 1971, as amended on September 28, 1979).
3. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Done at Rome on October 26th, 1961 (Rome Convention, 1961).
4. WIPO Copyright Treaty (WCT 1996).
5. WIPO Performances and Phonograms Treaty (WPPT) (1996).
6. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention, 1971)
7. European Directive on Rental and Lending and Certain Related Rights Directive No. 92/100/EEC (1992).
8. The European Directive on the Harmonization of Copyright and Certain Related Rights in the Information Society. Directive No. 2001/29/EC (2001).
9. "Term Directive" - Council Directive No. 93/98/EEC of 24th November 1993.
10. The European Satellite and cable retransmission Directive No. 93/83/EEC of 27 September 1993.
11. Proposed Protocol on Protection of Audiovisual performances.
12. Model law concerning the protection of performers, producers of phonograms and broadcasting organizations, 1982 (ILO- UNESCO-WIPO).

List of Personalities Contacted and Interviewed

Interviews

1. Arpitha Mukherjee (Research Fellow, Indian Council of Research in International Economic Relations, was contacted in 23rd July 2001 at Delhi and issues with respect to the topic of research were discussed)
2. Adam Ayub (interviewed on the 23rd November 2004 at Trivandrum)
3. Anupama (Asst. Director, Disney Channel on August 1st 2005,Mumbai)
4. Anwar (News producer, Trivandrum Doordarshan, 28th November, 2004 at Trivandrum)
5. Ashok.k.Jagtap (President Cine Musicians Union, 21st August, 2005,Mumbai)
6. Sanjeev Kanitkar (Secretary, Cine Musicians Union, 21st August 2005,Mumbai)
7. Bhagyalakshmi, Ms. (Ace Dubbing artiste, interviewed on 25th of November, 2005).
8. Bilimale. p. (Yakshagana Exponent, American Institute of Indian Studies, Archives Research Center for Ethnomusicology, Gurgaon, Haryana).
9. Chandrasekhar Gourishankar Vaidya (veteran film personality and union activist, interviewed on 3rd of August, 2005 at Mumbai).
10. Devanand (veteran film actor, producer and director –interviewed in Mumbai on the 20th of August, 2005)
11. Dinakar Chawdhary (Secretary General IMPPA (Indian Motion Pictures Producers Association-interviewed on 22nd of August 2005 at Mumbai)
12. Favio D'souza (CEO Indian Music Industries (IMI) Mumbai-Interviewed on 29th August, 2005)
13. George, K.G. (MACTA, 25th May, 2003 AT Kochi)
14. Glen (junior artiste, interviewed on 16th August, 2005, at Mumbai)
15. Haripad Soman (character and dubbing artist -interviewed on the 2nd of July, 2003 at Trivandrum).
16. Himanshu Bhatt (Secretary, Cine Singers Association and Hon. Gen. Secretary AIFEC, interviewed on the 9th of August, 2005 at Mumbai).
17. Idavella Babu (Joint Sectretary, AMMA, Interviewed on 25th November, 2004 at Trivandrum).
18. Jaisheel Suvarna (Secretary, AVA, interviewed on 10th of August 2005 at Mumbai)
19. Jalabala Vaidya (Theatre personality & Actress Akshara theatre, New Delhi, interviewed on 25th of July 2001 at New Delhi).
20. Janani Ravichandar (asst. director, interviewed on 25th of August, 2005 at Mumbai)

21. John Mathew Mathan (director and Producer, Interviewed on 27th of August, 2005 at Mumbai)
22. Jose Prakash(veteran actor, producer- interviewed on 24th November 2002 at Kochi)
23. Krishna Das (ace percussionist- *edakka* player-Secretary All Kerala Performing Artists Association, interviewed on 25th November, 2005 at Trippunithara)
24. Late Srimathi Leela, P. (veteran playback and recording artist-interviewed at Chennai on the 27th of October, 2003)
25. Louis Mathew (program officer of Chalachitra Academy, contacted on various occasions from 1st July 2003 on wards for getting information on the film industry)
26. Sri Madhu (Veteran actor, producer and director-interviewed on 1st July 2003 at Trivandrum)
27. Sri Mani (Distributor, exhibitor and producer, son of studio pioneer in kerala P.Subramanyam (Merryland) Interviewed on 4th July 2003 at Trivandrum).
28. Mohan (President of South Indian Film Chamber of Commerce, met during the course of material collection at Chennai)
29. Niranjan Naik (media advisor to AVA interviewed on 10th of August, 2005 at Mumbai).
30. Omana, T.R (veteran character and dubbing artiste, interviewed on the 24th of October, 2003 at Chennai)
31. Rajeev Menon (Secretary (staff) of CINTAA, interviewed and contacted for information from the 3rd of August, 2005 at Mumbai)
32. Rajeev Ranga (Ex-President of Cine Dancers Association, interviewed on the 23rd of August, 2005 at Mumbai).
33. Prof. Rajendra Babu (Academic at Madras University, Script writer and office bearer Malayalam Chalachitra Parishad, interviewed on the 18th of September at Chennai)
34. Rakesh Nigam (CEO IPRS, Interviewed on 10th of August, 2005 at Mumbai)
35. Rana Prathap (AIR Program Officer, Interviewed on 24th November 2004).
36. Rasheed Mehtha (Secretary, Movie Stunt Artistes Association, Mumbai interviewed on 6th of August 2005 at Mumbai)
37. Rita Mehta (fledgling Dubbing artiste ,member AVA ,interviewed on the 10th of Aufgust,2005 at Mumbai)
38. Selvaraj (Director, office bearer of South Indian Film Artistes Association, Chennai-interviewed on 14th of September 2003) and contacted on various occasions.

39. Sampath kumar (aspiring Actor, Tamil film Industry, interviewed on 29th of October, 2003 at Chennai).
40. Shibbu S. Kottaram (Deputy Director Programs, Chalachithra Academy, Trivandrum, contacted on various occasion since February 2003 for information on the film industry, contacted 2nd of July 2003).
41. Shivlal Suvarna (Dubbing artist, office bearer AVA, Mumbai interviewed on 10th of August, 2005).
42. Sonic, O.P. (music composer and Office Bearer IPRS, interviewed on 10th August, 2005 at Mumbai).
43. Sri Hassaan Kamaal, (Lyricist and Office Bearer IPRS Interviewed on the 10th of August 2005 at Mumbai).
44. Sri Siyad Kokkers (president Kerala film Chamber of Commerce, contacted particularly during the crisis in May 2004, allowed the research scholar to attend the meeting held by the Chamber to respond to the challenge thrown up by the artistes).
45. Thankamma Shetty (Secretary (staff) of AMPTP, Mumbai interviewed on the 1st of September 2005 at Mumbai).
46. Theodore Bhaskaran (historian, author and journalist, interviewed on the 25th of September, 2003 at Chennai).
47. Upendra Channana (Secretary, All India Film Directors Association, interviewed on the 24th of August, 2005 at Mumbai).
48. Vasudevan,T.E.(veteran Producer and a pioneering spirit with respect to several organizational and welfare activities in the film industry in Kerala, interviewed on the 15th and the 19th on November ,2001 at Kochi).
49. Ln. K.N. Venkateswaran, (General Manager, South Indian Film Chamber of Commerce, Chennai, contacted for information and for access to the library of the South Indian Film Chamber of Commerce in September and October 2003).
50. Vishnu Sharma (Ace Dubbing and Voice over Artist, Office bearer AVA, interviewed on 10th of August, 2005 at Mumbai)
51. Vishwas Njarakkal (Actor who acted in the award winning film 'Marana Simhasanam' or' Throne of Death ', directed by Murali Nair produced by a foreign production house.) interviewed on 1st December 2001 at Vypeen, Kochi.
52. Dr. Uma J. Nair (contacted in November 2001 for information on the film industry based on her economic study)
53. Sri Sambathan, Manager FEFSI, Chennai (interviewed on the 13th of September 2003 and contacted for information on numerous occasions thereafter).

Institutions and Offices Visited and Contacted

Kerala State Chalachitra Academy, Trivandrum, Center for Development Studies, Trivandrum., C-DIT, Trivandrum., Indira Gandhi Center for Performing Arts, Bombay., University of Bombay, Library, National Film Archive of India, Ministry of Information & Broadcasting, Pune , Film and Television Institute, Chennai, Roja Muthiah Memorial Library, Chennai, Malayalam Chalachitra Parishad, Chennai, American Center Library, Chennai., FICCI, N. Delhi, American Center for Performing Arts, Indian Law Institute, N. Delhi, National School of Drama, Delhi, British Council Library, Delhi, Indian Council of Research in International Economic Relations (ICRIER), New Delhi, South Indian Film Chamber of Commerce, Chennai, South Indian Film Artistes Association, Chennai, Film Employees Federation of South India, Chennai, Cine Musicians Union, Chennai., Kerala Film Chamber of Commerce, Ernakulam, AMMA Association of Malayalam Movie Artists, Trivandrum, MACTA –Malayalam Cine Technicians Association, Ernakulam, AIVA –Association of Voice Artists, Mumbai, All India Film Employees Confederation, Mumbai, Cine Dancers Association, Mumbai, Cine Singers Association, Mumbai., Cine Musicians Association, Mumbai, Junior Artists Association, Mumbai, Movie Stunt Artistes Association, Mumbai. Indian Film Directors Association, Mumbai, Cine and Television Artists Association, Mumbai, Sangeeth Natak Academy, N.Delhi, Indian Performing Rights Society (IPRS), Mumbai, Indira Gandhi National Center for Arts, New Delhi, American Institute of Indian Studies, Archives Research Center for Ethnomusicology, Gurgaon, Haryana.

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6. Arpitha Mukherjee, *Audio Visual Policies and International Trade: The Case of India,* Hamburg Institute of International Economics, HWWA –Report, (2003). Available on <http://www.hwwa.de/Forschung/Publikationen/Report/2003/Report227.pdf> as on 1st January 2006.
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