COPYRIGHT LAW AND PERFORMERS RIGHTS

Performers are recognised by the society as vital links between literary, dramatic and musical works and the public. There is no doubt that performers spend sufficient skill and labour to merit copyright protection. Our great musicians - vocalists and instrumentalists, talented dancers, popular actors on the stage and on the screen, and other performing artists who delight the hearts and feast the eyes and ears of millions of people everyday by their visual or acoustic presentations who keep alive our rich and varied cultural heritage did not enjoy protection till recently. Performer’s position in law, thus, has been quite weak as the copyright law did not recognise the rights of performers. Laymen, including performing artists, were apt to raise their eye-brows in disbelief at this state of our law.

This chapter examines the question as to the definition of a performer. It tries to evaluate the reasons for the weak position of performers. It makes a critical assessment of judicial response to performer’s right in the three countries which are studied here. It also discusses the impact of recent changes in the performers position in India.

(A) DEFINITION OF PERFORMERS:

The classic definition in international law is "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works." The definition is wide in that it includes performances of works in the public domain, but narrow in that it excludes all those who do not perform "work", e.g. variety artistis, acrobats, sports personalities or extras on stage or in
The definition of performer under the 1994 Indian Amendment takes care of many such performers and is quite wider. It provides that "performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance.

It is rather paradoxical that although of all neighbouring right owners they are closest to derivative authors such as translators of literary works or adaptors of musical scores who receive full author's rights their rights are in many jurisdictions and in the international law the weakest. Unlike other neighbouring right owners, they are physical persons, like authors, and from a purely philosophical point of view it is difficult to see the essential difference between the work of a derivative author, say a translator, or an arranger, and that of a performer. Just as the translator renders the original work as faithfully as possible in another language, so the performer interprets the spirit of the work as truly as he can musically or on the stage. Just as the arranger, although basing himself on the original work adds another dimension to the work, so does the performer and different performances of the same work by different artists vary greatly from one another. Most languages emphasise the creativity of the performer by expressions like an actor 'creating' a part or a pianist presenting a most 'personal' or 'original' rendering of a well-known concerto.

This is applying the most stringest tests of the droit d'auteur. In 'copyright' terms there is not much doubt that performers "spend sufficient skill and labour" to merit copyright protection.
(B) REASONS FOR WEAK POSITION OF PERFORMERS UNDER COPYRIGHT REGIMES:

There seems to be two reasons for the weakness of the performer's position in law. The first is historical and social. Actors or "strolling players" were regarded as "vagrants" by the law during the formative period of copyright. Adam Smith in his work *The Wealth of Nations*, gave "players, buffoons, musicians, opera-singer, opera-dancers" as classical examples of "unproductive labour." Modern times have removed this social stigma and from the bottom of the social scale, star performers have gone to the top and some have become the idols of modern society. The second reason is historical and technological. Adam Smith, goes on to say: "The work of all of them perishes in the instant of its production". This was perfectly correct in his days. We have noted in the preceding chapters that fixation of the work in a tangible form, so that it can be reproduced, is in many jurisdictions a requirement for protection. The ephemeral nature of a performance may, therefore, have provided a valid reason for denying a copyright to performers. This reason was removed with the invention of records, films, radio and television. From the time when performances could be fixed and the fixations both reproduced in large numbers and performed to large audiences, thus involving the two basic rights in the copyright 'bundle', the reproduction right and the performance right, the second reason too had been removed.

(C) NECESSITY OF PROTECTING PERFORMERS:

The copyright law recognises and protects the economic interest of the person creating an original literary, dramatic, musical or artistic
work. The copyright protection was not required as seen above in the chapter on historical development as long as literary, dramatic or musical works could not be multiplied or reproduced on a commercial scale. But with the development of modern technology, the multiplication or reproduction of the work has become easy. The economic value of the work has increased greatly with the invention of sound recording, photography, radio and television. The law protects these economic interests by conferring on the author exclusive cinematography, recording and broadcasting rights.

As far as the fixation of the performance is concerned, it was not possible till the first half of the last century as the technology has not developed by then to enable the live performance of a performer to be fixed. Due to this the performer was to repeat his performance again and again, as that was the only way to hear or see his performance.

But now the rapid development of modern technology has made it possible to fix a live performance whether the performance is on the stage or in the broadcasting studio, and use the recording for making more records for commercial use or for broadcasting by radio or television. The new technology has had two consequences for performers. The one that favours performers is that the demand for programme material embodying their performances has multiplied and is still increasing, thus, creating new employment opportunities. The one that militates against performers is the task of controlling the uses made of their recorded performances. Once a performance is recorded it can be repeated in public without the necessity of engaging the performer whose performance has been recorded or indeed without the presence
of any performer at all. In this respect their plight resembles that of authors in the field of "reprography" or phonogram producers in respect of "home taping". Performers have, thus, lost countless employment opportunities. This may be called as "technological unemployment" of performers.

Thus, if someone records the performance of a performer without his consent, reproduces it and sells the records, or performs them in public, the performer himself had no remedy against such a person. Once a performance is fixed in a record or in a cinematograph film, the record-producer or the film producer as the owner of the copyright was protected by being given exclusive rights regarding the records or the film. The performer had not been given a right to share the royalties received by record producers or film producers for public performance or broadcasting of records or films. This was simply an unjust situation and, therefore, protecting performers was the need of hour to meet the challenge of new technology.

The minimum safeguard that is a performer's due and the legal system must afford him is protection from "bootlegging" (illicit recording of his live performance) by ensuring that his live performance (wherever given) is (a) not "fixed" in a tangible or material form without the performer's consent; and (b) not broadcast or publicly performed without his consent. Bootlegging deprives the performer of his livelihood. Therefore, it is also necessary to protect him against: (i) reproduction or multiplication from such unauthorised fixation of his live performance; (ii) broadcasting or public performances of such unauthorised fixation. Finally, even where his performance is fixed
with his consent, and therefore, is authorised fixation, it is necessary to protect him against reproduction of the authorised fixation for purposes different from those for which the performer gave consent for the initial fixation.

**(D) STATUS OF PERFORMERS IN U.K., U.S.A. & INDIA:**

**(i) Dramatic & Musical performer’s Protection Act 1925**

In United Kingdom till recently there was no copyright in a performance.\(^{10}\) U.K., whose copyright system is the basis of Indian Copyright law, protected performers by using criminal sanctions without giving them a copyright or neighbouring right.

The Gregory Committee\(^{11}\) considered that undue complexity in dealings would arise if performers as well as entrepreneurs were to have property rights against third parties. The committee which was invited to make recommendations in favour of creating new rights for the protection of performers of musical and dramatic works, felt that if a right of this kind was conferred it would add to the number of licences which were needed when performances by mechanical means were given in public and that the further extension of copyright, or a similar right, in this direction was not justified. It, therefore, only recommended certain modifications of the existing provisions of the Dramatic and Musical Performer’s Protection Act, 1925\(^{12}\), which gave to performers a summary remedy in the cases therein mentioned.\(^{13}\) Thus, this Act was only modified and not repealed by the Copyright Act, 1956.

**(ii) Performer’s Protection Act, 1958-1972:**

However, the Act of 1925 together with the amending provisions of the Act of 1956, were repealed and re-enacted by the Dramatic and
Musical Performer’s Protection Act, 1958. The Act of 1958 has itself been amended by the Performer’s Protection Act, 1963, in order to give effect to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations entered into at Rome on October 26, 1961 and by the Performer’s Protection Act, 1972. The fines payable under the provisions of the 1958 Act and the 1963 Act have been increased by the performer’s protection Act 1972 and a liability to imprisonment for not more than two years has been added. Protection extends to the performers of literary and artistic works as well as of dramatic and musical works as from August 31, 1963, when the Act of 1963 came into force. It is clear that the introduction of the word “artistic” into sub-section (i) of Section 1 of the Act of 1963 resulted from a misapprehension. The Convention uses the expression “literary or artistic works” in the same sense as they were used in the Brussels Convention as including everything in the general field of art, such as drama and music which are not specifically mentioned. But the Copyright Act 1956, Section 3(1) uses “artistic” in the narrower sense of drawing, painting and architecture. By failing to appreciate this, and repeating the copyright words “literary, dramatic, musical or artistic works” in sub-section (1) of Section 1 of the Act of 1963 this Statute has created the odd conception of a performer performing a drawing, a painting or a house.

Section 1 of the Act of 1958, as modified by the Act of 1963, gives to actors, singers, musicians, dancers or other persons who act, sing, deliver, declaim, play in or otherwise perform literary, dramatic, musical or artistic works a remedy which may be imposed summarily or
an indictment, in the case of a person knowingly making a record
directly or indirectly from or by means of, the performance of such
performers without the consent in writing of such performers.

It is also an offence to sell, hire, distribute for the purpose of
trade or perform a record so made, further, if such record is made in a
country outside the United Kingdom and the law of that country
contains a provision requiring the consent of any person to the making
of the record, such record is deemed to have been made contrary to the
Act of 1958, if, whether knowingly or not, it was made without such
consent and without the consent in writing of the performers.

The Act of 1958 also makes it an offence, by Section 4 thereof,
to possess contrivances for the making of such records, and, by Section
5 thereof, gives power to the court to order the destruction of such
records and contrivances. Where an offence committed by a body
corporate is proved to have been committed with the consent or
connivance of, or to be attributable to any neglect on the part of, any
director, manager, secretary or other similar officer of the body corpo­
rate or any person who was purporting to act in any such capacity, he as
well as the body corporate, shall be guilty of that offence and shall be
liable to be proceeded against and punished accordingly.18

An offence is committed only when the consent of each performer
is not given in writing and the defendant acts knowingly. In particular,
he must know about the absence of consent,19 and he is entitled to rely
on the apparent authority of a person purporting to act as the performer’s
agent unless he had no reasonable grounds for doing so. As with only
criminal offence where specific mens rea has to be made out, this puts
a burden of proof on the prosecution which may well be difficult to discharge. For the future, the Whitford Committee proposes that (as with other regulatory offences) the factor should instead be treated as one of defence, it being for the defendant to show that he had reasonable grounds for supposing that the performer had consented.  

"Certain offences, in the nature of fair dealing, are prescribed. No recording or filming of a performance requires consent if the defendant proves that it was for his private and domestic use only. A record, film, broadcast or diffusion may be excused by showing that its purpose was to report current events or that the performance was by way of background or in some other way purely incidental."

(iii) Civil Action For Damages:

As Section 1 of 1958 Act provides only for penalties in criminal proceedings against a person found guilty of statutory offences and does not impose any defined duty to any particular class of person, no civil action can be brought for a simple breach of statutory provision. The Act does not define any duty to performers. There is jurisdiction in equity, however, to restrain a defendant from doing an unlawful act in contravention of the provisions of the 1958 Act where a person can show that he has a private right which is being interfered with by the criminal act, causing him special damage over and above the damage to the public in general. For example, the court will grant an injunction against a person making unauthorised recording of live performances, "bootlegging", where it is established that the record companies with whom the performers have exclusive recording contracts are losing
sales and the performers are, in consequence, losing royalties on the lost sales. An injunction may also be granted and damages awarded on the basis of interference with the trade or business of another by unlawful means and without just cause or excuse. Both the performers and the record companies are entitled, in appropriate circumstances, to an injunction and to an order to compel the defendant to permit the plaintiff to search his premises.

The new Copyright, Design and Patents Act of 1988 further attempts to improve the position of performers by providing them statutory civil rights of action. The new rights which are described as 'rights in performances' are not limited just to the performers themselves but they are extended to those who have recording rights in relation to performers. The rights of performers are not copyright subject matter but are related rights.

Section 181 of the 1988 Act provides for a performance if either it is given by a qualifying individual or takes place in a qualifying country. Performers rights are infringed by a person who, without his consent -

(a) makes, otherwise than for his private and domestic use, a recording of a whole or any substantial part of a whole or any substantial part of a qualifying performance, or

(b) broadcasts live, or includes live in a cable programme service, the whole or any substantial part of a qualifying performance.

But Section further provides that damages for above infringement will not be awarded against a defendant who shows that at the time of the infringement he believed on reasonable grounds that consent had been given.
A performer's right under the Act is also infringed by a person who, without his consent imports into the United Kingdom otherwise than for his private and domestic use, or in the course of a business possesses, sells or lets for hire, offers or exposes for sale or hire, or distributes, a recording of a qualifying performance which is, and which that person knows or has reason to believe is, an illicit recording.  

In addition to the remedies of damages and injunction, which are available as a consequence of infringement being regarded as a breach of statutory duty, a person having rights in a performance may seek an order for delivery up of illicit recordings. A court may order the destruction or forfeiture of a recording delivered up or seized under the above provisions taking account of the adequacy of the other remedies available for the infringement.

The period of protection of rights in relation to a performance will be 50 years from the end of the calendar year in which the performance takes place.

The Act, in addition to above mentioned civil remedies, also provides criminal sanctions, section 198 of the Act creates a range of offences which are broadly similar to those now applicable in respect of commercial dealing with infringing copies of copyright works. The main changes from previous Act's provisions are that the penalties have been enhanced and brought into line with the penalties for copyright offences, and possession and importation of illicit recording are included for the first time.

In sum, the value of present U.K. Act is that it has finally recognised the performer's right which were long over due.
(iv) **Performer’s Rights & U.S. Statutory Copyright Law**: 

In the United States, the author’s public performing rights were first included in statutory copyright in respect of dramatic works by the Act of August 18, 1856. In the Act of January 6, 1897, the public performing rights were extended to musical works. Neither the 1856 nor the 1897 Act contained any specific limitations on the new rights, except that they related only to “public performances”.

The 1909 Act further extended the public performing rights to works prepared for oral delivery. At the same time, the Act imposed the “for profits” limitation on the performing rights in works prepared for oral delivery and musical works but not on the performing rights in dramatic works.

Finally, by the Act of July 17, 1952, the author’s public performing rights were extended to nondramatic literary works, subject to the “for profit” limitation.

The recognition of performer’s rights was criticised from various sides by people who feared that the provision would unduly restrict the free enjoyment of music and thus interfere with the legitimate public interests. Some felt that copyright should not extend to performing rights, while others, who did not consider such rights as outside the proper scope of copyright, argued that they should be limited to certain performances of vital interest of the author. To compromise the various views suggested, Mr. Arthur Stuart, a representative of the American Bar Association, proposed to limit the author’s public performing rights in musical works to public performances for profit.
While the *for profit* limitation was extended to musical works, the same was not true of dramatic works. The final report on the Bill gave the following explanation for the different treatment accorded to dramatic works:

> It is usual for the author of a dramatic work to refrain from reproducing copies of the work for sale. He does not usually publish his works in the ordinary acceptation of the term, and hence in such cases never receives any royalty on copies sold ... if an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavoured to so frame this paragraph as to amply secure him in these rights.\(^41\)

Stephen P. Ladas in his work adds another argument. He says:

> The law considers that persons attending a performance of a dramatic work will not ordinarily attend a second performance of the same work and, therefore, an unauthorized performance, though gratuitous, will cause the author a monetary loss, by depriving him of a potential audience.\(^42\)

Another significant change in the U.S. Copyright law in connection with public performing rights was brought about by the Act of July 17, 1952. This Act among other things extended the author’s public performing rights to nondramatic literary works. The first bill intro-
duced for this purpose placed the performing rights in nondramatic literary works in Section 1(d) concerning dramatic works, thereby giving these new rights the same wide scope as dramatic performing rights.

In only a few cases have the courts been presented with the question of what constitutes a "public" performance. The more difficult and significant question has been the scope of the "for profit" limitation. Although the words "for profit" as such may seem clear and well defined, the complications of modern economic conditions render them ambiguous in certain situations, and it has taken a number of court decisions to give them a more precise meaning. Specifically, the courts have had to deal with practical situations where the profit element in a public performance was more or less indirect.

(v) Judicial Response To Performer's Rights in U.S.:

The first important case to deal with such a situation was John Church Co. V. Hillard Hotel Co. The litigation involved a musical composition which had been performed in the dining room of a hotel belonging to the defendant. The case turned upon the meaning of the words "for profit" and the court held that the performances in question were not for profit in as much as no admission fee or other direct fee had been charged to the patrons hearing the performances. It was argued for the plaintiff that the performance of music in the hotel restaurant was a means of attracting paying customers and hence was for profit although no direct fee was charged for the music, but this contention was overruled by the court.

Other important problem came up in connection with the growing broadcasting industry, namely whether or not the broadcasting of a
public performance constitutes a new public performance; and simi-
larly, whether or not, the playing of radio in public places, whether by
means of standard radio receivers or more elaborate receiving installa-
tions such as those frequently found in large hotels, constitutes a new
public performance aside from the broadcast.

The cases involving instances of "multiple performances" do
not deal directly with the question of whether a performance is "pub-
lic" or with the "for profit" limitation. However, they represent an
important chapter in the development of the author's performing right.
Unfortunately, the problem of "multiple performance" was somewhat
obscured by the fact that the early litigations involved instances in
which the initial performances were unauthorized.

The first case to come up was *Jerome H. Remick & CO. V. General Electric Co.* A copyrighted song had been played by an
orchestra at a hotel, and "picked up" by the defendant broadcaster. The
court held that the broadcasting of the restaurant music was not a
separate performance, but that the broadcast of an unauthorized public
performance made the broadcaster a contributory infringer.

Another case, *Buck V. Debaum* concerned a situation involving
an authorised initial performance. The defendant, a restaurant owner,
had turned on a radio in his restaurant. The station he turned in brought
a musical programme which included the copyright song "Indian Love
Call". The plaintiff, who was president of ASCAP and sued on behalf
of his organisation, contended that the said acts infringed the author's
right of public performance for profit although the broadcast of the song
had been duly licensed by ASCAP. The court held that the acts of the
defendant did not constitute a new performance and consequently that there was no infringement of the said right.

The issue of importance in this connection was whether or not the "picking up" of the broadcast constituted a new performance. The court held that it did not.

But the Supreme Court\textsuperscript{46}, in an opinion delivered by Justice Brandeis held that the said acts did not constitute a performance of the music, thus, establishing the theory of "multiple performance". Although the Supreme Court clearly established that the "picking up" of a radio broadcast is a separate performance, it did not decide whether or not such performance infringes the author's performing rights in cases where the broadcasts are authorised by the authors.

The Copyright Act of 1976 provides that in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works, the copyright owner has the exclusive right to perform such works publicly.\textsuperscript{47} Thus, unlike the exclusive rights of reproduction, adaptation and distribution, which apply equally to all types of copyrighted works, the performance right is limited to the enumerated works and excludes pictorial, graphic and sculpture works and sound recordings. Pictorial, graphic and sculptural works by their nature not capable of being performed although they may be displayed. Since to perform a work "publicly" means to perform it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered,\textsuperscript{48} it seems clear that performance in "semi-public" places such as clubs, lodges, summer camps, schools, and the like are
public performances.49 The Act also defines "to publicly perform" as meaning to transmit or otherwise communicate a performance by means of any device or process, whether the member of the public capable of receiving the performance receive it in the same place or in separate places and at the same time or at different times.50 In other words, a performance includes not only the initial rendition but also any further act by which that rendition is transmitted or communicated to the public.

While the Copyright Act of 1909 contained provision which depended upon whether a performance was for profit, but the 1976 Act has abolished this distinction and provides an exclusive public performance right irrespective of profit. Thus, an unauthorized public performance need not be for profit in order to constitute an infringement of the exclusive right to perform although nonprofit requirement still exists with regard to certain exempted performances.51

(vi) Non Recognition Of Performer's Rights in India:

The Indian Copyright recognises and protects as seen in the preceding chapters of this study the rights of an author in his original literary or dramatic work; of a composer in his original musical work; and of an artist in his original artistic work (including that of a photographer in the photograph taken by him). By the requirement that the work must be original, to qualify for copyright protection it is evident that these works are created for the first time by the writer, or the composer, or the artist, as the case may be.

The law, however, found no difficulty in recognising that copy-
right can subsist in translations\textsuperscript{52} of literary and dramatic works, as well as in compilations, selections\textsuperscript{53}, abridgments\textsuperscript{54} and other adaptations of literary and dramatic work, and in arrangements and transcriptions of musical works, even though they are not original in the sense that they are created for the first time, but are only derivative works being derived from an existing (basic) literary, dramatic or musical work.

The performer quite often performs\textsuperscript{55} an existing work and in that sense his performance is derivative in the same way as a translator translates or an abridger abridges an existing work. The performance may be live performance before a public or private audience, or a live performance over radio or television, or a performance fixed in a cinematograph film, or a performance recorded in a sound record. But the copyright law has not found it possible to confer any rights on the performer in respect of his performance when he performs in a motion-picture, the copyright law confers on the film producer alone an independent copyright in the cinematograph film (including the soundtrack) apart from the separate copyright in the work in respect of which or a substantial part of which the film is made.\textsuperscript{56} Similarly, when a sound-recording is made of the performance of a performer, the copyright law confers on the record-producer an independent copyright in the record, apart from the separate copyright in the work in respect of which or a substantial part of which the record is made. Thus, it is clear that in no case has the performer anything in the nature of a copyright in his performance. If the performance is over the radio or television, once again the performer has no control over its use. The Act confers a special right, called "broadcast reproduction right" to protect the
broadcasting authority.

Thus, the performance of a performer is not a "work" in which copyright can subsist under the Act. Nor does the Act confer anything like a "neighbouring right" to performers as it does to the broadcasting authority. Copyright is a creature of the statute and does not subsist outside or beyond it.

(vii) **Performers Rights & Indian Judicial Response**

It is indeed a matter of great shock that an attempt before the Bombay High Court to claim copyright in his performance by a cine-actor failed in *Forture Film International V. Dev Anand.*

It is in the fitness of things to recapitulate the case in details. The film producers entered into a contract to engage the popular cine-actor to play the leading male-role in their Hindi production "Darling Darling" and to pay him a hefty Rs. 7 lakh as remuneration. The payment was to be made by annuity policies of the L.I.C. in specified sums on or before the release of the film in seven named territories such as Delhi/U.P. (Rs. 1 lakh), Bengal (Rs. 35 lakhs), Tamil Nadu (Rs. 0.25 lakhs) etc. The producers further covenanted that:

Your work in our picture on completion will belong to you absolutely and the copyright therein shall vest in you and we will not be entitled to exhibit the said picture until full payments... are secured to you by way of annuity policies of L.I.C. It is, however, agreed that upon the deliveries of the said annuity policies..., your copyright will automatically vest
in us. We, therefore, agree that until the said poli­
cies are delivered to you, we shall not release the
said picture nor exhibit or distribute or exploit or
part with any prints of the said picture to any
party.... for the purpose of exhibition, distribution
or exploitation in the territories specified above.

The picture was duly released in three of the seven named
territories.\textsuperscript{58} The actor sought injunction to restrain the producers from
releasing the picture in the other four named territories as well as
territories not named (Bombay and overseas) until full payment was
made to him. He claimed that the stipulation vested the copyright in the
film in him and totally prohibited the producers from exhibiting the film
anywhere until full payment was made to him as agreed with a provision
for relaxation in favour of the producers giving them a limited right to
exhibit the picture in any of the named territories after making the
payment as stipulated for that territory.

The court rejected the claim of the actor that the covenant vested
in him the copyright in the film as a whole and held that it only
purported to vest in him the copyright in his work, that is, his perfor­
man ce in the film. It was, therefore, squarely in issue whether such a
copyright was recognised or protected by the Copyright Act.

It was contended for the actor that the performance of an actor
was covered by the definition of "artistic work" or "dramatic work". Alternatively, it was argued that the actor's performance must be
regarded as a component or part of the cinematograph film in which
copyright subsisted as a "work" under the Act.
On the other hand it was argued for the producer that 'work' meant a work tangible in nature and did not include the performance of an artist and that the agreement could not vest in the actor something which in the first place did not and could not exist under the Act. Accordingly, the actor could not restrain the producers from releasing the film in territories other than the seven named territories on the basis of his copyright either in the film or his work therein.

The division bench which heard the appeal preferred by the producers from the order of a single judge granting the injunctions sought for by the actor upheld the contentions of the producers. Examining the provisions of the Act, the bench proceeded to consider whether the performance of an actor in a film is covered by the definition of "artistic work" or "dramatic work" or "cinematograph film" and thus protected as a "work" under the Act.

The performance of a cinema actor, being neither a painting, nor a sculpture, nor a drawing, nor an engraving, nor a photograph, is clearly not an "artistic work" as comprehensively defined in the Act. Examining the definition of "dramatic work", the court rejected the contention that the performance of an actor which is fixed in the film is a dramatic work within that definition. Nor would the court countenance the argument that there could be one owner of the copyright in a cinematograph film as a whole and different owners of the copyright in portions thereof consisting of the performers who have collectively played roles in the motion pictures. In sum, the Copyright Act 1957 does not recognise the performance of an actor as a "work" protected by the Act.

The detailed treatment of above case is warranted by the fact that
it is the only case in which the claim of a performer to copyright in his performance came to be tested in the courts and that the decision which is of general validity in respect of all performers, whether an actor, or a singer or a musician, or a dancer, or any other performing artist. It is also a warning to them that they can expect no protection from the copyright law. Their only protection must be sought from carefully drafted contractual stipulations. A stipulation vesting in them the copyright in their performance is an exercise in futility. It is puzzling why Dev Anand contract linked up payment with only seven specified territories letting the producer free to market his film merrily in the other vast markets without any safeguards for the actor.

(viii) **Indian Copyright (Amendment) Act 1994 & Recognition of Performers Rights**:

The Copyright Amendment Act 1994 now seeks to make a dramatic change in the existing copyright law. One of the objects of the Amendment is to extend protection to all performers by means of a special right, to be known as the "performers's right", in respect of the making of sound recordings or visual recordings of their live performances, and of certain related acts. The conferment of copyright protection on performer's right will be in conformity with the requirements of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation, 1961.

For the first time the Amendment Act has inserted a definition of "performer" under Section 2(qq) which reads as under:

"performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a
person delivering a lecture or any other person who makes a performance.

The Act also defines "performance" in relation to performer's right, which means any visual or acoustic presentation made live by one or more performers.59

The Act has substituted new sections for Section 38 and Section 39 which deal with the "performer's right".

Clause (1) of Section 38 lays down that where any performer appears or engages in any performance, he shall have a special right known as the "performer's right" in relation to such performance.

Clause (3) provides that during the continuance of a performer's right and without the consent of the performer anyone who does any of the following acts in respect of the performance or any substantial part 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 visual recording was -
(i) made without the performer's consent; or
(ii) made for purposes different from those for which the performer gave his consent; or
(iii) made for purposes different from those referred to in Section 39 from a sound recording or visual recording which was made in accordance with Section 39.
(c) broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with Section 39, or is a re-broadcast by the same broadcast-
ing organisation of an earlier broadcast which did not infringe the performer's right;
(d) communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or a visual recording or a broadcast.

shall, subject to the provisions of Sectin 39, be deemed to have infringed the performer's right.

But what is shocking is that clause (4) of Section 38 has taken from performer's what was given to them by the Amendment since it has laid down in explicit terms that once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of sub-Sections (1), (2) and (3), shall have no further application to such performance. Thus, the position of cine actors still remains same what it was after Dev Anand case. In view of this Amendment, the cine actors have to rely on their contracts with their producers rather than the copyright law.

It can, therefore, be concluded that while performers rights have now been adequately recognised in United Kingdom in its 1988 Act and with the U.K. joining the Rome Convention, performer's position under the British system is further strengthened. The protection to performers in U.S. is also sufficient though a lot more is to be done in this regard. As far as Indian Copyright law and its protection to performer's rights is concerned, despite the 1994 Amendment and major changes brought by it, the position of performers in cinematograph films has not improved. The cine actor, therefore, still remains so far as the copyright law goes, a wage - earner whose performance is not protected as an intellectual creation. Recognition of cine-actor's right in respect of his performance in films should, therefore, be recognised urgently.
1. Rome Convention, Article 3 (a).
2. See generally, STEWART, STEPHEN, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS.
3. Indian Copyright (Amendment) Act 1994, Section 2 (qq).
4. For details see chapter on "Neighbouring Rights", infra chapter IX.
7. STEWART, Supra note 2, at p. 184.
8. The term "'recording'" and "'record'" in the Indian Copyright Act 1957 (Section 2 (w) & (x) denote only sound recording and sound record ("phonogram") i.e. "aural fixing". The term "'fixation'" is wider and includes recording of images and sound - audiovisual fixing.
9. This corresponds to the right of the author of a literary, dramatic, musical or artistic work to publish or not to publish. The performer's right to fix or not to fix his performance must be recognised.
11. Cmnd. 8662, Pt. VII.
12. 15 & 16 Geo 5, C. 46.
13. Cmnd 8662, supra note 11, para 172; See Section 45 of and Sched. 6 to the Copyright Act 1956; and see 1977 Copyright Committee, Cmnd 6732, para, 406.
14. 6 & 7 Eliz. 2, C. 44.
details see the chapter on "Neighbouring Rights", infra chapter.

16. C. 32, Section 3; Section 3; maximum fine & 1000; See Criminal Law Act 1977, Section 28 (2) (7).

17. COPINGER ON COPYRIGHT (1980, 12th ed.), at p. 691.


22. Performers Protection Act, 1958, Section 1,2 (provisos).

23. Ibid; Section 6.


27. Ibid, Section 182 (2).

28. Ibid, Section 184.

29. Ibid, Section 195.


33. 11 STAT. 138 (1859).

34. 29 STAT. 481 (1897).

35. 35 STAT. 1075 (1909).

36. 66 STAT. 752 (1952).

37. See Hearings Before the House and Senate Committee on Patents
on S. 6330 and H.R. 19855. 5th Cong. 1st Sess. (June 1906), at p. 173.

38. Ibid. at p. 174.


40. H.R. REPORT No. 2222, 60th Cong. 2d Sess (1909).

41. Ibid. at p. 4


43. 221 Fed. 229 (2d Cir. 1915); Also see Herbert V. Shanley Co. 222 Fed. 344 (S.N. N.Y. 1915).

44. 16 F. 2d 829 (S.D.N.Y. 1926).

45. 40 F. 2d 734 (S.D. Calif. 1929).

46. 283 U.S. 191 (1931), Annotated in Numerous Law Reviews, quoted in Varmer, Supra note 42 at p. 89.

47. U.S. Copyright Act 1976, Section 106 (4).


49. House Ref. No. 94 - 1476 at p. 64.


51. Ibid. Section 104.


53. Macmillan V. Suresh Chandra Deb, 17 Cal 951 (1890).


55. Indian Copyright Act, 1957, Section 2 (9): “performance” includes any mode of visual or acoustic presentation including any such presentation by the exhibition of a cinematograph film or by means of broadcast, or by the use of a record, or by any other means and, in relation to a lecture, includes the delivery of such lecture.

56. Ponnuswami, Supra note 6.


58. Delhi/U.P.; Mysore; and C.P.C.I.

59. Ponnuswami, supra note 6, at p. 611.

60. Indian Copyright (Amendment) Act, 1994, Section 2 (q).