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. 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, one cannot point out any express indication of the performance sans fixation or otherwise singularly

2 Douglas 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. In these circumstances the actual contributors to the creative work or the authors do not have ownership rights. 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. This provision has driven and determined the status of actors in the film industry though not directly discernible with respect to the audio industry.

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.


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


\(^8\) 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.

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." Therefore 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. 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.


Under the constitutional limits the subject matter of copyright has been limited to ‘Writings’ of an author 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. 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’.

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

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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 1976. 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).
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performance for the performer. 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.

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. 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. 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

20 Though the facts of the case did not involve the question of performers' rights.
21 327 Pa 433, 194 A.6331 (1937).
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.* 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. 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’. 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

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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.


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.  

*RCA v. WHITEMAN*  

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. 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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27Stanely Rothenberg, op.cit., p.214.  
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

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.

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.


\(^{36}\) 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."  

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. 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

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37 Benjamin Kaplan and Ralf S. Brown, op.cit., p.568
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 embodied 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

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40 Judge Dimock rendering the judgment with Justice Medina concurring.
Metropolitan Opera Association v. Wagner – Nichols Recorder Corp\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{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\textsuperscript{46} and the decision of the Court of New York in Metropolitan Operas 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.\textsuperscript{47} The late pianist

\textsuperscript{41} Supreme Court of the State of New York, New York County, 1950, 199 Misc. 780, 101 N.Y.S.2d 483.
\textsuperscript{42} Benjamin Kaplan, "Performers' Rights and Copyright", 69 Harv. L. Rev. 412.
\textsuperscript{43} This was in fact an answer to the problem posed by the decision in Whitesmith v. Apollo Company.
\textsuperscript{44} Benjamin Kaplan and Ralf S. Brown, op. cit., p. 578.
\textsuperscript{45} Id., p. 579, the Court quoted from the H.R. Rep., 2222, 60\textsuperscript{th} 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."
\textsuperscript{46} 114 F. 2d 86 (2d Cir. 1940), cert. denied, 311 U.S. 712 (1940). Discussed earlier.
\textsuperscript{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.

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. 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. 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. 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. The Court of Appeals had found an action

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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. 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. Much of its economic value lay in the right of exclusive control over the publicity given to his performance. The rationale of the

52 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.  

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. 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\textsuperscript{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

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. 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

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. 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

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.

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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 petitioner's 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 plaintiff's 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 plaintiff's right of privacy, unfair competition, unauthorized and uncompensated appropriation for commercial purposes if the plaintiff's 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.
of quasi partnership on a joint adventure. 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_

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 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

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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).


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. 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.

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\textsuperscript{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.\textsuperscript{72}

\textit{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.\textsuperscript{73} The only attribution of moral rights is given to qualifying works of visual art.\textsuperscript{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

\textsuperscript{71} Id., p.190. Superior Court case no. 453-224, reported in 18 U.S.L. WEEK 2024(U.S. July 26,1949).


\textsuperscript{73} Paul Goldstein, Copyright, Vol.1, Aspen Law & Business, New York (2\textsuperscript{nd} edn. -2002), p 15: 179.

\textsuperscript{74} 106 A of the Copyright Act, 1976.
accorded relief. 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. 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. 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. 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

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. 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. 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. 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

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. 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. 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.

The flow of information has become particularly immense with the application of the Internet technology. 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. 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."

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...
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. 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.

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 Digital Performance of Sound Records Act\textsuperscript{90}, the Digital Phonograph-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\textsuperscript{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 phonorecords. 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.\textsuperscript{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


\textsuperscript{92}Ibid.
the use of their work. Cable television subscription and interactive services would also fall within the bill's 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, LexisNexis, 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. 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

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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 owner's 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. 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.

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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

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. 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. In effect the statute sets aside controlled composition clauses in circumstances where 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)(i)(ii).
date\textsuperscript{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.

\textit{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 \textsuperscript{102}. The information is 
to be contained in the context of statutory licenses of subscription digital audio 
transmissions.\textsuperscript{103}

\textbf{The Digital Millennium Copyright Act (DMCA)}

The DMCA was passed in 1998 in order to implement the WIPO Copyright 
Treaties\textsuperscript{104} and saw the introduction of certain alterations and additions to rights 
of performers’ and producers in the digital medium\textsuperscript{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."\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{101} 22 June 1995.
  \item \textsuperscript{102} 115(c)(3)(g).
  \item \textsuperscript{103} This is also subject to an exception like the one in Audio Home Recording Act, 1992.
  \item \textsuperscript{104} The WCT and the WPPT.
  \item \textsuperscript{105} Digital Millennium Copyright Act, WIPO Implementation Legislation, NMPA, <http://www.nmpa.org/nmpa/wipofinal.html> as on April 22 2005.
\end{itemize}
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

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\(^{107}\) 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\textsuperscript{106}. Sound Exchange only handles the collection of royalties from compulsory licenses to \textit{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 \textit{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.

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{109} Title II of the DMCA adds a new Section 512 to the Copyright Act.

\textsuperscript{110} In Section 512(j).

\textsuperscript{111} In Section 512(h).

\textsuperscript{112} This has been provided explicitly in the act Section 512(m).

\textsuperscript{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. 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. 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).
infringing, material being found on the net. 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.

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 allegor should initiate court proceedings within a stipulated period and if he does not do that then the provider would need to put the material back on the site after the elapse of ten to fourteen days from the receipt of the counter notification. Penalties and damages can be elicited in case of misleading notices as well as counter notices.

Similar conditions and limitations are provided with respect to hosting of information location tools by the service provider. 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.

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. 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

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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. 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. 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

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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. 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. There is no mandatory stipulation that the manufacturers need to produce products equipped with a particular design in response to any particular technological requirement. 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. There are six exemptions that have been clearly prescribed. Nonprofit libraries, archives and educational institutions are

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{130} Anti circumvention measures can be exempted for the sake of protecting the minors from unsavory sites or material. It is important to note that material on the Internet has been clearly cited.\textsuperscript{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.\textsuperscript{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.\textsuperscript{133} These measures have raised fears about excessive obstruction to fair use of the disseminated material.\textsuperscript{134} The continuous evaluation mentioned above is to evaluate whether additional exceptions need to be created from time to time.\textsuperscript{135}

\textsuperscript{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.

\textsuperscript{129} Section 1201(f). For facilitating reverse engineering.

\textsuperscript{130} Section 1201(g).

\textsuperscript{131} Section 1201(h).

\textsuperscript{132} Section 1201(i).

\textsuperscript{133} Section 1201(j).

\textsuperscript{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.

\textsuperscript{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. 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.

**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.

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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. It also marked a recognition of unfixed matters that was anathema to the constitutional understanding of copyright in the United States. The Section regulates the unauthorized fixation and trafficking in sound recordings and music videos. Section 1101 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 phono-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.
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 phono-record, 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.\textsuperscript{143}

\textbf{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\textsuperscript{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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{147}

\textit{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

\textsuperscript{145} \textit{Id.}, p.8E-19.
\textsuperscript{146} \textit{Id.}, p. 8E-24.
\textsuperscript{147} \textit{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.