industries. Several corporate entities have in the recent past faced losses and near bankruptcy in an industry where no one is sure of a sure fire formulae to success and profits. Therefore to put all the eggs in the corporatisation basket for affording salvation to the ills plaguing the performing artists or the labor front might be foolhardy. However as has been proved it is definitely a safe bet that the professionalism that is ushered in by the corporatisation of the entertainment industry would surely pave the way for more professionalism and accountability in the industry. The question will still remain whether the performer would be in a fair bargaining position despite the minimum safeguards like a written agreement being practiced. The standard contractual practices would help in the administration of rights if performers in the audiovisuals were granted rights in the future.

In short, it can be safely inferred that the state of the industry demands an overall reform and from the performers' perspective, looking at the present state of legal regulation, welfare initiatives, labor and contractual security, an alternative model of economic security would be most appropriate. To this end the grant of performers' rights would be most beneficial to a secure future and an acknowledgement of the performers' creative prowess. Under the present state of law, contractual practices, level of collective organization and bargaining, state institutions and policy, the environment in India is not conducive to work a rights regime for performers effectively. But this is not to deny the fact that these institutions, organizations and practices could very well rise to the occasion when the rights regime comes into force.

**SUGGESTIONS**

Drawing strength from the preceding study the following suggestions are put forth to effectively implement a performers' rights regime in India.

1. *Need for Statute:* Even though the notion of protection through personality rights can be found in the jurisprudence of diverse systems nevertheless the performers concerns in particular have been found to suffer in certain circumstances for which these general principles do not provide relief. Diverse jurisdictions do not have uniform loyalties with regard to these common law actions and in a globalized communications environment this
could aggravate certainty of relief. It can be seen that practices of trade and implied general covenants have further confused decisions in this regard. Instead of an uncertain dependence on these premises, a statutory prescription would diminish the course of conjectural jurisprudence and assuredly define the substance and limits of protection.

2. **Less Impetus on Charity:** The state nor voluntary agencies need to struggle to indulge in charity and consequent inequitable distribution but can help the performer from benefiting from the profits of the exploitation of his performances with the grant of positive rights and the application of such methods such as equitable remuneration and collective administration. A percentage of these collections can also be used to beget or create a pension fund or provident fund and medical insurance for the performer of a perennial nature. This would go a long way in inspiring confidence in the audiovisual industry and trust in the future generations to invest time, resources and talent in this vital segment of the culture industry.

3. **All India Union Needed:** There is the need for a single union for each sector in the audio-visual industry for the entire country. The region and language wise fractions weaken the organization structurally and financially. The greater is the number of organizations more is the chance for infighting and disunity and vulnerability to compromise the interests. Though there is one single umbrella organization for workers, it would be better to have a single umbrella organization in the country for each section of the workers including performers. Trade unions need to be formed rather than charitable organizations that seem to cater to benevolent impulses of certain well to do members alone. As in a democracy there cannot be any coercive formation of unions, the way forward would be to exhibit the utility of the unionization by providing a valued platform to it as being representative of the performers and secondly to provide institutional assistance to it to take over greater functions of administration.

4. **Need to Involve the Performer and the Unions:** There is a need to involve performers at all levels into this debate of rights rather than confine it to merely eliciting opinion and information from the leadership alone.
5. *Need to Introduce the Concept of Residuals:* It would be ideal to introduce the concept of residual in the tariff decided by the negotiations between the workers and artists in the film industry and the producers. But that would require infrastructure, finance and manpower to administer the proceeds there by arising. In the absence of certain and comprehensive labor and economic security, the residuals would surely aid the worker and artist in distress.

6. *Need for Collective Administration Societies:* Taking into consideration the lack of a voluntary helpful infrastructure on behalf of the performers in India conducive to administering the intellectual property rights in India the state should come forward to establish a collective administration society on their behalf in India for both audio as well as audio visual performers. The other alternative would be that the state should financially aid the performers to form their respective societies and in the administrative planning and execution till such time that the concept is firmly entrenched in the country. This is important considering the fact that other than in the audio (IPRS) or music-publishing (PPL) field such a body for collective administration does not exist in the audiovisual realm. Even the producers do not have a body of this nature in the cinematograph industry and the licensing is rendered individually. Therefore the audiovisual industry today stands without any speck of any organized collective administration activity and the performers do not have any model in the country to look forward to. This necessitates State initiation and support for at least a substantial time till performers are able to unify and organize towards administering the rights in their performances on their own.

7. *Establishment of a Common Clearing House:* The establishment of a common clearinghouse would ease the burden of multiplicity of rights being an issue as well as economize administration. This would be so both with regard to the audio as well as the audiovisuals.

8. *Scrutiny of Collective Administration:* Most importantly provision on collective administration in the Copyright Act needs to be specifically extended to the performers and scrutinized like the law does at present for the copyright protected entities. The Copyright Board must oversee the functioning of the society.
9. Positive Rights can Change Attitudes and Practices in India: An express grant of statutory authorization rights would essentially change the way rights in performances are looked at within the frame of the present provisions. It would no longer be something that can be brought as a commodity or service of labor to be exploited at the will of the producer. There would no longer be any presumptive transfer of property right in the performance upon the payment of money agreed upon on the other hand each of the different rights would have to be separately traded. In the absence of the formal assignment or licensing, the rights would be treated as being retained in the performer. In the event of rights of authorization being granted consent to record or any other consent as provided under the Act at present would not provide the producer the apparent right to indulge in all the collateral exploitation that follows from the affixation.

10. Need to Change the Present Law: As has been analyzed, the present grant of a preventive remedy does not fully empower the performer. It only provides him recourse upon violation and does not recognize the presumptive right of ownership over the intellectual creation and the right to authorize its various uses like the rights granted to the literary, artistic and other entities protected under the copyright. The performers' aspiration to be recognized by the intellectual property law has been acknowledged by various jurisdictions that have been as prolific in the productivity as the entertainment industry in India has been.

11. Prior Definitions and New Rights: Several terms need to be defined and others need either to be redefined or an affirmation needs to be made that the very same meaning as is appended to then in the general definition clause would continue to hold good against the new rights as well. For instance under the current prevalent scheme there is no definition of the term 'visual recording' in the Act however it has been referred to in the definition of the term 'cinematograph'. Endowing rights on the subject matter without providing any clue as to what it means makes the Act and its applicability confusing. There is no clue whether the definitions under Section 2 of the Copyright Act would be extendable to the 'special rights' granted under Section 38 of the Copyright Act. This needs to be clarified.
12. Copyright Law Needs to be Complemented by Labor Law: Not only the copyright law but the labor law too needs to be changed or altered when it comes to the task of making the rights work in the entertainment industry. Though a specific legislation in this sphere would be welcome encompassing both the labor law that includes minimum contractual aspects and those relating to the working conditions and the copyright law. A combination of both these should provide the performer and the other film workers with great social and financial security and remove theoretical objections to the categorization of creative performers as 'workers'. A combination of the British and the French models could provide a balance between the freedom of contract and presumptive status as a worker that would make the performers derive benefits of both welfare as well as returns from exploitation. Amendments need to be made in the Industrial Disputes Act and in other labor enactments in order to recognize the performing artist as an eligible category.

13. Need for Institutional Grievance Redressal: A grant of rights to the performer either under Copyright or labor law need not improve matters for the performer unless the institutional grievance redressal is firmly put in place. This should change the attitude of disdain for the judicial process in the entertainment industry. In other words, a tribunal for the entertainment industry is most essential. Though this was envisaged in the year 1984 it was never put into place. The Tribunal must also deal with the copyright disputes that includes performers’ rights and must be an integrated redressal mechanism to deal with the problems plaguing the contributor in the entertainment industry in the country. A time frame should be granted within which the disputes must be disposed of. Representative actions should also be entertained.

14. Need for Transparency: While none of the entities (be they producers, distributors, directors, institutional investors or actors) are averse to a residual or copyright-based remuneration model, they point out that a system of total transparency and accountability is essential. The unreliable model of exploitation has been cited as the reason for delayed corporatisation as well as institutional banking. The string of exploitation contains numerous factors, which finally lead to the release of the
performance to the public and retrieve the profits. The distributor and the
exhibitor, video distributors, cable and Internet distribution are all avenues
that would need to be accountable and transparent in their functions if the
ture value is to percolate back to the performer and the producer.
Standardized practices and scrutinizing mechanisms like collective
organizations and administrative bodies are required to check
malpractices and see to it that transparent practices are followed.

15. **Encourage Institutional Lending and Corporatisation:** If delayed payments
based on residual uses and payments are to be introduced, the industry
should be manifested in an organized manner and practices must be
standardized. This can happen only if the incidences of quick money
makers are diminished and trust worthy producers come to the fore with
clean money raised from accountable banking institutions or corporate
producers. This could spur corporate houses with better credit and trust
worthiness to enter into the fray. This can create an ideal environment for
the residual model of remuneration or the rights model of remuneration of
delayed payments.

16. **Need to View the Industry Holistically:** The copyright issue cannot be seen
in isolation and it should be placed in the context of the interconnected
nature of the industry. The optimum efficient implementation of a
copyright model for the performer can only be realized if the practices in
every distinct sphere of the industry is standardized and vice versa.

17. **Marginalized State Role in Regulation and Administration Needs to be
Reversed:** It is evident that state has always played a marginalized role in
the affairs of the audiovisual industry in particular and the entertainment
industry in general. This docile approach has to change if the benefits of
the ‘industry’ status are to be harnessed for all sections in the film industry
and the entertainment industry. The issue of performers’ rights should not
be confined as a copyright issue alone but must be seen in the larger
context of policy towards the entertainment industry, as the administration
of the same requires a total overhaul.

18. **Need for Mandatory Application of Written Agreements:** The lack of any
standardized format to execute agreements between the performing artist
and the audio visual media be it in films or other audio performances
creates a virtual opportunity for exploitation of the performers trust. Either
the consent or the authorization must manifest itself in written form and
subscribe it to formalities that copyright protected entities currently
demand.

19. **Deficiencies in the Present Indian Statutory Provision:** Even within the
context in which the Act is placed today with its limited vision of granting
rights only to non-audiovisual recordings, the following changes need to be
made in the statute. The appellation of a 'special right' should be done
away in Section 38(1) of the Copyright Act. Such a nomenclature is neither
in keeping with either the TRIPS to which India is a signatory nor to
national and international trends. It is relevant to note that a separate
status (Neighboring Rights) has only been preferred in other jurisdictions
to meet the necessities of administration of rights or for the better
protection of the performer. Therefore the use of the term 'Special Rights'
is a misnomer.

20. **Safeguard Clause:** It is an anomaly that at no place is a safeguard clause
incorporated with respect to literary and artistic works or other entities and
therefore this needs to be incorporated and the unspoken fear of these
entities should be assuaged at the outset. This would instill the confidence
to extend additional and more extensive positive rights to the performers.
This could also take away the categorization as special right.

21. **Durational Term:** While the durational term is at parity with that of the
international trend, that is for a period of fifty years, there is a need to
increase the duration as the creativity of the performer cannot be
considered akin to the status of the producers of the sound recording or
that of the film producer but more intellectually akin to those for the
authors. The need for the benefit of protection to percolate to heirs of the
performer needs to be appreciated with same verve as those for the
authors of works. The young artist would never be able to savor the
benefits of his performance in his old age. That could be the period when
their efforts reach its pinnacle of demand and old age might necessitate
the need for a monetary compensation. The international treaties –the
WPPT, the envisaged Protocol - as well as the European Community
Directives have only specified a grant of a minimum period of fifty years
but the countries are free to increase the duration of the term. Further the E.C. has also introduced the concept of rights commencing from performance as well as upon publication. Taking into account the rich heritage of music in the country contributed by the disciplined virtuosos of the art form who have toiled immensely through hardships in their initial years, the performers should be amenable to enjoy the fruits of their labor in their old age as well as make life comfortable for their kith and kin. Even though a similar provision is not provided for the sound recordings. It can be seen that it is specifically provided that upon the expiry of the term of protection in the film, the underlying copyright entities with surviving rights can continue to clamor for their rights. The same rationale ought to apply for the creative performer as well. Besides in a digital age if the duration is not increased, with widespread abuse it remains to be seen whether benefits of royalty would percolate as heavily as it previously used to so an increase in the duration would certainly garner more benefits that what it previously could gross in a shorter term. It should be recollected that Justice Sri V.R Krishna also demanded a protection for the performing artists not lesser than that enjoyed by the copyright protected entities. His call, it might be recollected was for an extension of the same treatment to them. Therefore India is at liberty to grant equal or more than an equal protection to its artists particularly those in the classical genre. It should be recollected that the reason for classifying the performer along with the phonogram producers and broadcasters was only for the ease of regulation owing to the common concerns they shared.

22. Consent: The term 'Consent' has not been defined or explained in the Section. It is noteworthy that the copyright entities do not authorize the doing of any act of exploitation by means of mere 'consent'. It has not been specified whether the consent has to be oral or written or express or implied. This lack of formality compounds the situation further as a lot of consequences follow or possibilities follow the grant of the consent to affix. The onus to prove or disprove consent would be burdensome for the performer. It is relevant to note that the word 'Consent' has not been used even in the Model law drafted for the Rome Convention rather the term 'authorization' is used. Though the term authorization has not been
defined nevertheless it exudes a more formal character than the term "consent". It would be unfortunate that in a developing country rights are to be bartered upon mere consent, either implied or express. It would be appropriate to lay down a format to be complied with in order to sanctify consent.

23. *The Need for Right of Authorization:* At present, if the user begets the consent to record, there is no control over the uses to which the recording is put to, as regards reproduction (qualified by the need to be applied to purposes specified at the time of recording) communication and broadcasting of the record is concerned. This is a serious deficiency, as the diverse rights of authorization have not been provided to the performer and the Act is unclear as to the extent of control over the performance by the performer. The Act is ambiguous about the possibility whether only the person to whom the consent to record has been granted can use it for all other purposes including broadcasting or communication to the public, or whether any body who is possessed of a recording for which primarily consent had been given to some one can use the same for the rest of the purposes.

24. The right of making available with its characteristic of regulating the process of accessing the protected subject matter at a place and time chosen by him has not been distinctly granted under the Indian Act. Rather it is read into the definition of the term "communication to the public". This indirect reliance can prove cumbersome in the long run as right of communication to the public does not obviously carry this form of access. Further with respect to recorded performances most jurisdictions are hesitant to grant an authorization right of communication to the public or broadcasting from recorded performances. Reliance on communication to the public will not work under the present circumstances because it covers only 'works ' and not special rights. This needs to be amended and also a separate right of making available in line with the definition in WPPT should be incorporated into the Act.

25. *Compulsory Licensing:* As such the provision is silent with respect to requirement of compulsory licensing. This means that at present the performers' rights do not exempt the use for compulsory licensing. It can
be noticed that such a circumstance has been addressed in countries like the United Kingdom by clearly specifying the circumstances in which compulsory licensing would be applicable.

26. **Provision & Scrutiny of Collective Administration:** The Section does not mention anything regarding the application of collective administration provisions for the performer. This is a serious anomaly and deficiency since it is evidently perceivable that the recourse to easy commercial exploitation of both audio as well as audiovisual performances in all these countries have been through this machinery recognized by the law. This lacuna has to be filled in the statute. Further the statutes in these countries have provided either through the Librarian of the Congress or the **Counsel d’etat** or the Copyright Tribunal to scrutinize and intervene in order to safeguard against anti monopolistic practices by these collective bargaining and administering bodies. Either existing offices such as the Copyright Board should expand their powers or new offices need to be created to execute these functions.

27. **Non-Waivable Equitable Remuneration:** Complementary to the need for these bodies, the mechanism of non-waivable equitable remuneration as endorsed and propositioned by the international instruments and adopted by almost all analyzed national jurisdictions would provide commercial convenience as well as safeguard rights in the long term for the performer in India. As it is evident, the rationale of applying this in the European union has been made expressly clear. It acts as a security against outright transfer provisions of the most lucrative rights such as broadcasting and communication to the public and functions also as an alternative to the substantial authorization rights. The present European trend (with respect to cable retransmission) by which the administration of equitable remuneration rights have to be compulsorily handed over to the collective administration societies need to be followed in India taking into account the low state of empowerment of the artists.

28. **State Support:** The state should come forward to finance and support these units or aid substantially the present organizations from preparing to meet the challenge of the legislation. This is relevant as can be inferred from the preceding study that collective organizations in India are not well
equipped to meet this challenge at present. A grant of rights to be individually dealt with would be superfluous as an outright transfer would be effected in an industry where the performer is placed in an unfair bargaining position. Therefore until commercial administration and bargaining has accepted the notion of intellectual property or residuals into its discourse, an individual grant of rights in India would have no meaningful impact.

29. **More Beneficial:** It should be statutorily mandated that the individual agreements must always contain terms more beneficial than the terms mandated by the collective agreements rather than leave it to conventions of collective organizations. An agreement that has terms less beneficial should be termed null & void statutorily.

30. **Performance Right:** Together with the grant of a substantial right to the communication to the public and the broadcasting right, a performance right should be granted to the performers in the audio as well as the audiovisual. This can be with an alternative in the form of a right to equitable remuneration. Considering the incessant use it can be considered to be beyond the individual bargaining and only to be collectively licensed by a collective administration society.

31. **Joint Clearing Houses:** The producers and the artists would have to set up joint clearing houses as it would ensure multiplicity of rights not being an impediment for administration. It has to be noted that even the producers of audiovisuals do not have a joint copyright clearing house in India. This should be attempted both with respect to audio as well as audiovisual segments. This would be economical in operations as well as convenient for administration.

32. The term 'visual recording' has not been defined under the Act. Either it is a superfluous appendage to a vague notion or it is a qualified cinematograph. Such a term or distinction has not been used in any of jurisdictions comparatively studied nor has such an entity sprung up in any of the international instruments. Either the term requires to be defined or the term appears to be of no relevance.

33. **Temporary Copying:** The circumstances where in temporary copying needs to be legitimized have not been mentioned in the Copyright Act or in
the section pertaining to the performers. This is a serous lacuna considering the fact that there can be in the usual course considerable inadvertent temporary storage in the digital realm while innocently harnessing the same with no intent of copying or storing the same permanently for infringement. Exceptions on the lines of DMCA in the United States and the European Directives need to be carved out in the Act.

34. Intermediary liability: Intermediary liability needs to be qualified to exempt innocent service providers who merely act as conduits for the transfer of the software. The circumstances of innocence must be defined or presumed knowledge must be defined. The traditional premises of liability under the existing Act cast an onerous presumptive liability on the intermediary. It would be instructive to follow the path taken by the European and the American Regime in this respect.

35. Anti-circumvention & Rights Management: There is a total absence of the need for rights management information and anti circumvention measures under the Indian Act. These needs to be crafted in with a delicate segregation of instances where in circumventions must be allowed taking into account the requirements of fair use. Particularly in a developing country, the use of such circumvention controls could shut out fair uses unless norms of exceptions are streamlined and defined. The issues of temporary storage, intermediary liability and that of the circumvention and rights management information are issues that need to be addressed with respect to all entities under the copyright umbrella.

36. Fair Use: There is an element of uncertainty with regard to the exact limits of fair use to be applied to performers. This needs to be removed and an assuring framework needs to be formulated. The interconnected nature of performance does not leave much scope for the separate elucidation of fair use. This has been the pattern followed in most of countries analyzed.

37. Fair Use Remixes: There is the need to amend the fair use provisions that allows version recordings and remixes of a sound recording after a period of two years (52(1)(j) of the Copyright Act, 1957) but at present this does not require the consent of the performer nor is the performer eligible to receive royalties. This needs amendment by making the consent of the
performer as essential as that of the producer or eligibility to receive royalties in the same terms as received by the producer.

38. The importation of illegal unauthorized recordings and its copies need to be checked by a specific provision in the statute leaving no room for speculation.

39. *Suggestions Specifically for the Audiovisual Performer:* In the light of the international developments, the legislations in other countries both following rigid copyright notions and the authors rights regimes and the law and circumstances in India that has been analyzed, it is evident that the audiovisual performer in India suffers dereliction by the statute. The major drawback of the displacement of the audiovisual performer from the regime of protection can be seen to be a result of apprehensions in the face of huge investments, a multitude of contributors in the making of the film and a lack of infrastructure to work the rights if ever granted. However these have been found to be addressed in other countries with equally cost intensive, prolific and vibrant industries by creating legal and administrative mechanisms to work the rights without jeopardizing commercial exploitation. The record of minimal litigations and smooth functioning show that these have worked efficiently in these countries. Collective bargaining and administrative mechanisms have worked well alongside state institutions and state supervision.

40. The following propositions emerge for a copyright-based remedy to performers in audiovisuals in India. The performers in audiovisuals have always been treated distinctly from the rest of the performers in respect of their rights in fixations taking into account the peculiarities in the exploitation of the audiovisual. The Indian conditions are no less different and therefore concepts need to be applied that ensure rights of the performer's and at the same time assure hassle free exploitation of the audiovisual. However while doing so the best interests of the performer have to be taken into account in the context of the general lack of proficiency in legal and contractual matters compounded by unfair bargaining conditions.

41. Upon an assessment of the nature of protection in countries such as U.S., U.K and France and the developments in the European union, the WPPT
and the nearly successful Protocol in all of which India was a keen and earnest participant, it demands that economic rights for the performer in the audiovisual along those lines need to be prescribed taking into account the special conditions prevailing in India. The rights are the right to authorize affixation of live performance, the right to authorize the broadcast and communication to the public of the live performance, the right to authorize the reproduction of the affixations, the right to distribute the affixations, the right of rental of the affixation with the right of equitable remuneration in the alternative, the right of authorizing the making available of the affixed performances, the right of communication and the right of broadcasting the affixed performances with the alternative right of equitable remuneration from the use of the performances.

42. Statutory Rights of Authorization: The audiovisual performer in India should be vested with statutory rights of authorization. This would change the way rights are viewed presently where in the absence of express contracts the rights are presumed to pass over to the investor/producer. The grant of rights would change this presumption as in the absence of a formal transfer the rights would continue to vest in the performer and any use would be tantamount to infringement. This would shield him against unlimited exploitation that the performer is vulnerable to under the guise of customary trade practices. However a grant of rights in an unfair playing ground where in the majority of the performers are placed in an unfair bargaining position would result in an outright assignment of rights through written instruments. This would not improve the status of the performers under the copyright regime. Further there also fears that commercial exploitation could be cumbersome if the performers either conditionally licensed or failed to grant rights for future exploitation. Therefore a way out of this imbroglio would be the concept of 'presumptive transfer' that has been mooted at both national and international forums for managing rights in the audiovisual.

43. Presumptive Transfer: The option of presumptive transfer of rights is best suited to Indian conditions, as it has proved that the mechanism has worked well either through statutory mechanisms or collective bargains in other countries particularly considering special characteristics of the
audiovisual and the difficulty of individually managing rights by the performers. Further mere endowment of rights would essentially result in outright transfer contracts unless qualified by collectively bargained agreements. In India with the collective contracts yet to seriously contain residuals and performers yet to form part of the process, that would not be beneficial. The notion of an unqualified 'presumptive transfer of right' would also be hit by this disadvantage. Therefore the statute should specify a presumptive transfer of rights with rights to remuneration from its exploitation. The rights should include the reproduction, distribution and rental, making available, broadcasting and communication to the public. This would protect the performer from unfair outright transfer of rights and a fixed payment. The statute should prescribe that any agreement of engagement of the performer with a production company or individual producer should be solemnized through a written agreement and registered with a body established for the purpose or in the absence of the same with the union representing the performer or the labor office or the copyright office. Uses to which the performance would be applied and the rights granted, including the various technologies and purposes should be separately mentioned and in the absence of specification, the rights for the specific use can be considered not to have been transferred at all. The agreement should also mention the rates for the separate uses or in the alternative the usual collectively bargained tariffs would apply or and in its absence or the actor being a non-member, the rates fixed by the labor or copyright regulatory office for the different rights and uses would be applicable.

44. Salary Distinct from Residual or Equitable Remuneration: The statute should specify that the agreement should stipulate that the salary of the performer would be distinct from the remuneration from the uses mentioned earlier. In the absence of a salary being mentioned either the collectively bargained minimum tariffs would begin to operate that would be dependent on the hours of work put in by the performer. The rates of both the salary as well as the remuneration agreed upon must always be equal or higher than that stipulated by the minimum tariffs stipulated by the collective agreement or by the state fixed remunerative structure. The
agreement should also specify the duration of the engagement as well as the nature of the role and a copy of the complete script. It must also indicate a fair estimate of the nature of treatment. Any change to the clauses of the written agreement must be ratified by the performer and the reviewed agreement should be subject to the same process as the original.

45. Copyright Law & Labor Law: Both the provision of the copyright law as well as the labor law should acknowledge the sanctity of either provision and should be read as complementary and not as overriding or as an alternative to one another. The salary on no account must be considered as encompassing future residual payments or in lieu of rights. Further the presumed status of ‘worker’ should in no way be considered to extinguish the rights bringing in the conventional employer employee relationship. However residual payments distinct from the salary may be allowed to be paid in advance for exploitation for a period of time. But this should be specified in the statute and documented with the aforementioned scrutinizing checks conducted. This could considerably ease the pressure of continuous monitoring of exploitation on collective administration units. It must be noticed that both the concept of salary as well as residual payments based on exploitation must be ingrained into the Indian system. As has been mentioned earlier to this end an amendment of the labor statutes recognizing the performer as a ‘worker’ under the statute would open up labor law protection to the performer. Though this can be achieved through collective agreements, this besides being dependent on market forces, it would also be denying those artists who are not members of the unions. Thus the French model of three-pronged protection through labor law, copyright as well as collective bargains would be best suited to Indian conditions. The non-waivability of the rights and the statutory provisions must be specified in these statutes and this should strengthen the performer generally in an unfair bargaining position.

46. Categorization: While the written agreement should be essential in respect of all classes of performers, it should be left to the decision by the collective bargaining bodies whether rights and residuals should be applicable to certain categories alone. In the absence of collective bodies
deciding on the same, it should be the state regulating body that lays down the categorization on the basis of the degree of creativity required in the performance. The statute should indicate this provision of qualifying the eligibility of performers by indicating the freedom to subcategorize, proportionate to originality and creativity. (As a distinct categorization has already evolved in the audiovisual industry, the customary ways can determine this issue with fairly definable criteria. The regulating body in deciding these matters must be composed of those in the industry along with permanent officials of state. The practices in the industry need to be taken into consideration while deciding on these eligibility factors in the absence of any collectively bargained agreements coming to an agreement on the same.

47. No Waiver: It has to be statutorily stipulated that at no instance should there be an individual waiver of these rights. This would secure the performer against outright transfer clauses. The statute should stipulate a presumptive transfer of rights of the performer in the audiovisual that can work subject to the specifications afore mentioned. (The idea of presumption is not to be considered as an affront to the freedom of contract in the artist but one taking into account the lopsided bargaining positions in the industry. While there can be a contract to the contrary against the presumption of transfer for retaining rights). The producer is free to apply the work to the uses mentioned and the rights provided. Any deviation from the same would require the express contract for the same as otherwise it would be considered as an infringement. The salary should be distinctly paid separate from remuneration from the exploitation. This secures the performer from the evil of future payment promises based on returns alone.

48. State Function & Supervision: The statute should specify either in the provisions or must delegate to a state appointed authority like the copyright Board or Tribunal in the U.K. or the Conseil d'Etat in France or the Librarian of the Congress in U.S., the right to take a decision regarding the uses and the rates for the same depending on the contemporaneous commercial utility and larger public interest. This should enable a positive discrimination between those services more commercially demanding like
for instance fee based interactive communication or broadcasts and free to air broadcasts.

49. **Minimum Guarantees**: It should be specified in the statute that the rates can be deviated from if more beneficial provisions are included in the agreement than the minimum laid down in the collective agreements or the minimum fixed by the regulatory authority or state.

50. **Non-Transmissible**: The right to remuneration must be made non transmissible and only to be transferred to collective administration societies or to be administered individually.

51. **Collective Administration**: The salary as well as the future payments should be routed through the collective administration office set up for the purpose. In the absence of collective bargaining agreements, minimum rates for the salary must be prescribed by the state as well the rates for the returns from repeat uses. The law should recognize and scrutinize the functioning of collective administration societies.

52. **Regulatory Authority**: The statute should prescribe a regulatory authority that would fix and arbitrate upon the minimum rates taking into account the changing financial prospects of the industry and contemporary market demand. A regulatory authority must render this with members from all sectors in the audiovisual industry to periodically advise and fix the rates. This becomes all the more important considering the developing nature of the economy and the lack of maturity of the collective bargaining institutions in the country.

53. **Broadcasting & Communication to the Public**: No discrimination need be shown to the audiovisual performers with respect to the remuneration from broadcasting and communication to the public, as it constitutes a major segment of the exploitation. Instead of leaving the same to the collective bargaining forces and vagaries of the market a right or an equitable remuneration right would go a long way to help the performer. As there is already a presumption of transfer right in operation, the performer would not be able to obstruct the exploitation of the right.

54. **Rights Against Third Parties**: Any transfer of the rights in the audio visual by the owner of the rights to third parties should protect the rights of the performer with respect to remuneration from repeats as well any other
remuneration as stipulated by statute or by the terms of the agreement. This should be specifically stated in the statute. This would prevent treatment based on privity of contract as a reason for non-honoring the contract.

55. Non Property Rights: The rights to record, to broadcast or to communicate to the public in the live performances, taking a leaf from the British framework, must be made a non-property right transmissible only through testamentary dispositions or by law. This would secure the performers who might lose all rights by losing the right to affix, broadcast and communicate the live performance. (An agreement to affix the same in an audiovisual would operate the presumptive right of transfer subject to remuneration).

56. Labor Law Benefits: Specific amendments need to be brought in to labor legislations in the country recognizing the performing artist as a worker and extending to the worker the benefits of the film production being declared as an industry. This would entitle him to welfare benefits in the like of provident fund, gratuity etc. (The prevalence of these three means of protection under the French law and other jurisdictions dispels the fallacy nurtured in India that creative artists cannot be classified as workers while at the same time harnessing the benefits of the residual or intellectual property protection). It must be specifically provided in the copyright Act that the labor law provisions and vice versa would not have any adverse on the protection of the performer. While collective organizations should be strengthened and conditions created so that performers would feel the compulsion to be a member of the unions as it would beget benefits for him. A statutory compulsion to be a member of the trade union would be against the tenets of fundamental rights. Nevertheless the labor law provisions complemented with copyright support would cover members and non-members alike.

57. Record of Uses: It must be specifically laid down in the statute that the producer should intimate the performer or his collective organization or the regulatory authority about the chart of exploitation of the product periodically. Penalty must be imposed in case of failure to do so.

58. Representative Deals: The statute should recognize representative deals in case of group performances. This should be permitted, provided all in
59. **Moral Rights**: There has to be a statutory grant of the right to paternity and integrity subject to exceptions for the sake of the exploitation of the performance in the audiovisual. Lack of specificity with respect to the exceptions to the moral rights have always led to problems about the allowable exceptions to rights of paternity and integrity. This can be resolved by firstly the legislation providing a detailed specification about the kind of circumstances and uses rather than use terms like 'manner of use' etc. If through a collective bargaining mechanism this can be achieved then that should suffice. Further the written authorization agreement must carry a specification about the role, the screenplay script with intimation about the possibilities of use. Any deviation from the same must require a consultation and concurrence of the performer. Remixes and version recordings covered by statutory licensing under fair use provisions must cover performers in audio-visuals in its soundtrack. Either the consent of the performer or the remuneration as stipulated should percolate to the performer as well.

60. **Moral Rights Safeguard**: The right to preview before the release of the film or publication must be specifically granted to the performer. The Copyright Board or the broadcasting authority can conduct the preview at the moment of the film certification or before certification. It would be incumbent on the producer to produce the certificate whether the cast has agreed to the final version either prior or post production of the film before publication. Though there is no parallel provision in any other countries, this would alleviate the lot of women performers who are normally exploited in the manner of depiction without them having any clue of the intent and the effect.

61. **Employer-Employee**: Circumstances of employer—employee relationship of a continuous nature like in a broadcasting organization can be considered as an exception taking into consideration, the terms of engagement in the like of a monthly salary etc but a stern set of criteria has to be evolved so that it is not used to circumvent the rigor of the rights granted. It must be borne out of a specific prescription in the contract in
writing of the intent of such a relationship. The 'Work for Hire' pattern followed in the United States could be a useful guidance. While this may affect the rights vested in the performer, the earlier mentioned statutorily imposed status of 'worker' for labor security benefits should not be confused as a relationship of employer-employee thereby extinguishing the rights of the performing artist.

62. Control Over Foreign Production Houses: Production units that arrive in the country for shooting using performer capital from India should render themselves amenable to these laws and render accounts of the exploitation chart worldwide. A specific statutory provision should mention the need for foreign production houses to be amenable to the Indian provisions and assure that if more favorable conditions exist in their country those must find expression in the contract with the Indian performer.

63. Broadcasting, Communication & Performance: The positive rights of authorization granted in some jurisdictions have stopped short of authorization rights for use of affixed performances in broadcasting and communication to the public & the right of remuneration for broadcasting and communication to the public or for the performance of the audiovisual. However this has been made up for by the prevalence of collective bargaining agreements. It is important to have a provision in this regard in the Indian law particularly in the absence of a collective bargaining contracts.

64. Making Available: The right of 'making available' being a serious threat to traditional modes of delivery in the future, a specific right of making available should be formulated to suit the Indian digital market in audiovisuals as the broadband essentially ushers in possibilities of an on-demand-Interactive audiovisual entertainment.

65. Audio and Audio-visual Fixations: There is a need for clearer delineation between the definitions of audio and audiovisual fixations. Under the Indian law the terms representing these have been sound records and cinematographs respectively. While the word cinematograph does encompass the sound track as well, it can be noticed that the sound
record does not exclude the sound track in the cinematograph. This can create scope for speculation where in the sound track performers could either qualify for sound record performer protection and vice versa. The clear-cut enunciation would be important considering the fears raised at the international conclaves by performers particularly since the audiovisual performer would be treated separately from the treatment of audio performer. The difference between a pure audiovisual fixation of sound and a reproduction incorporated into an audiovisual would need to be maintained to this end.

It follows from the study that the application of the copyright framework with aforementioned safeguards is essential both for the economic and moral right's security of the performer and the overall regulation and organization of the entertainment industry in general and audiovisual industry in particular. However, the study reveals that the current state of contractual practices, collective organization, bargaining and the statutory application are not in a highly credible state nor prepared to handle the responsibility in the country. This however should not be reason for not granting the rights but it should be stressed that only when the collective organizations, the collective administration establishments and state institutions work in tandem to administer the rights that true realization of the performers' rights can take place in a land of rich cultural heritage and promising cultural exports. It can be hoped optimistically that the grant of rights would ignite and activate the performer at the individual level, the producer interests, the collective organizations, the state institutions and policy makers to harness the right's regime positively to the advantage of the performer and the investor in the industry.

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2 Section 2(f) and Section 2(xx).