LIST OF ABBREVIATIONS

1. A.I.R: All India Reporter.
2. A.C.: Appeal Cases (L.R).
3. ADAMI: Société civile pour l'administration des droits des artistes et musiciens interprètes.
5. AIFEC: All India Film Employees Confederation.
6. AIR: All India Radio.
7. ALL ER: All England Reporter.
8. AVA: Association of Voice Artists.
10. AMMA: Association of Malayalam Movie Artists.
11. AMPTP: Association of Motion Pictures and Television Program Producers.
13. BECS: British Equity Collecting Society.
15. Ch.: Chancery (L.R.)
16. Ch.D: Chancery Division (L.R.).
17. CINTAA: Cinema and Television Artists Association.
21. CONTACT: Confederation of Television Artists Commercial Operators and Technicians.
25. DTH: Direct to Home.
29. EMLR: Entertainment and Media Law Reports.
30. FEFSI: Film Employees Federation of South India.
31. FWICE: Federation of Western Indian Cine Employees.
32. F.S.R.: Fleet Street Reports.
34. G.P.: Gazette du Palais.
35. IDBI: Industrial Development Bank of India.
36. ILO: International Labor Organization.
37. IMI: Indian Music Industries.
38. IMPPA: Indian Motion Picture Producers Association.
40. IPRS: Indian Performing Rights Society.
41. ITV: Independent Television
42. J.C.P.: Semaine Juridique
43. JOUR. COPR. SOC'Y U.S.A.: Journal Copyright Society of the U.S.A.
44. K.B.: Kings Bench.
46. MACTA: Malayalam Cine Technicians Association.
47. NFDC: National Film Development Corporation.
49. PACT: Producers Alliance for Cinema & Television.
50. PAMRA: Performing Artists’ Media Rights Association.
51. PPL: Phonograms Performances Limited.
52. PTC: Patent & Trademark Cases.
53. RIDA: Revue Internationale du Droit d’Auteur.
54. SAG: Screen Actors Guild.
55. SC: Supreme Court.
56. S.ct: Supreme Court.
57. SCC: Supreme Court Cases.
58. SIFCC: South Indian Film Chamber of Commerce.
59. SPEDIDAM: Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse.
61. UCC: Universal Copyright Convention
64. USPQ: United States Patents Quarterly.
65. WCT: WIPO Copyright Treaty, 1996.
66. WIPO: World Intellectual Property Organization
68. WTO: World Trade Organization.
INTRODUCTION

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

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

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

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

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

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

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

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

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

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

Chapter 7 concentrates on the main focus of the research thesis – performers' rights in India. A historical introspection is attempted to understand the status of performers protection or status in India from the ancient to the modern period and an assessment of its value in the intellectual property context. An assessment is made of the possibilities of the performers protection in the common law context and whether common law rights for the performer would persist in India in the absence of the statutory rights. An attempt has been made to evaluate the preparedness of the Indian law in the backdrop of the international instruments for performers rights particularly in the digital context. The attempt has been to clinically analyze and critically evaluate judicial perspectives with respect to performers rights. A critical appraisal of Section 38 seeks to bring to the fore the inadequacies of the statute and contradictions in its intent. The special reference
or the major impetus of the study is on the audiovisual performers' rights. The fairness of the exclusion of the audiovisual performer from the ambit of limited protection extended under Section 38 is analyzed by delving into the status of the performer since the beginning of the audiovisual industry in India. The effort has been to assess the adequacy of protection - legal, labor and contractual provided to the performer in the industry and to find whether an intellectual property paradigm ever existed in India. The attempt is made all the more meaningful in the context of the declaration of the film trade as an industry and the opening of investment in the audio visual sector to all the foreign investors as well. Chapter 8 is devoted to exploring these issues.

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

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