CHAPTER 1

PHILOSOPHY OF PERFORMERS’ RIGHTS AND THE CONFLICT OF INTERESTS

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

Performers’ Labor and the Philosophy of Intellectual Property

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

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2 The tradition of performing arts goes back to Vedic times in India. The theory of performing arts called Natyashastra was compiled by Bharatha muni. It is also regarded as the Fifth Veda and is a text accessible to all the castes. Saryu Doshi (Ed.), The Performing Arts, Marg Publications Bombay (1st edn.-1982), p. 2.
intellectual laborer with his own distinct creative contribution in enhancing the quality and value of the performance of the work of the author. Though the manner of creativity might have undergone a change over the centuries nevertheless the effort has been continuously recognized and patronage has been extended to encourage the performer. With the advent of fixation and scope of mechanical and cost effective dissemination of recorded performance the performers' economic and commercial value has also increased. It also brought along craftsmen in performances specially attuned to the demands of the new media. The performers' spirit to create and impress has been persistently challenged and the performer has responded ably by applying creativity and tact. In the cultural sphere, the political system of all countries have acknowledged the distinct creativity and acknowledged the intellectual prowess of the performing artist. The performer has been able to tilt the fortunes of works by sheer magic of their presence and performance.

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

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

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

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

8 Lionel Bentley, Brad Sherman, Intellectual Property Law, Oxford University Press, First Indian Edition (1st edn.- 2003), p.32. For an account of Natural rights, (f.n. contd. on next page)
with its impetus on the personality and the rights of property over labor ring literally true for the performer as it has for other forms of intellectual property. Under the general theory of labor as propounded by Locke, the performers’ subject matter finds accommodation within the labor theory of value. According to it the laborer removes the subject matter from the common state and the laborer fixes his property in them. In other words, the rationale is that the labor was to be his title to the creation. Others do not have the right to meddle with another’s labor and pain. If this philosophy influenced the juristic and the political philosophy of intellectual property then the intrinsic worth of the performers’ labor should also come within the eligibility quotient.

The profundity of the philosophy cannot be lost as even literally the philosophy propounded by Locke affirms the property of men in his own person that nobody has any right to but himself. This affirms the fundamental human right of the person to his own personality that guides him and the respective uses of both the physical labor and the faculties of his personality that guides him. Nobody has a right to the labor of his body and the work of his mind but the laborer himself. One of the justifications theoretically advanced for the creator is that it is the natural right to the product of the intellect. The creativity has to be encouraged and the social and economic justice to the creator has to be realized. The opponents of this theory would base their criticism on the basis of social utility. However, the social utility would be the value of these rights proportional to the argument, production and public dissemination of cultural products. The authors’ reference to the ancient aphorism to every cow its calf with regard to literary authorship applies in equal measure to the performers’ affixations as well.

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


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

12 Ibid. Labor marks the far greatest value of things.

13 Ibid., p.23.

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

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

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

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

\textsuperscript{18} J.A.L Sterling, \textit{op.cit.}, p.55.

Besides the natural justice arguments, there are the creative incentive arguments, general public interest arguments, social contract and the moral arguments. This can be complemented by encouragement of learning, promotion of economy and cultural promotion.

\textsuperscript{19} J.A.L Sterling, \textit{op.cit.}, p.59.

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

\textsuperscript{21} \textit{Id.}, p.60.

\textsuperscript{22} J.A.L Sterling, \textit{op.cit.}, p.43.
less eligible to protection than the entities so far protected by copyright or principles of intellectual property.

Performers' Rights and the Common Law

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

Millar v. Taylor

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

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

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

25 It should be pointed out that prior to the promulgation of the Statute of Anne also the Courts in England had been seized of the question and have decided in favor of bestowing a common law literary property in literary creations. However it was the Courts of Equity that granted the reliefs. The perpetual property right enjoyed by the authors in their literary work existed much before the statute of Anne. Even after the Act was passed there was no dispute for the next 50 years or so with respect to the existence of common law property right in literary works. This is evidenced by the decisions of the Courts of Chancery between 1735 and 1752 where in no fewer than 5 injunctions were passed protecting printed works from being pirated. All these decisions were from the Court of equity. See, Eaton S Drone, A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States, So Hackensack, Rothman Reprints, Inc., New Jersey (1972), p. 27.

was unaffected by the statute. He was successful and a favorable verdict was
given in his favor. The verdict was based on the theories of property that
substantiated the existence of a common law copyright in the intellectual labor. 27
The Judges led by Chief Justice Mansfield based their majority judgment
recognizing a common law copyright by tracing it to theories of property rights.
Chief Justice Mansfield found that the source of authors’ rights was the same
either before or after publication and connected it to the notion of justice. It was
based on the rationale that man should reap the benefit of his efforts of his own
ingenuity and labor and that another should not use the name without his
consent. Justice Willes linked the rationale of common law copyright to incentive
and as an encouragement for the efforts of learned men. Justice Aston grounded
his rationale on the basis that the author owns the produce of his mental labors.
According to him the invasion of the property right was against natural reason. It
is important to note that despite the difference with the Lockean rationale in this
regard the judge confers property right to the author. In other words to sum up it
was the arguments based on justice, the incentive and the natural rights that
substantiated the common law property right to literary property.
The judgment stood out for the manner in which the Natural Law Property theory
was relied and utilized by the judges. All the judges drew heavily from the
rationale and philosophy of Grotious, Pufendorf and Locke28. It can in other
words be rationalized that intellectual labor is endowed with quality of property
owing to the incentive it imparts, the justice it begets for the creator and
agreement with natural law that it realizes in this regard. The judges discussed
the nature and origin of literary property elaborately28. It is significant to note that
these very same questions are important from the point of view of the performers’
search for common-law precedent in order to base their rights without recourse to
statutory rights.

27 The only dissenting judgment by Justice Yates was also dependent on the very same theories
of property to negate the existence of any common law right.
28 Peter Drahos, op.cit., p.25.
28 The questions considered were of great consequences that included whether performers’ have
common law property rights in their performances?, whether intellectual productions have
attributes of property?, whether the exclusive rights of authors to multiply copies of his books
existed at common law and had been recognized prior to the statute of Anne?, whether this rights
was lost by publication? and whether it had been taken away or abridged by the Statute of Anne.
The judges maintained that literary property did exist at common law and that its ownership was neither lost by publication nor abridged by the Statue of Anne. They were supported by the general principle underlying all property that the laborer is entitled to enjoy the fruits of his labor whether manual or mental. The common-law existence of literary property was attested by its existence for two centuries. It was held that publication would not prejudice this right. As this was the only means to render his property useful. It was further held that the statute of Anne was only a cumulative remedy and did not disturb the literary property and that there was nothing in the Act to show that this was the sole object or effect of the Act.

_Donaldson v. Becket_{22}

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

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22 Eaton S. Drone, op.cit.,p.28.
24 ld., p.37. This was an appeal brought to the House of Lords from the Court of Chancery that granted an injunction based on the judgment in _Millar v. Taylor_, 98 E.R.201 (K.B.). Ten judges were for this finding while one dissented and lord Mansfield was silent on all the points in convention.
25 This was decided at eight to three.
26 Decision seven to four.
27 Decision six to five.
28 ld., p. 38.
Two thirds of the judges who advised the Lords or three fourths including lord Mansfield held on to the doctrine that in the absence of any statute literary property exists in common law and is not lost or prejudiced by publication. There was nothing in the judgment in Donaldson v. Becket to unsettle this doctrine or to overrule the position in Millar v. Taylor so far as it affirmed it. On the other hand the finding in Donaldson v. Becket that the Statute of Anne took away the right is an implied recognition of the existence of the right. It is noteworthy that after the case law of Donaldson v. Becket, support for the propositions not overruled by the judgment began to emerge from the British Courts.

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

40 For instance, in the case law of Jeffrey v. Boosey (1851) 4 H.L.C.961. The Court of Exchequer as well as the House of Lords gave expression to the ruling. The Courts were still aligned to the masterly analysis by Lord Mansfield who had ruled in favor of common law copyright for intelectual productions. However, there have also been decisions contrary to the ruling since Millar v. Taylor, 98 E.R.201 (K.B.) and Donaldson v. Becket, 98 E.R. 257, in which the injunctions granted in favor of the petitioner, has been dissolved. In circumstances where in an injunction had been initially granted against the publication of a book in which copyright had expired. Cited in Eaton.S.Drone, op.cit.,p.42.
41 See Beck Ford v. Hood, 101 E.R 1164. This is the only case cited as an instance of continuing application of common law copyright to literary property. However the circumstances, it is evident that there were reasons for this exception. Cited in N.S.Gopalakrishnan, op.cit.,p.152.
42 Section 31 of the Copyright Act, 1911 read: 'abrogation of common law rights: - no person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provision of this act or of any other statutory enactment for the time being in force, but nothing in this Section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.'
to have found space for validation as intellectual property and protected under the aegis of common law property rights unaffected by the strictures and prejudices of the statutory provision. However the section had a dissuading effect on the English Courts. It did not merely confine itself to the subject matter specifically mentioned in the legislation but the intent cast a shadow in its approach to attribute property rights to other intellectual subject matter claiming a property character and civil remedies as well. Despite being a criminal deterrent legislation, the courts found the presence of Dramatic and Musical Performances Act, 1925 a dissuading factor to attribute property rights to Performers’ performance directly. Though in the course of evolution these property rights were indirectly recognized on other premises and principles.

This position in England is important for the performer in the Indian context considering the fact that both countries have a common historical pedigree and a continuity of the copyright system. The Copyright Act, 1914 promulgated in India is a replica of the 1911 enactment. It also carried the preemption clause. However there was no statutory expression of copyright for the performers labor. Therefore the Common Law property in intellectual creations that was recognized in Donaldson v. Becket, 98 E.R. 257, cannot be considered to have been impacted by any statutory expression in India. Under the Copyright Act, 1957 also the prohibition is against any copyright in any work other than through the means of the Act, but neither performance nor the performer is included in the term “work”. Therefore a common law property right could very well be endowed on the performer in India.\(^3\)

In the United States of America, the case of Wheaton v. Peters\(^4\) posed interesting questions in the new land about the existence of common law literary property and its existence. The case decided in the year 1834 is a standing precedent. It deviates from the position laid down in Donaldson v. Becket, 98 E.R.257, on several of the important propositions. The two questions before the Supreme Court were whether the copyright in a published work existed in common law and if so whether it had been taken away by the statute of 1790. The Court held that the law had been settled in England that since the passage of the Statute of Anne, an author had no right in a published work except to the

\(^3\) Though there are no case laws, which have attempted recourse on this premise.

\(^4\) 33 U.S. 591.
extent secured by statute. Significantly, it was also proclaimed that there was no common law of the United States and that the State of Pennsylvania in which the cause of action had arisen too had not adopted one. The copyright most importantly did not affirm an existing right but created one. The interpretations, analysis and criticisms of the judgment have pointed out that the judgment has only based itself on two grounds that the common law of England did not prevail in the United States and that in England it had been decided that the common-law property in published works had been taken away by statute. The first basis is no longer holding and has been swept away. The doctrine is well established that a complete property in unpublished works is secured by the common law. The Supreme Court in the case of *Wheaton v. Peters*, 33 U.S. 591, admitted this position. This decision has been followed by the same forum, the Circuit Courts and several State Courts in the United States. It has been logically analyzed that if there can be a common law in unpublished productions, then there is no principle that exists independently of the statute by which it can be held not to prevail in the case of published works. In fact there have been differences between what constitutes publication among the State Courts and in the Federal Courts. From the aforementioned analysis it is inferable that historically, logically and by means of analogy, performer can be afforded protection by means of common law rights even in the absence of specific statutory streamlining. This possibility was inherent in the Anglo-Saxon as well as in the Anglo-American jurisprudence applicable to intellectual labor.

**Performers' Rights and the Conflict of Interests**

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

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45 Eaton S. Drone, *op. cit.*, p.43.
46 *Id.*, p.44. Three of the judges were in favor, two against and one in absence.
47 *Id.*, p.47.
48 See chapter three for an analysis of the case law developments in the United States with respect to the performer where in publication has been interpreted to safeguard the property rights of the performer.
and doctrinal reasons. The major adversaries have been the traditional entities like literary and artistic subject matter that have enjoyed copyright protection as well as the modern eligible entities like the producers of cinema, sound recorders and the broadcasters and other communicators to the public whose existence is fused with that of the performers. As new media in a digital world continues with its influx, the queue of actors in this tussle continues to lengthen. The Internet and the phenomenon of convergence pose additional challenges to the performer as well as the rest of the entities in the copyright realm. The grounds of opposition at times have been different and at other times have been based on similar premises though it arose from different interests. One can discern a commonness and similarity between the various arguments put forth and against the grant of performance rights where ever in the world the debate has surfaced. The similarities are not only with regard to the issues involved but also with regard to the personalities and institutions involved and the stances which they adopt. The intractable conflict of interests have seen but for a few exceptional countries prolonged inertia and circumspection on the part of the legal decision makers, awaiting clarity and definition of the economic and legal consequences if the performance right is granted. It has been a century of thought and tentativeness based on real and hallucinated misgivings and fears. The arguments can be grouped into economic, equity and constitutional premises.

Performers' Rights and Threatened Interests of Authors'

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

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49 Both copyright and continental countries have reservations based on a conservatism, which they found, threatened if performers were accommodated automatically.
the authors so agree to its acceptance. It is further qualified that the rights should only cover those of a limited field in the performance, recording or broadcast.\textsuperscript{51}

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

\textit{Loss of control}

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

\textsuperscript{52} Id., p. 160.
\textsuperscript{53} Id., p. 159.
\textsuperscript{54} Richards Arnold, op.cit., p. 7.
Consumer to Bear the Brunt

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

Representative Hegemony

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

Questions over Economic Viability of the Industry

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

\textsuperscript{56} Id., p.160.
\textsuperscript{57} Id., p. 163.
misgivings have been voiced on the imposition of a performance fees and the consequent royalty rates could have deleterious impact on the health of any particular industry particular industry and also alter the relationship between the industries. However the performers' have countered that no such difficulties have surfaced in countries where performers' rights have been appropriated to their legislation and rather the performers' would only be too glad to facilitate the use of their performances rather than be a stumbling block. There has not been noticed any fall in the remuneration of the author's remuneration because the deal includes paying the performer. It has been pointed out in studies by the copyright office in the United States (and several other countries where such studies have preceded adoption) revealed that it would not pose any detriment to the broadcasters industry, if the performance right were granted to the sound recorders and the performers.

Opposition Based on Burden on Broadcasters and the Consumer

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

59 The reports on the economic impact vary from one country to another. The Canadian and the Australian report show that a high cost would have to be borne by the industries and for supporting the same through collective infrastructure. They also forecast that the models are not conducive to generating employment at a brisk pace.


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

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

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

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

Inadequate Compensation

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

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

64 Ibid.
66 In the states it was a contest between the performer and the recorder with the broadcaster. It is interesting there does not seem to have been much opposition from the recording industry to the quest of the performer as regards performance rights. However there does not appear to have been much consternation with regard to granting the rights to their live performances in its transfer to the recordings. Either it was never debated with all the attention focusing on the exploitation by the broadcaster or the performers' were happy with the contractual agreements entered into with the recording producer.
employed lot and then there are those waiting for their first breaks on whom none are willing to place their bets. However critics argue whether a performance right would beget equitable distribution of wealth. There was also a weak argument that as there are performers who are composers as well it would not be befitting for them to be provided with two rights.

**Aid to Performers of Unpopular Numbers**

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

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

69 Id., p. 27.

70 Ibid.

Equity

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

72 Gary L. Urwin, op. cit., p.28.
Rights Imperil Freedom of Speech

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

Stimulant to Artistic Creativity

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

Argument Based on the Interpretative Width of Words

The hangover of legislations with respect to literary and artistic property creates a mental block when it comes to accepting new forms of intellectual property for legal protection. While in some countries it is the definition and meaning to be appended to the word author or work that is brooded upon, in others it is the more direct and apparent guidelines like the constitution that guide interpretations. The word "writings" in the American constitution have sufficiently provided the detractors of performance rights with the weapon to cry that a
performance on a record cannot be considered writing\textsuperscript{77}. But their Courts have expansively interpreted the same and accorded 'records' the status of writings, as it is a method of fixing creative works in a tangible form. Such dilemmas have been encountered in other jurisdictions as well. Interpretations of the words 'dramatic performances' as to who are authors and what is originality have been encountered elsewhere as well. But the legislative intentions have been sufficiently straightforward and precise providing no leeway for the interpreter. But the word writings in the American constitutional lexicon was narrowly construed and lent an additional arm to the confusion, as even the eligibility of a tangible fixation was doubtful.

\textit{Derived Execution}

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

\textit{Unqualified General Protection}

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

\textsuperscript{77} Gary L. Urwin, \textit{op.cit.}, p.36.

\textsuperscript{78} \textit{id.}, p.37.

\textsuperscript{79} Richard Arnold, \textit{op.cit.}, p.5.

\textsuperscript{80} \textit{id.}, p.6.
relatively negligible obstruction in exploitation from any performer with or without compulsory licensing in different countries.

*Question Over Creativity*

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

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81 Gary L. Urwin, *op.cit.*, p.44.
82 While the effort of creativity might not seem equally distributed nevertheless that is something to be left to consensus. *Id.*, p.49.
**Best Left to Market Forces- Freedom of Contract**

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

**Anticompetitive Trends**

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

**Era of Convergence**

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

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\(^{84}\) *Id.*, p. 7


\(^{86}\) Brad Sherman and Lionel Bentley, *Performers' Rights: Options for Reform* (October 1995), Report to assist the Inter Departmental Committee constituted by the Government of Australia to
The characteristics displayed by the performer fully confirms to the theoretical justification that was used for the substantiation of intellectual property. This positively points to the eligibility of the performers creative labor in the intellectual property firmament. An assessment of the chances of performers' protection within the common law regime points out to strong possibilities of protection. The aforementioned elucidation of the conflict of perspectives between the authors, producers, broadcasters, users and the performers regarding the grant of rights to the performers is indicative of the issues to be tackled by the legal system in any country that desires to find an agreeable solution to the issue of performers' rights. The philosophy, economic and legal logic has nevertheless found the diverse jurisdictions applying themselves to realize the rights to the optimum extent possible and the conflict of interests has never been found to be insurmountable in character.