CHAPTER TWO
JUDICIAL AND LEGISLATIVE DEVELOPMENT OF
PERFORMERS’ RIGHTS IN THE UNITED KINGDOM

Objective of the Chapter: This chapter endeavors to study the evolution of performers’ rights in United Kingdom and understand the judicial, legal and administrative means adopted to secure a balance between rights and commercial expediency in order to secure the rights of the performers. The study is significant from the Indian perspective considering the common legal history particularly with regard to copyright law.

Statutory Attempt to Protect the Performer

Moves to realize statutory protection for performers in United Kingdom were made comparatively early. In Great Britain the first legislative moves in this regard was made in the year 1925 through a Private Members Bill. Though it received state support during the legislative progress, it is noteworthy that it was the interests representing the industry that decided to sponsor a bill on behalf of the rights of the performers’ in England. Thus it was to be expected from the outset that the endeavor to secure a statutory protection would only go to the limit where the interests of the sound recorders or the broadcasters would not be hurt. This is evident from the criminal remedy that was proposed by the proponents of the bill rather than a civil remedy that would ostensibly have provided the performer with some right akin to that of a proprietary interest. That would have got them far too close to a copyright status for the interests in the industry to feel comfortable. Further, it could be said that it could have been one way for the sound recorders to rein in the broadcasters who were causing great consternation to them and the performers’ by exploiting affixed performances and live performances without authorization and without limit. The bill was moved with

1 Initiated by Sir Martin Conway in the House of Commons. It is significant that it was only a private members bill rather than one that was moved under the aegis of the state. But the Bill did receive the support of the government. Richard Arnold, Performers’ Rights, Sweet and Maxwell, London (2nd edn., 1997), p. 14.

2 Ibid. The primary sponsor of the Bill was the Gramophone Company Limited now EMI records.
the ostensible intention of improving the broadcast programs in order to encourage the performers' to come forward and exploit their talents through the new media. This can be considered as a way that the broadcasters found to boost the confidence of the performers' as they were desisting from participating in programming owing to the easy susceptibility to piracy off the air. It also negatively impacted the relationship between the performer as well as the gramophone companies as the latter lent or licensed the product to the broadcasters. Thus, for the aforementioned reasons the performers' confidence had to be boosted through some credible tangible legislative means. It can be inferred that the broadcaster as well as the gramophone or the sound recording companies stood to gain and there was an interest in the advancement of some kind of protection for the performer.

Civil Proprietary Rights Considered

Significantly, Parliamentary interests were not oblivious to the requirements of a proprietary right or a civil right in order to make the same an effective remedy. Though it was mooted in the parliament it did not find acceptance in the House of Commons and was overruled. The proponents did attempt to bring the same within the ambit of the Copyright Act rather than attempt a separate legislation; this was vehemently opposed on technical and administrative grounds. It was also advanced that an effective remedy lay in injunction and damages. Thus it can be noticed that as early as in 1925 the need was voiced in the parliamentary debates to bring the issue of performers' protection into the copyright spectrum and to grant statutory civil rights.

3 Ibid.
4 Ibid. The reason advanced for initiating the Bill does not make any mention of the performers' interest explicitly but only that of the industry as a whole. The concerned bill apparently had the approval of the broadcasting industry; the gramophone companies as well as that the artists despite being provided a mere criminal remedy- Statement by Earl of Shaftsbury in the House of Lords.

5 Ibid. Henry Slesser propelled this debate. Whom Slesser represented appears to be an interesting question whether he was the spokesman for the performers' does not seem apparent but his utterances seem to be genuinely in their interests. Though out voted it appears he raised an important point, which would otherwise have been by passed.

6 Id., p.14-15. Statement of Sir Viscount Haldane in the House. The Bill was passed on July 31, 1925 without amendments.
The First Legislative Initiative- The Dramatic and Musical Performances Act, 1925

The first initiative to grant the performer any protection under the law was made by the English legislature in the year 1925\(^7\). There were no reported case laws that addressed and decided the question of performers' protection prior to this enactment\(^8\).

**Salient Features of the Act**

The Act as it finally fructified was a preventive criminal measure to stall unauthorized reproduction of dramatic and musical performances\(^9\). It was an offence under the Act to knowingly make records directly or indirectly from or by means of the performance of any dramatic or musical work without the consent in writing of the performer\(^10\). The protection was targeted or was confined to the audio products that is making of records. The reproduction could be rendered either directly or indirectly and this could mean through means other than from the original recording and could also be from the recording of the artists\(^11\). It covers any dramatic or musical work that holds the audio part of the performance. The use of the words dramatic or musical works could mean works based on a prior literary or artistic work though such a controversy does not seem to have arisen. Significantly it is stipulated that the consent is required to be in writing—in other words, oral consent would not be sufficient\(^12\).

The abettors or contributory infringers along with the offender are equally liable—this includes those who sell, let on hire or distributes for the purposes of trade or

\(^7\) The Dramatic and Musical Performances Act, 1925.

\(^8\) The judiciary as well as the litigant could have been restrained owing to the preemptive tenor of the 1911 enactment that made the extension of copyright protection to new entities virtually impossible judicially unless the parliament legislated on the same.

\(^9\) *Ibid.* The preamble expresses only this idea. Appendix 2A.


\(^11\) It is unclear whether imitations would come under the purview.

\(^12\) Richard Arnold, *op.cit.*, p.274.
by way of trade exposes or offers for sale or hire any record. The contributors’ liability arises only if the offence was for the purpose of trade. Interestingly the public performance of the record has also been accounted for, though what is used for public performance must be the pirated one or the stolen one. By way of punishment, the offender is liable to a summary conviction and to a fine not exceeding 40 shillings for each record for which the offence is proved. But a maximum limit of fifty pounds has been placed on any transaction. However if the purpose was with a non-trade objective even the principle offence of unauthorized production of the records has been exempted. The mere possession of essential equipment to commit the crime (but not actual execution) of the Act would invite a fine not exceeding 50 pounds. The Courts are empowered to order destruction of the records or plates used for making the copies. The Act was strictly confined to audio records or similar contrivances for reproducing sound – leaving open the question whether the audio segment of an audiovisual would be included. The performance of any dramatic or musical work includes any performance, mechanical or otherwise of any such work that the performance is rendered or intended to be rendered audible by mechanical or electrical means. Importantly, the Act defined the term “performer” as meaning the persons whose performance is mechanically reproduced.

Criticism

Though there is no mention that performance needed to be derived from any "work", in order to be a prerequisite to qualify as a performance under the enactment nevertheless the title of the enactment appears to be self-explanatory in this regard -Dramatic and Musical Performances Act. This can be considered ambiguous and susceptible to varied interpretations. The maiden legislation for the performer was explicitly a criminal deterrent measure but without any corporal penalty. The imposition of a paltry fine (upon a summary conviction) was the only...
consequence to fall upon and deter the offender. This symbolic statute, though a harbinger of greater reforms would not be enough to counter the organized pirates and bootleggers. Though the audiovisual market might not have been as well developed as the audio segment nevertheless the Act had left out a key sunrise sector that profited from performances and was exploited by the pirates and the bootleggers. The Act did not provide a civil remedy by way of injunction and damages to the owner of the recordings or to the performer and therefore was a soft legislation, as without these the rights of the performers’ would be rendered nugatory. There was no explicit mention as to who possessed the locus-standi to move the Court. There is no guidance in the Act with regard to the qualitative criteria to be fulfilled in order to be a performer as the definition of the word “performance” was a weak functional definition. The legislation seeks to protect the subject matter that is the performance without reference to its character either as property or a quasi-property. It is significant to note that neither is there an express negation of the fact that it is either property nor is there a mention whether it is anything in the nature of property. This confounds the interpreter as even though not ordained as being protected by copyright standards, it still could have had the property right qualities recognized. This ambiguity in the Act led to ensuing case laws.

Judicial Perspectives on Performers’ Rights

The first case law within the ambit of Dramatic and Musical Performances Act, 1925, arose in the year 1930, five years after it was enacted. In the mean time there were no reported case laws as referred to in the commentaries with regard to any criminal proceedings to check infringements of the enactment. Interestingly the first case law, Musical Performers’ Protection Association Ltd. v. British International Pictures Ltd. sought to pray for a civil remedy rather than a criminal indictment against the alleged offenders. The plea was for an injunction to restrain the commission of a criminal offence that was essentially a civil tool in

21 (1930) 46 T.L.R. 485, cited in Richard Arnold, op.cit.,p.15. The cause of action arose during the course of the making of the Alfred Hitchcock film Blackmail. The defendant was the production company that hired musicians to provide incidental music to the film. Although the defendant paid the musicians, the latter were not asked nor did they consent in writing to the incorporation of their work in the making of the film. However five of the musicians later assigned their rights under their 1925 Act to the present plaintiffs who brought the proceedings.
a civil remedy. The question to be resolved by the Court was whether the 1925 Act granted a civil right and a civil remedy for any right of property.

The Judge did not feel inclined towards these arguments and declined to grant the prayer of the plaintiffs upon the following grounds. Both substantial and practical issues influenced the decision of the Court. The Judge was impelled by the fact that there was no hint of any reference to the Copyright Act in the new Act. Further the Act only provided for fines and no penalties were prescribed. Therefore there was no indication of anything propertied percolating to the performer. According to the Judge both non-copyright and copyright protected works come within the purview of protection of the act. Further, any member of the public could initiate prosecution. The court inferred that the Act was deliberately worded to preclude a property right being read in. the Judge was also further awed by the prospect of 100 separate rights of property being administered for a performance composed of a hundred performers.

A Critical Viewpoint

From the judgment it appears that the right to property in intellectual labor appears to be one that can only be legislatively conferred. Only if civil remedies are explicitly conferred can a property right said to have been conferred. Though this appears to be a handicap specially confined to the realm of intellectual property and English legal statutory and judicial discourse. There is not even a murmur of performers' rights akin to that of common-law literary property even if in the present circumstances, the performers' had rendered the services though the question was as to the extent of authorization.

The judgment also exposed the other frailties that the performer was confronted with in the frame of the 1925 Act. Even with the criminal remedies afforded to him, he did not have enough teeth to counter infringements in order to compensate him and provide equal justice. The fines that were imposed on the violator went to the crown . The fact that the prosecution could be launched by anyone further diluted his responsibilities. Rights were to be determined by the kind of remedies that were conferred. A concern that the Judge echoed was the

22 Richard Arnold, op.cit.,p.16.
practical difficulty involved when a number of performers were involved in a performance.\textsuperscript{23} Thus hypothetical practical and technical difficulties appear to have overwhelmed the judicial mind in the interpretation of the 1925 Act. Even though the principle of civil injunction and damages for breach of statutory duties was commonly resorted to and granted by the Courts in England, the Courts were not inclined to apply it to the performers' under the canopy of the present Act\textsuperscript{24}.

The Gregory Committee Report

The Government of United Kingdom constituted the Gregory Committee in 1952 to go into questions and issues in copyright law revision that included the revision of performers' rights. The Committee put to rest all speculation that the Act of 1925 granted implied rights of a civil nature that was explored in the Blackmail case\textsuperscript{25} in the year 1930. The artists' representation to be considered as entities eligible to copyright protection was out rightly rejected by the Committee. The Gregory Committee Report clarified that the 1925 Act did not propose to give civil rights to the performer. The Gregory Committee Report out rightly rejected the recommendations of the Musicians union, Equity and the Variety Artist’s Federation to give performers' a right in the nature of a copyright. Among the several reasons cited in support of the decision the one that strongly influenced their position was that it was not done before.\textsuperscript{26} Thus the lack of an authoritative precedent in law and practice was advanced as a substantial reason to refuse to the performer a claim to a civil redress.

The 1958 Act

Influenced by the recommendations contained in the Gregory Committee Report, the Dramatic and Musical Performances Act, 1958 was passed in United

\textsuperscript{23} Id.,p.16.
\textsuperscript{24} Groves v. Lord Wimborne [1898] 2 Q.B.402. No further case seem to have come up under the 1925 Act and this seems to point not to the efficacy of protection for the performer rather the there seems to have been least inspirational impact on him to spur him into the litigation.

\textsuperscript{25} Justice McCardie appears to have been vindicated in his judgment 20 years later.
\textsuperscript{26} The Gregory Committee Report, 1952. Richard Arnold, op.cit.,p.16.
The enactment had the following differences with its predecessor. It was a certain improvement over the pioneering legislation of 1925. Alterations were made with respect to the penal provisions that included not only enhancement of the existing fine but it was supplemented with corporal punishment (of imprisonment), in addition to the fine that was the only punitive measure in the prior enactment. The amount of fine was also raised from the previous ceiling of 50 pounds to 400 pounds. There was an alternative to those who could not pay the fine, which was to undergo imprisonment on conviction or indictment for a term not exceeding two years or to a fine or to undergo both. The need for authorization of the performer for private and domestic purposes was exempted but the use for non-trade purposes was not exempted. This is a significant difference from the prior provisions in 1925 enactment. The most noteworthy of the additional coverage was with regard to the extension of the Act to cover performances in cinematograph films. The making of cinematograph films knowingly without the consent of the performers' was also made an offence. The consent of the performer was required to be in writing. It had to be from the performance of a dramatic or musical work. The recording could be made directly or indirectly. While the consent in writing was made compulsory with respect to performances in cinematograph, imprisonment as a punishment was not prescribed as a punitive measure for the infringement of the performers' right in the cinematograph. It was also made an offence to sell or let for hire, distribute for purposes of trade or expose for sale or hire the cinematograph film so made. The use of the film for exhibition purposes to the public was also a violation of the provisions. The only use that was exempted was that of use for private or domestic purpose. It is noteworthy that knowledge was made an ingredient for liability.

28 Section 1. Id., p.276.
29 Ibid.
30 Section 2(a).
31 Section 2(b).
32 Section 2(c)(Proviso).
33 This narrows down the scope for convictions.
Another striking addition was the imposition of penalties for broadcasting without eliciting the consent of performers. Broadcast of a performance could be done only with the written consent of the performer. This was to be observed even if it is only a partial performance that was covered. Interestingly imprisonment was not extended to infringement through this form of communication and the fine does not exceed 400 pounds. There is no distinction in treatment with regard to those who are in possession of plates. For the first time special defenses were introduced. There was an elaborate provision for fair use concerns. If the record, cinematograph, broadcast or transmission to which the proceedings relayed was made or intended for the purpose of reporting current events then it was not be considered as infringements. If the recording was only a background or incidental to the principal matters composed or represented in the film etc, it will not attract the provisions. That is incidental usage did not warrant any consent from the performer.

Another significant addition to exemptions was that the exploiter who bona-fide (in good faith) believed that the consent had been procured from the performer would be exempted from liability as if it had been proved that the performer had themselves consented in writing to the making of the infringing matter. Private and domestic uses were also exempted. In a sense the 1958 enactment was an advance over the prior Act having taken into account the technological changes as well as the performers' concerns therein. The performer's definition has not been attempted and any one whose performance can be mechanically reproduced is considered a performer. Therefore a descriptive or explanatory or functional definition has been attempted.

The Performers' Protection Act, 1963 (amended)

The 1963 Act amending the law relating to the protection of performers' was enacted in order to give effect to the Rome Convention. The difference from the
prior enactments besides the wording of the title has been that there has been a more specified enumeration of performances with reference to works in relation to performers. The existing ambit of the term performers and performances had got narrower. The extent of the enactment was expanded to include performances that took place outside the United Kingdom and the infringement-taking place inside the United Kingdom. Though Infringements outside were not to be entertained. A new provision was incorporated for taking care of offences by corporate bodies identifying those who were responsible in case of any misdemeanor by the companies. Live transmissions without the consent in writing of the performer otherwise than through the use of a record or cinematograph film or the reception and the immediate retransmission of a broadcast either to a subscriber or through wires or other paths, provided by a material substance so as to be seen or heard in public was made an offence under the Act. Cable programs and the possibilities they afforded were taken into account. Any infringement would invite a fine not exceeding 400 pounds and a minimum of 50 pounds.

This Act was the result of international pressure particularly following the Rome Convention in the year 1961. Interestingly without making any change in the criminal remedy afforded, the ambit of the Act was expanded. It might be reminded that the Rome convention was never particular about the means employed to beget protection for the performer. Thus the British idea of offering a criminal remedy was never in disagreement with what was adopted at Rome. In fact the United Kingdom proudly claimed that it had influenced Rome. However changes were brought about to the Dramatic and Musical Performances Act by amending the title to Performers Protection Act, 1963 to suit the Rome agreement. Changes were made to the definition of the term 'performer'.

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41 Ibid. Section 1.
42 Ibid. Section 2.
43 Ibid. The 1956 Act that was passed extended the Act to films but kept the criminal remedies intact. It has to be noted that the performer in the audiovisual film also found a criminal remedy under the 1956 Act. This seems to echo the general European trend of not isolating the audiovisual stream from the statutory initiatives.
44 Section 4-A.
45 Id., p.281. Section 3.
46 Section 4.4
47 United Kingdom was opposed to the grant of a full-fledged authorization right at the Rome convention, 1961. Richard Arnold, op.cit., p.18.
provision was incorporated to make it clear that the place of performance was immaterial. Notice was taken of the possibilities of cross border exploitation particularly the use of cables. Further it included the extension of the Act to records made abroad without consent required by the local law and to extend the Act to the relay of performances by wire. The present statutory regime under the Performers' Protection Act was considered to be working satisfactorily as there were very few prosecutions under the 1963 Act. An increase of fines was effected in the 1972 amendments to the Performers' Protection.48

An Assessment of the Act and the Amendments

An analysis of the provisions and the amendments show that infringements began to be taken more seriously by the lawmakers. The increase in the fines shows the realization for the need for more deterrence to be built into the law. The introduction of corporal punishment is also a pointer in this direction. The recognition of records of performances effected outside the state and the protection accorded to these upon fulfillment of certain criteria within the country shows the credence given to the cross border exploitation under the onslaught of novel technology like broadcasting. Possibilities of evasion by resort to corporate ownership were to be curbed by the attribution of culpability to specific officers under a principle of presumption. One of the most significant features of the performers' enactments in Great Britain has been the fact that both the media (audio and the audiovisual) were taken into consideration for protecting the performers' labor. There was no discrimination meted out to the audiovisual performer. This is noteworthy considering the fact that the Rome convention that had influenced the legislations in several countries (including United Kingdom) had discriminated against performers' in audiovisuals by excluding them from the purview of the Act. However United Kingdom seemed not to oblige the spirit of the Rome convention in this respect.

Drawbacks

The imposition of fines did not directly benefit the performers' since the fines went to the state coffers. Though the State claimed that the Act functioned

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48 See the schedule appended to the Act, ld., p.284.
immaculately, nevertheless there were several cases that came before the Courts expecting to beget a civil injunction remedy rather than stay limited to the apparent criminal remedies. The right of the performer cannot be invoked once the consent was granted and further duplication of the affixation and sale by third parties of the records for which consent was given. There was neither attribution nor remedy for the violation of any moral right of the performer in his performance.

Apple Corp. v. Lingasong Ltd.

In Apple Corp. Ltd v. Lingasong Ltd.49, the plaintiffs were the famous five of pop-the legendary Beatles. The subject matter of contention was the performance rendered by them in a star club in Germany, Hamburg. Upon an oral consent by one of the Beatles in the presence of others, one Mr. E.W Taylor made a tape recording of the same. No consent in writing had been granted by the singers. The affixer offered to sell the same to the manager of the troupe for a price. But the price offered by the affixer-recorder was not found agreeable by the manager and was refused. After a gap of 10 years an offer was made yet again to the Beatles with a price tag of 10000 $ and a royalty but this was again refused. In the year 1975 there was a proposal from Lingasong Music Company to convert the same into gramophone records. In response to this deal and the impending release of the gramophone records, the Apple Corp., the Beatles company, moved the Court for an injunction against Lingasong seeking to restrain the defendants from making, selling or distributing by way of trade records or tapes reproducing the Hamburg performance by the Beatles together with a prayer of injunction against passing off as also against unlawfully interfering with the plaintiffs trade or business or50 legal relations.51 The claim was based on the Dramatic and Musical Performances Protection Act, 1958 and The Performers' Protection Act, 1963.52

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50 Id., p.347.
51 Ibid. Surprisingly and rather intriguingly the plaintiffs did not contend on the basis of ownership of copyright.
52 However in the meantime, the Courts seem to have been accessed with much frequency for the criminal redress but often the Courts as can be perused in arguments for a civil redress, the Courts did grant injunctions in the nature of Anton pillar even in a criminal proceeding. Though
Justice Robert Megarry opined that the Act of 1925 and 1958 could not be regarded in isolation without reference to the Copyright Acts. The Court reasoned that the parliament enacted these limited remedies and abstained from conferring any copyright in a performance. Therefore the action of the petitioner was to bring a right of action in tort for the breach of statutory duty that would confer something in the nature of copyright on something that parliament has refrained from making the subject of copyright. The Judge was convinced by the observations of Justice Mcardie in the Blackmail Case. In relation to the Rome convention, 1961, the Judge pointed out that though changes were brought into the ambit of the enactment but it left the structure and operation just as it were. The criminal remedy was an act of deliberate selection and not an omission. The Court also noted that the though only some sort of oral consent was given to the making of the original tapes but even that is not enough to grant any equitable relief. Equity, it observed, had a long tradition of decorously disregarding the statutory requirement of writing. Even though the difference between consent for primary fixation and the right to make copies was pointed out, the Court did not deem it necessary to interfere. The Court also took into account the long silence from the plaintiffs on this issue as negating and estopping (preempting) the right of the plaintiffs to a civil Action.

The Whiteford Committee Report

The Whiteford Committee went into the question of performers' rights in the year 1976. The Rome convention, 1961 and its provisions to which Britain was a signatory impelled a need for the study of performers' status by the Committee. On the question of the definition of the term "performer", the Committee was convinced that protection needed to be extended to cover variety artists. Though they refrained from attempting a definition of the term "variety artists", the

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55. Id., p.109.
Committee observed that it must include acrobats and jugglers within the definition of the term "performer". While the move was a break from the conservative attitude of linking the performers' protection to the performance of a literary, dramatic or an artistic work, the paradox was that it appeared to lay down an arbitrary new line of segregation. Though the Committee considered sportsmen as being ineligible for protection, it did not explain under what rationale the distinction between sportsmen and variety artists was to be maintained. This is a striking anomaly since both acrobats as well as jugglers are performers' of "non-works" that earlier on were excluded together with sports or other "non-scripted" events. Thus once the distinction between works and non-works no longer prevailed, any attempt to pick and choose performers' from the non-work based category smacked of arbitrariness and the preference was inexplicable. But the Committee did not dwell or elaborate on this other than express its preferences.\(^56\)

With respect to 'defense' to infringement, the Committee also advanced the opinion that the requirement to prove knowledge or that the defendant had the knowledge need not be discharged by the petitioner or the complainant but the defense of innocence was to be exercised by the defendant if he \textit{bonafidely} believed that he had reasonable grounds to believe that the consent of the performer had been obtained.\(^57\) The Committee suggested that the penalties imposed should be constantly reviewed.\(^58\) It felt that this could be done by taking note of the changing technology and communications environment. Even though the Committee did not make any suggestions regarding the desirability as to whether an upward revision was required or not, it is noteworthy that the dynamic environment in which the performer operates had been taken into account and the need for variations suggested.

A most significant recommendation made by the Committee was with regard to civil redress that had been a long-standing demand of the performers'. Though the Committee felt that it was difficult to confer any new property right as according to it that was outside its agenda, it nevertheless endeavored to confer new remedies. It was for the first time that a governmental body in the United

\(^{56}\) \textit{Ibid.} \\
^{57}\) \textit{Ibid.} \\
^{58}\) \textit{Ibid.}
Kingdom was keen on providing the redress through injunction and damages to the performer. Though this was not tantamount to granting full property status to the performers' work, it was in fact just falling short of it. The Committee was against granting a copyright status to the performer as it felt that the grant of rights to his performance could lead to practical difficulties. The right to civil redress appears to have been recommended without addressing the rest of the issues that were voiced earlier on with regard to the conferment of a civil redress. The Committee recommended that Section 2 of the 1963 Act should be amended to avoid a construction of reciprocity.

Most significantly, the Committee discarded the need for consent to be made in writing. This would make contracts vulnerable to a lot of interpretation particularly oral contracts and its implications. There is no justification advanced by the Committee in negating the need for consent of the performer to be made in writing. The Committee preferred a consolidated Act covering all the present Performers' Protection Acts. It is noteworthy that they did not find the need to bring it under the canopy of the Copyright Act, though it was suggested that it should be incorporated under copyright and related rights. Nevertheless, the need for a consolidated Act was accepted which indicates the importance that was ascribed to performers' rights protection. The Committee was vehement in the disapproval of the idea of a single Act consolidating both the copyright and performers' protection. The reason cited was the prevailing complexity of the Copyright Act.

### The Turning Point for Performers' Rights - the *Ex parte* Decision

After the unsuccessful attempt in persuading a civil right for the performer in *Apple Corps v. Lingasong*, the artists approached the Courts in the following year in *Ex parte Island Records* case. The plaintiffs were comprised of a combination

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59 Id., p.110.
60 Id., pp.104 to 105. Whiteford Committee Report.
61 Id., p.110.
62 Ibid.
63 Id., p.108. The Committee relied heavily on the recommendations of the phonographic industry and the musicians union.
64 [1978] Ch.122.
of successful artists along with the recording companies. Each artist had an exclusive contract with the recording company for the exploitation of his musical performances. It was alleged that their business was being deleteriously affected and damaged owing to the illegal conduct of the defendants dealing with tape recordings of live musical performances and making copies of the same and selling these in the form of gramophone records, tapes and cartridges. Their conduct was causing loss by reducing the sale of legitimate records. This was contrary to the statute as exemplified in Dramatic and Musical Performers’ Protection Act, 1958. The plaintiffs prayed for an Anton pillar order, as they feared that all evidence would disappear if they served a writ on the defendants. The plaintiffs appeal was on the ground that they had a claim for breach of a statutory duty created by the Dramatic And Musical Performers’ Protection Act, 1958, and alternatively that they had a right in equity to protect their private rights from injury by tortious or criminal acts. The question before the Court was whether bootlegging which was a crime could confer a civil right of Action on the performers’ and recording companies. They pointed out that as the statute had been passed for the protection of a particular person or class of persons (the performers) as they could give or refuse their written consent. The Courts also had to consider the protection of private rights as a reason for a civil cause of action. Based on the decision of Gouriet v. Union of Post Office Workers that though generally a violation of a criminal statute could not afford a civil redress nevertheless there was an exception when the offence was not only against the public at large but also causes special damage to the private individual. If a petitioner can show that his private right is being interfered by a criminal act thus causing or threatening to cause him special damage over and above that caused to the generality of the public then he does have a cause of action.

The Court rejected the first premise on the ground that the Act did not impose a public duty towards a class (performers) in comparison to other Act’s of the genre that begot and invoked such a cause of action. The appeal was allowed by a majority of three to two on the second ground where in the Judges including Lord

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65 Ibid. About thirty in numbers.
66 Ibid. Bootlegging.
67 Id., p.124.
68 Id., p.126.
69 Ibid.
Denning reasoned that the rights of the performer's and the record companies under contracts between them were civil rights in the nature of rights of property which gave rise to a civil cause of action. This judgment had far-reaching ramifications in that it granted untrammeled property rights though not perhaps in the same parlance and character as what is meant by it in copyright terms.

The Intervening Lonhro Precedent

In the Lonhro Ltd. and Another v. Shell Petroleum Co. Ltd the wide principle of civil liability accepted in Ex parte Island Record Case that arose upon injury to property or rights in the nature of property was denied its sanctity by the House of Lords. The observation of the learned Judge further narrowed the scope of remedy for those affected by bootlegging though the performers' were exempted. It is noteworthy that the facts don't reveal a similarity with that of intellectual property and contracts associated with it. Lord Diplock cast certain observations about the decision in Ex parte. The learned Judge observed, "The application for Anton pillar orders was made by performers' whose performances had been bootlegged by the defendant without their consent and also by record companies with whom the performers' had entered into exclusive contracts. So far as the application by performers' was concerned it could have been granted for entirely orthodox reasons. (As it had been passed for the protection of performers'). Whether the record companies would have been entitled to obtain the order in a civil action to which the performers' whose performances had been bootlegged were not parties is a matter that for the present purposes it is not necessary to

71 Id., p.135.
72 The perspective of property rights put forward by Lord Denning raised a lot of skeptic comments from the legal analysts. See David Kitchin, "Putting the Boot into Bootlegging Ex Parte Island Record Ltd" [1978] EIPR 33
73 Lonhro Ltd. and Another v. Shell Petroleum Co. Ltd (No.2)[1982] A.C.173, H.L.
74 Id., p.175. Lonhro were the owners of a crude oil pipeline from the port of Iberia in Mozambique to a refinery at Feruka near Umtale in Eastern Zimbabwe, called at all material times as Rhodesia. The refinery was operated and owned by seven participating oil companies and the use of the pipeline owned by the plaintiffs was governed by an agreement. While the agreement to source fuel through the pipeline was subsisting there was a declaration of independence from the government of the region. This led to sanctions being imposed by Great Britain by means of two directives. Defying the sanctions the refinery company brought oil through routes without resorting to the pipeline owned by the petitioners. This led to heavy loss for the plaintiffs and they wanted to restrain the refinery from resorting to any other means of sourcing the oil than by way of pipeline as that was causing interference with the contractual agreement between them and thereby sustaining damages.
"decide". Further Justice Lord Diplock was unable to agree to the propositions of Justice Lord Denning and Waller \(^7^5\) in \textit{Ex parte} with regard to their rights in the nature of property propositions.

\textit{RCA v. Pollard}\(^7^6\)

In this case the Judges relied on the \textit{Lonhro} judgment to drive home the point that the petitioners were not entitled to a civil action for injunction and damages as claimed by them. The Lonhro decision had overruled the wide principle of civil liability enunciated by Denning and Waller Justice that the injury to property or rights in the nature of property was sufficient to invoke the civil right of Action. The Judges endorsed both the views of Lord Diplock that overruled the decision of Shaw and Waller as well as that of Denning and Waller in \textit{Ex parte}\(^7^7\). The effect was that while the argument whether the statute was for the performer as a particular class was disapproved in \textit{Ex parte} was reinstated as the proper yardstick to which the performers' qualified, on the other hand, the wide theory of injury to property to which any party, be it the performer or the recorder or any affected party sought recourse on the civil side to the Courts was set aside as being too wide a principle to be found agreeable in \textit{Lonhro}.

The Court felt doubtful in allowing some such principle where the defendant's conduct involved no interference with contractual relationships but merely reduces the potential profits. Upon the facts, the Court found that the conduct of the defendants did not reduce the value of the plaintiffs' property. As the wider principle did not find favor with \textit{Lonhro}, there was no question of any non-

\(^7^5\) \textit{Id.}, p.187.

\(^7^6\) [1983] Ch. 135. \textit{RCA Corporation} had at all material times the benefit of exclusive recording contracts with Elvis Presley where by they were entitled to the right to exploit for profit records of all performances of Elvis Presley. The second plaintiff's, RCA Ltd was at all material times licensed by the first plaintiffs in respect of the sale, manufacture and distribution in the U.K. of the records of the performances of Elvis Presley. The plaintiffs claimed that they had the right to exploit the records of Elvis Presley to the exclusion to all others and that they had private proprietary interests, which they had to protect from the unlawful interference that caused damage to their interests. The plaintiffs further alleged that business of the defendants of dealing with bootleg records of Elvis Presley was a violation of their legal right. They also sought a declaration that the defendants were not entitled to engage in making and selling or letting for hire or distribution for the purpose of trade, exposing or offering for sale or hire or using for public performance any record of the performance of Elvis Presley without his consent in writing, it was also sought to restrain him by way of injunction, to order delivery up and special damages as further relief.

\(^7^7\) \textit{Id.}, p.158.
proximal damage to be taken note of and the need for a civil right to be invoked. All the Judges found the result undesirable and regrettable but decided that the parliament was a more apt office to bring in new remedies for new wrongs. The judgment was heartening for the performer as the recognition of the performer as a class to be protected gave them the locus for civil action, while the deprecation of the injury to property theory by the court did not provide the recorder with any reprieve. While the performer gained inadvertently, the fate of the recorder was left undecided. One outstanding characteristic of the judgment has been that there has been no outright negation of the character of property to the subject in dispute that is the recorded performances.

Rickless v. United Artists Corp.

The next landmark in the series of battles for that assured civil right of action was in Rickless v. United Artists Corp. This concerned the production by Blake Edwards and United Artists of a sixth 'Pink Panther' film after the death of Peter Sellers, using clips and outtakes from previous films of the artiste in the series. The test as formulated and accepted in Lonhro decision was followed by bringing the Act within the ambit of the principle of a civil claim for statutory breach. The court recognized that a coherent scheme of protection for the benefit of the performer had already been framed in the Act. The most interesting highlight of the decision was the recognition of proprietary pretensions in the provisions of the Rome convention imparting protection to the performer in order to substantiate the availability of civil rights and remedies for the performer. The Judge inferred that civil rights were an implicit endowment on the performer under the Rome convention. Though the Rome convention had left the matter to the respective states, it had not expressly spoken against it. But to have read in an obligation in the absence of any specific directive in the Rome Convention was the denial of the liberal tone of Art. 7 and the volition of those countries that

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78 Oliver J. id., p.154.
82 Interestingly this is nowhere provided in the Performers' Protection Act.
wanted to enjoy the freedom of option.\textsuperscript{83} Unlike prior instances where in the Act was considered secondary and insignificant in comparison to notions and concepts in copyright, the Court thought differently in the \textit{Rickless} decision. Till then the performers' Act was even considered inferior to other criminal enactments as the denial of the right of civil claim for statutory breach in previous case laws show. It was also clarified that the Act was a significant welfare legislation that the public had a duty to protect for the welfare of the performers'. It was also settled that the performers' had a right as against the corresponding duty on the public to observe adherence to the Act. In other words, it was a different interpretation on the same set of materials that was presented before and after the Rome convention. Though it must be taken note that the grant of civil claim against breach of statutory right cannot be considered by any stretch of imagination as equivalent to a grant of property rights in the performance.

\textit{Rickless Examined}

As against the popular perception of the performer having been granted the property rights, the \textit{Rickless} judgment has only granted him a civil right to injunction and damages\textsuperscript{84}. But the advantages are relative in the sense that the \textit{Rickless} judgment did reach this conclusion by reasoning that the enactment was for the protection of the performer, which brought out the welfare point of the enactment -not that it was very much in doubt. The major premise and consequence of the judgment was that the grant of private rights of action inevitably led to the endowment of property rights. Any right of Action for injunction and damages led to the creation of property rights. It cannot have an isolated existence apart from the concept of the property. Though the application of the term property would create a logical administrative problem that seems to have been resolved by the use of the term quasi property. The judgment further infers that if the Act has been for the protection of the performer then it would have to endow private rights of action to the performer. Whether this would

\textsuperscript{83} Though the same has been subject to much criticism the recognition and the status accorded to the Act as a means securing to the performers' dignified and undiscriminating protection was assured

\textsuperscript{84} The judgment has come under academic debate and analysis, see Adrienne Page, "Rickless v. United Artists - a Queens Bench Perspective on Copyright and Performers Right" [1986] 8 EIPR 6.
provide all the remedies as afforded to a property right if it is acknowledged is doubtful. Though this provides the remedies of injunction and damages it need not fully grant other relief's that commonly go with property rights. However there is a paradox in this regard as the reason why the performer has found himself entitled to the relief for the statutory breach is due to its public right character of the law to protect the entity. It is not a private right that spurs or invokes a property right but it is a public right that has spurred the creation of a private right of action.

Critically it can be opined that the judgment totally misconstrued the Rome Convention at the interpretational level as grant of civil rights was substantiated on the basis of the Convention. It is notable that the Convention was large hearted to provide countries with much leeway by adopting the possibility of prevention clause. Further the Rickless case revolved around the fact of performers’ rights in films. The attention of the Judge does not seem to have been brought to Article 19 of the Rome Convention that categorically ousts the application of the Art.7 from the performers’ who have consented to perform in films or audiovisuals. Despite this and without reference to this apparent exception, the judgment seems to have based itself on the Rome convention as the influencing reason particularly in the factual context of the rights in films. The dilemma of the British Courts is evident from the fact that despite the acknowledgement of the breach of statutory rights leading to civil rights of private kind that it termed quasi property, they could not allow or countenance an injury to property argument. The ambit of the breach of statutory right is wider than the injury to property argument if appellation of “property” to performers’ efforts is what the Judges wanted to guard against.

Thus without countenancing the question of property status in a straight forward manner nor classifying the performers’ right as being of such status or with no reference to its incapacities vis- à- vis the copyright provisions, on the mere ground of principles alone, the judgment sought to base the performers’ civil rights on principles that emanate out of the violation of any general statute. Finally, on a comparison with other legal regimes, it can be seen that the English Courts’ finally succeeded in granting the right of civil rights to performers’ without touching upon the areas of common-law intellectual property, unfair competition, right of privacy, the right of publicity and most basically property rights in
intangibles. This indirect approach leads to an inadvertent grant of a right of unqualified limitless duration to the performer that is more advantageous to them than the limits of copyright. This approach, nevertheless, effectively procured for the performer, a guarantee against unauthorized use of their performances.

Salient Features of Performers' Rights in U.K. under the Copyright Designs and Patents Act (CDPA), 1988

Some of the salient features of performers' legal status in Britain today is instructive of the way the rights can be realized and managed for securing the rights of the performer. Under the weight of international and regional pressures like the European Commission, United Kingdom passed the Copyright, Designs and Patents Act in 1988. It incorporated changes in tune with the demands of the technologically transformed world as well as in tune with the demands of the administrative challenges to manage the rights. Performers' protection ceased to be a separate enactment under the Performer Protection Acts and was protected under the canopy of the 1988 Act. The only distinction was with respect to the fact that performers' rights were placed in Part-II, while the traditional entities were placed in Part I. This was symbolic of the fact that there was a variation in the treatment meted to the traditional copyright enjoying entities, the performers' and others. In other words protection would not be fully synonymous with that enjoyed by the copyright entities like the literary, dramatic and artistic subject matter. Even though the rights are marginally distinctive, nevertheless, there are broad areas of convergence and equivalence between the rights. The variations would be instructive of the difficulties in management, exploitation and administration if it were made on equal terms with the traditional copyright subject matter.

Performers' rights subsist in a qualifying performance in the United Kingdom law without observance of any formalities and very importantly it exists independent of copyright that may subsist in any work. The CDPA 1988 does not define the term "performer" but defines the term performance. However the definition of the term "performance" reins in the qualification of eligibility for the performer and sets limits to it. The term "Performance" means a dramatic performance, a

85 Section 180(4)(a).
musical performance, a reading or recitation of a literary work or a performance of a variety act or any similar presentation. The performance should be a live performance and one or more individuals can render it. It is noteworthy that while the first two categories are not linked to the performance of any work-the last two categories are so linked. Therefore it is a hybrid definition. Significantly the term "variety act" has not been defined under the Act and therefore commentators have called for the meaning ascribed to it in a dictionary. If the inclusion of "variety act" was inspired by the Whiteford Committee then it could mean magicians, clowns, jugglers, acrobats and the like. However the inclusion of the term "similar presentations" in the definition of performance leaves the way open for borderline cases. This would compel a judicial interpretation, as the principle of ejusdem generis would have to be applied, in order to identify those similar presentations that fall within the ambit of a variety act. It can be said that because of the hybrid nature of the term performances, the shadow of subjectivity still pervades the definition. For example not all sporting performances can qualify. But with the increasing entertainment quality, characteristic techniques and discipline in the aesthetics of the game and the immense commercial value much of the sports as well as those that are improvisations of the arts like ball room dancing can qualify. The terms of the provision therefore gives enormous flexibility for giving room for improvised performances, interviews and aleatoric (interactive shows) works. While the Act has tried to be as certain as possible with regard to eligible performances, the usage of subjective phrases creates room for speculation. The lack of a definition of a performer also gives way to speculation whether either artiste interpreters or artiste executants should be protected.

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87 Richard Arnold, op.cit., p.42.
88 Ibid.
89 While the Gregory Committee skirted the issue on the ground that it had not been rendered before, both Whiteford Committee and the following green papers did not consider the plea for extension. Id., p.46.
90 It has even been broached whether the artistic works such as lighting modulation during plays would qualify to be a performance, the rights owner being the light man technician.
91 Richard Arnold, op.cit., p.50. There is support for this by reference to the French text of the Rome convention and certain other documents such as the preparatory document for and report of the WIPO/UNESCO Committee of governmental experts on dramatic, choreographic and musical works.
The 1988 Act does not emphasize on a further classification or filtration among the performers' who are heard in the audio or appear in the film. In other words there is no requirement that the performers' should be professional and that the amateurs or less creative among them would be excluded from protection.\textsuperscript{92} Though the term performances are hybrid, there is no further classification between performers' based on any rational. Performers' rights cover each performer and in a collective performance it is not shared between the performers as each one of them is entitled to their rights.

The Act does not discriminate between mediums of communication or affixation and both audio as well as audiovisual medium performances of the performer, with some differences, are amenable to protection. The recording can be made either directly from the live performance or from a broadcast or cable program of the performance. The recording will also include the recording, made directly or indirectly from another recording of the performance.\textsuperscript{93}

The Need for Consent

The rights are violated if the users exploit the performances either live or recorded without the consent of the performer.\textsuperscript{94} It is noteworthy that no positive authorization right in the nature of that granted to the copyright protected entities under part 1 has been given to the performers. However since the amendment in 1996 following the harmonization directives of the European commission, there is a noticeable change in phraseology.\textsuperscript{95} Further there has been an up gradation of rights to property rights with rights in live performances continuing to be considered as non-property rights. There is a need for consent to be elicited from the performer\textsuperscript{96} and also the owner of recording rights. No formalities are specified for the manner in which consent has to be expressed. The rights include the need for consent for recording the live performance, broadcasts the live performance or makes a recording directly from the live performance that is broadcast. The rights from the recording are the right of reproduction, distribution, rental and lending and the right of making available.

\textsuperscript{92} Ibid.
\textsuperscript{93} Section 182(1)(a)(b)(c) of CDPA, 1988.
\textsuperscript{94} For instance the term authorization can be noticed with regard to the distribution right.
\textsuperscript{95} Section 180(1)(a)(b).
The rights make the CDPA to be in line with the WPPT requirements and in particular the "making available" right brings it at par with the digital challenges. The definition of "making available" is at par with the definition provided for in the WPPT in that it makes the making available of the recording without the consent of the performer by electronic transmission in such a way that members of the public may access the recording from a place and at a time individually chosen by them. It is also an infringement, bereft of distinctions, if the recording is shown or played in public or communicated to the public if that recording was made without the consent of the performer. This means that once the consent for recording is proper any use of this nature does not provoke action unless for equitable remuneration with respect to sound recordings.

**Duration of Protection**

The performers' rights subsist from the year next following the date of performance for a period of 50 years. This applies to all performances without distinction of nationality and place of performance. Through the E.C term Directive an improvisation has been brought about in this regard in that if within the 50 years a recording is released then for another period of 50 years from the end of the calendar year in which the recording was released rights would subsist for a period of 50 years. If the case concerns the duration to be enjoyed by a non-E.C. national then the reciprocal treatment principle would be the yardstick applied. This is a major gain of additional 50 years for the performer and this could provide the performer a right of 101 years (divided between unpublished and published durations- still it begets added protection).

**Assignment of Rights**

Initially performers' rights were not granted a property status but only civil rights of redress for breach of statutory duty and therefore it could not be assigned. They were similar to but fell short of full copyright status. But from 1996 performers' rights have been upgraded (partly) to the status of property rights. The rights are divided on the basis of that which may be assigned called

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97 Section 182CA(1).
98 Section 191(a)(b).
performers' property rights and those that are not assignable but transmissible on death. Property rights include reproduction right, distribution right, and rental right of the recording and the right of making available. While the non-property rights include right of fixation and broadcast of a live performance\textsuperscript{100}, public performance and broadcasting by means of recording made without consent \textsuperscript{101} and dealing in illicit recording. These are not assignable.\textsuperscript{102} These rights are transmissible on death. It is important to note that the non-assignability of certain rights has been effected to safeguard the performer from the clutches of the unfair bargains so that rights in the performance and initial fixation are not frittered away at throwaway prices.

**Formalities**

Property rights of the performer can be assigned only by means of a written instrument, signed by and on behalf of the assignor.\textsuperscript{103} The existence of a mere agreement to assign but no executed assignment will operate an equitable assignment in favor of the assignee in the similar mode as the concept is applied with respect to copyright. Assignment of property rights in relation to a future recording of contracts is also provided for.\textsuperscript{104} Assignment of a future recording of a performance would be ineffective only in certain circumstances like a prior assignment of the subject matter, no consideration was given, a condition precedent remaining unfulfilled and where the purported assignment formed part of the contract which had been held to be unenforceable as being in restraint of trade.\textsuperscript{105} Assignment of future rights cannot be rendered infructous by the absence of a signature. These provisions are noteworthy and useful as they secure the performer against unscrupulous exploitative practices in the trade by taking away all future works for paltry sums or even circumvents a prior assignment to a collecting society.

**Presumed Transfer of Rights**

One of the most conspicuous provisions has been the provision of presumed transfer of rental rights of performers' rights in films. The provision says that unless there is a contract to the contrary there is a presumed transfer of

\textsuperscript{100} Section 191(a) (3).
\textsuperscript{101} Section 191(c)(2).
\textsuperscript{102} See Richard Arnold, \textit{op.cit.},p.68.
performers' rights in films arising from the inclusion of his recording of the performance in the film. The performer is entitled to an equitable remuneration for the presumed transfer of rental rights. It is important to note that such a presumption does not work in case of sound recordings. Even agreements involving intermediaries would give effect to this agreement. The non-property as well as the property rights is susceptible to licensing practices. Either in relation to a specific performances or specific description of performances. Licenses can be either express or implied and the benefits of the same would percolate to successors and other representatives of the interest.

Compulsory Licensing

Compulsory licensing provisions are another important high light of the performers' rights regime in United Kingdom. Besides the circumstance where in the Copyright Tribunal can enforce the power of consent when the whereabouts or the identity of the owner of the performers' right is unknown, there are instances like in cable program service under the Broadcast Act, 1990 where in the inclusion is covered by a statutory license upon the payment of reasonable royalty or other payment. The Copyright Tribunal can also give consent for compulsory licensing subject to the circumstances that the performer has withheld the grant of consent unreasonably. The latter condition has however been removed upon the intervention of the E.C Rental and Lending Rights Directive, which found it objectionable. It is important to note that the Tribunal has the power to grant consent only in specific circumstances and this does not cover the entire array of rights. It is important to note that the Tribunal can undertake any action only after reasonable enquiry had been conducted. The term reasonable enquiry can include writing to and attempting to elicit information from the collective bargaining and administration authorities. The Tribunal has to ascertain where the original recording has been made subject to proper consent

106 Section 192(f)(1).
107 191(f)(4).
108 One of the few circumstances where in Courts had to resolve a compulsory licensing issue was in the case of Exparte Sianel Pedwar Cymru [1993] EMLR 251. While the deceased performer was known, the Tribunal gave the consent on behalf of unknown representatives.
109 A 28-day period of notice has to grant and it has to be published in an appropriate manner. Section 190(3).
from the performer and whether any further recording that is being attempted is in consonance with the purposes for which the original recording was made. The Tribunal may either not give consent but might only do so upon proper terms of remuneration being given. The Tribunals consent is specific to the right asked for (that is the reproduction right) and would not provide an open sanction for the recording to be exploited through any other avenues. It is important to note that if in the future the real owner is ever identified the tribunal can include the terms of payment in the order.

The circumstances are provided for where in the performers' rights shall be available as of right when it is being exercised contrary to public interest. This would require the sanction of the monopolies and mergers commission supplemented by the sanction of license by the secretary of state. The practices that invite the action from the commission are as follows when conditions are included in licenses granted by the owner of a performers' right that tend to restrict the use by which recording of the or the copy of the recording may be put by the licensee or which restrict the right of the owner to grant other licenses and the refusal of an owner to grant licenses on reasonable terms. The concerned Minister of Trade and Industry can cancel or modify the conditions and/or to provide that the licenses in respect of performers' property rights shall be available as of right. The Copyright Tribunal has the power to settle the terms of the license in default of the agreement if any that is not arrived at on the issue. Similarly the lending of films and audio recordings shall be considered to be proper with the payment of a reasonable royalty or other payment, for this a special order would have to be made by the secretary concerned. These performers' rights that have been revived by the terms of E.C. commission directive would be subject only to the payment of a reasonable royalty.

**Non-Property Rights**


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110 Section 190 (5).
111 Like through rental and lending and distribution of copies.
112 Section 190(6).
113 The Minister will have respect for terms of conventions in this respect to which the United Kingdom is a party.
114 Section 182.
115 Section 192 A (1).
made without consent and the right to deal with illicit recording. These rights are not assignable but are transmissible upon death. It has been specifically provided that the recording rights should be assigned or otherwise transmitted though the contractual rights upon which they depend are transmissible and the assignees are not affected.

The Right to Equitable Remuneration

One of the most important developments within the United Kingdom copyright law has been the creation of the rental and lending rights for intellectual creations including performer rights. This was the outcome of the European Commission harmonization drives that pioneered the incorporation of new and unifying changes across the European region. Where a commercially published sound recording of the whole or any substantial part of a performance in which performers' rights subsist is either played in public or included in broadcast or a cable program service, the performer is entitled to an equitable remuneration from the owner of the copyright in a sound recording. Another circumstance in which this operates is when there is a presumed transfer of a performers' rental right in copies of a film or an actual transfer of his rental right in copies of a film or of a sound recording to the producer. Even if the rental right transferred were assigned to a third party, the performer would be eligible to collect it from him. The right to equitable remuneration is unwaivable. This has a twin effect of nullifying agreements that try to circumvent the rigor of the right by providing for either the waiver of the right or exclusion from questioning the amount agreed upon as equitable remuneration. There is no way in which the role of the Copyright Tribunal can be ousted from the regulatory function on equitable remuneration. It has been mandatorily provided that the right would be transmissible only to a collecting society for the purpose of enabling it to enforce

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116 Section 184.
117 Richard Arnold, op.cit., p.71 Section 192b(1).
118 The definitions of rental and lending rights have been clarified to check any overlap into the realm of communication to the public. 182(c) (4) and 182(c) (3) (a) (b) (c).
119 Section 182(d)(1).
120 Section 191(f) (4) and Section 191(g)(1). This can be rendered even through intermediaries.
121 Section 191(g)(3).
the right on his behalf. The equitable remuneration can be arrived at either through the means of mutual agreement or through the means of intervention and prescription by the Copyright Tribunal. The Tribunal shall make the order as to the method of calculation as it may feel is reasonable in the circumstances. The Tribunal is expected to take into account the value of contribution made to the performance by the performer either in the audio or in the film. The criterion on which this is to be based on has not been spelt out but nevertheless this implies that a categorization between artistes would definitely be in mind while applying to make such a valuation. The reference to the Tribunal may be made during the course of the protection. This means that even if an amount had been arrived at either by agreement or by reference to the Tribunal, this would still be amenable to review on a further reference to the Tribunal. A major highlight of this right has been that there can be no move to exclude or restrict the Equitable Remuneration or to oust the right of any person or restrain any person to question the amount of equitable remuneration or to restrict the jurisdiction of the Copyright Tribunal. With respect to the right to equitable enumeration, the performer can deal the same either individually or by means of the collective administration society. This once again sees to it that the benefit reaches the performer and does not seep into the control of others.

**Difference Between Remuneration in Sound Recordings and Films**

There is a subtle difference in the mode of payment of equitable remuneration between the remuneration to be paid for performances in films and those to be paid for performances on sound recordings. The mode of payment on the rental right in the film can be a single payment made at the time of transfer of the right. There is no corresponding provision with respect to the sound recordings. It is important to note that the Act does not define what is meant by the term “Equitable Remuneration”. The extent of exploitation does not profoundly appear to be the criteria essential to be taken into account to resolve the question of mode of payment whether it should be single or any other mode

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122 The rights are transmissible by testamentary disposition or by operation of law as personal or movable property.
123 Section 182D (7) (a)(b).
124 Section 181(n)(4).
remuneration. In this aspect too there is a difference between sound recordings and the films. While it is specifically mentioned in the Act that a single equitable remuneration has to be given each time the recording is played such a stipulation is not mentioned with respect to the rental of films. However, there is reason to characterize this distinction as meritless as the term Equitable Remuneration as meant in the E.C. Rental and Lending Directive would testify.\textsuperscript{125} It speaks about equitable remuneration for the rental; this means that the remuneration has to be directly proportional to the extent of rental. This is despite Section 16 of the recital that says that the equitable remuneration may be paid at any time on or after the conclusion of the contract.\textsuperscript{126}

Yet another significant difference between the rights accorded to performers in sound recordings and films is that the performer in sound recordings has been given much longer rope with respect to rights than that accorded to the performer in the films. While a substantial right of rental has been provided to the performer in the sound recording, the performer in the film has been extended a qualified right of rental. There is no equitable remuneration for the performer in sound recording for the rental of the same. However the rental rights is presumably transferred for the performer in films when he agrees to incorporate his performance in the film to the producer. This is subject to equitable remuneration. It would require experience in practice as to which is more valuable or effective to performers. Again in contrast to the rights of the performer in the sound recording, the performer in the film is not granted any right in the performance or broadcast or incorporation in the cable program service. There is no equitable remuneration either for the concerned forms of exploitation.\textsuperscript{127} The performer in the sound recordings on the other hand is vested with rights to equitable remuneration for these modes of exploitations. The only criteria to be fulfilled being that the records must be commercially published. The only drawback for this criteria is that the characteristics of commercial publication is narrower than that construed when the performance reaches the public. Commercial publication is considered to take place when the issue of copies is

\textsuperscript{125} Article 4 (1).
\textsuperscript{126} Interpretations are possible to suggest that it doesn't indicate the amount but the method and the timer of payment Richard Arnold, \textit{op.cit.}, p.83.
\textsuperscript{127} Section 182D.
effected. When the sound records whose copies have not been circulated are broadcast or played in public or used in cable program service then the performer would not be entitled to equitable remuneration as the terms of the word commercial publication would not be fulfilled.

Collective Licensing

Collective licensing bodies have become indispensable mechanisms to implement the administration of multifarious performers' rights. However the law has taken precautions to see that these powers of ownership and administration by the collective administering or licensing bodies are not in any way abused through monopoly. In view of this the 1988 Act of U.K. had constituted the Copyright Tribunal with expanded powers to adjudicate this question. Further provisions have been added since the introduction of performers' property rights by the regulations introduced in 1996. Both licensing schemes and licensing bodies are regulated under the Act.\footnote{Schedule 2A. Para 2 (a)(b).} Licensing schemes operated by these bodies can be referred to the Copyright Tribunal and application for licenses can be made to the Tribunal. The application must relate to licenses for copying a recording of the whole or any substantial part of a performance in which performers' right subsists or for renting or lending the copies to the public.\footnote{However it has been ruled that the Copyright Tribunal can consider the scheme as a whole. The decision was given in the British Phonographic Industry Ltd. v. Mechanical Copyright Protection Society Ltd., Composers' Joint Council Intervening (No.2) [1993] EMLR 89.} However there is no power in the Tribunal with respect to issue of copies to the public other than the aspects relating to lending and renting.\footnote{Schedule 2 A. Para. 3(1).} The reference can be from a representative body alone and not from a single individual if it is only the scheme that is proposed to be operated.\footnote{In this regard is endowed with wide powers for granting an order in full, in partial or in a modified form for any sanction for license of any limit of duration. While no power to prevent the prevalent scheme from being operational is present with the Tribunal, if it passes an order it can be dated retrospectively. The Copyright Tribunal has the jurisdiction to hear and determine the proceedings for 12° Schedule 2A. Para.2 (a)(b).} The organization has to be reasonably representative of the interests who need a reference. The Tribunal in this regard is endowed with wide powers for granting an order in full, in partial or in a modified form for any sanction for license of any limit of duration. While no power to prevent the prevalent scheme from being operational is present with the Tribunal, if it passes an order it can be dated retrospectively. The Copyright Tribunal has the jurisdiction to hear and determine the proceedings for
determining the amount of equitable remuneration for exploitation of commercial sound recordings. It has the power to decide upon reference the amount of equitable remuneration for transfer of rental right, Determination of royalty or other remuneration to be paid with respect to retransmission of broadcasts of performances or recordings, references made to it with respect to licensing schemes in operation and settling royalty for lending of recorded performances.

A Flexible Approach

Even after a reference, the Tribunal can be accessed again, though a minimum period needs to have elapsed from the time of the previous order. Not only with respect to the unreasonableness of the terms of the license but also where there has been a sheer failure to grant the license, the aggrieved can knock on the doors of the Tribunal. Even grant of licenses beyond the scope of schemes are brought within the scope of the Tribunal for checking out their reasonableness. The tribunal in such cases of reference makes an order if it is satisfied that the charge is well founded. The order shall contain such terms that the Tribunal considers reasonable. Both the operator of the scheme as well as the applicant has the right to apply to the tribunal to review the order. The endowment of powers on the Tribunal to keep vigil and scrutinize the various licensing schemes and instruments act as a shield against abuse of a monopoly position and makes use and exploitation of performances much more accessible and economically cost effective.

Service Providers’ Liability

Provision for clarifying the liability of the service provider has been incorporated by making him liable only if there was an actual knowledge to the service provider of their service being used by another for infringement. In deciding on the

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132 Section 205 B (1)(A) TO (H).
133 Schedule 2A. Para. 5 (1).
134 Schedule 2A. Para. 6(1).
135 Reasonableness depends on the availability of other schemes, or granting of other licenses to other persons in similar circumstances, the terms of those licenses and schemes and to exercise its powers so as to secure that there is no unreasonable discrimination between licenses or prospective licenses under the scheme or license in question and licensees under those schemes and licenses. The Tribunal has to take into account the entirety of circumstances and is vested with tremendous discretion. Richard Arnold, op.cit., p.89.
136 Schedule 2A. Para. 6(2)(a), (b) and 6(3)(a)(b).
137 But this can be only after the elapse of a particular period of time. Schedule 2A. 7(2)(a)(b).

Cochin University of Science and Technology
Infringements

The CDPA upgraded the protection to the performer from a mere right of civil action for breach of statutory duty to a wholesome property right in the form of a copyright since the year 1996. While performers' property rights are actionable in the same manner as the infringements of other property copyrights, the non-property rights have been distinctively treated as they can invite actions only for the breach of statutory duty. An important requirement under the CDPA, 1988 has been that the infringer in case of secondary infringements needs to know or should have reason to know that the act lacked consent in order to be found to have violated the provisions. This expands the notion with respect to the culpability of the accused as it goes beyond the need for actual knowledge.

Fair Use Provisions

The provisions regarding the permitted acts and exceptions with respect to performers' rights had been provided for taking into account the peculiarities of the subject matter. The first of the exceptions is for criticism and news reporting purposes. Though what constitutes fair dealing is a matter of fact that varies according to the circumstances of each case. Incidental inclusions of a performance in a sound recording, film, broadcast or cable program is not an infringement. However music or other accompanying words that are

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138 191JA(1)(2).
139 This is different from the position followed under the performers' protection act where in there was a requirement of the knowledge. The Courts under the previous acts required that the defendant had the actual knowledge of the lack of consent Gaumont British Distributors Ltd. v. Henry [1939] 2 K.B. 711. In the Peter Sellers decision it was found that the defendant did not have the actual knowledge but they had reason to believe so.
140 It has not been verbatim reproductions of the CDPA Part I dealing with the fair use provisions of copyright protected entities such as literary and artistic works. While there are areas of broad similarity nevertheless there are differences molded specifically to suit the requirements of the subject matter. One can find variations with the exceptions suggested under the European commission E.C. Rental And Lending Rights Directive and the Rome Convention. The Act goes a long way forward than the exceptions accorded to literary and artistic works under the convention.
141 Schedule 2. Para. 2. (1).
142 Richard Arnold, op.cit., p.123.
143 Schedule 2. Para. 3(1)
deliberately included are not considered to be incidentally included. In such circumstances it appears to be irrelevant whether they are covered by copyright or not. Copying of a recording of a performance in the course of either instruction or preparation for instruction in the making of films or film soundtracks does not infringe either the performers' rights or the recording rights. The condition is that copying must be rendered by a person either giving or receiving the instruction. The exception does not extend to any subsequent dealing in such recordings, as they would otherwise be illicit recordings.

A sound recording, film broadcast or cable program played or shown at an educational establishment for the purposes of instruction before an audience consisting of teachers, pupils and persons directly connected with the activities of the establishment is not considered to be played or showed in public so as to infringe performers' rights or recording rights. Recording by educational institutions for educational purposes do not constitute infringement. The exception will not extend to subsequent dealings based on the recording or copies made for educational purposes. Lending of copies by educational institutions does not infringe performing and recording rights. Lending of copies of recordings by libraries and archives are also exempt. Similarly it is not an infringement when the recording or copy is for deposit in a library or archival purposes. Any thing done for the parliamentary or other proceedings – judicial or for the reporting of such proceedings are also exempted. No rights are infringed by anything done for the purpose of the proceedings of royal commissions and statutory enquiries or for reporting such proceedings held in public. The provision it appears does not extend to reporting proceedings held in private. Recordings, which are part of public records, may be copied. Any act done which is specifically authorized by an Act of parliament is not an infringement of performers' rights or recording rights unless the act so provides.

A Digital Friendly Exception

A significant provision pertains to a situation when a recording of a performance in electronic form has been purchased on terms which allow the purchaser to

144 Schedule 2. Para. 3(3).
145 Schedule 2. Para. 5(1).
146 Schedule 2. Para. 9(1).
make future recordings from it, a person to whom the recording is transferred may do any thing which the purchaser was allowed to do without it being construed as an infringement of performers' rights or recording rights. ¹⁴⁷ This is provided in so far as there are no express terms which either (a) prohibit transfer of the recording by the purchaser, impose obligations which continue after a transfer, prohibit the assignment of any consent or terminate any consent on transfer or (b) stipulate the terms in which a transferee may do the things that the purchaser was permitted to do. A recording made by the purchaser, which is not transferred together with the original recording, will be treated as an illicit recording. This provision is important from the point of view of commerce of performances in their digitized form and this will permit transferees from the purchasers to make back up copies and also ensure that the back up copies are transferred together with the original.

However the sale or transfer of a recording alone or a back up copy alone at the same time retaining the original or the back up copy has not been considered as a likely loophole that can arise in the circumstances. ¹⁴⁸ A recording of a song may be included in an archive maintained by a designated body. Subject to the condition that the words must be unpublished and of unknown authorship at the time the recording was made, the making of the recording must not infringe any copyright, and the performer must not have prohibited the making of the recording. Copies of the recording can be supplied by the archivist, provided, the person requiring a copy satisfies the archivist that he requires it for the purpose of research or private study and will not use it for any other purpose and that no person is furnished with more than one copy of the same recording. Lending of copies of films and sound recordings can be rendered upon an appropriate order by the Secretary of State subject to a reasonable royalty or other payment being made. Playing sound recordings as part of activities of a club, society or other organization. It is important to note that the exemption is applicable to sound recordings alone and not to films, broadcasts and cable programs.

¹⁴⁷ Para. 12 (2).
¹⁴⁸ See Richard Arnold, op.cit., p.129.
Incidental Records

Incidental recordings for broadcasts or cable programs are not to be considered violating the performers' rights. This is subject to the condition that the further recording must not be used for any other purpose and it must be destroyed within 28 days if it is being first used for broadcasting or cable program service. A recording for supervision of broadcasts and cable programs is a permitted activity. A most interesting exemption has been with respect to showing or playing in public of a broadcast or cable program to an audience which has not paid for admission. However the audience is presumed to have paid for admission if they have paid for admission to a place where the broadcast or cable program is to be shown or goods and services are supplied at prices which are substantially attributable to the facilities for seeing or hearing the broadcast or program or exceed those usually charged at the place in question and is partly attributable to the facilities. Residents and inmates are exempt so are members of a club or society if this function is only incidental to the other main purposes of the club or society. Reception and retransmission of broadcasts in cable program services are exempt. Recordings for the sake of subtitling by designated bodies are not considered as infringements. Recordings of broadcasts or cable programs for archival purposes are also exempt from the purview of performers' rights.

Formalities

An important aspect of procedures prescribed under the Act is that unlike the need for writing to express consent prescribed in the prior performers' protection acts, the CDPA does not specify that the formality of writing needs to be observed in all circumstances of sanctioned exploitation. Oral and implied consent would suffice to quell the accusation of infringement. However in this regard a distinction has been made between the performers' property rights and the performers' non-property rights. The formality of writing with regard to

\[149\] Schedule 2, Para. 16(1).
\[150\] Schedule 2, Para. 16(2)(a)(b).
\[151\] Schedule 2, Para. 17(1).
\[152\] Schedule 2, Para. 18(1) and 18(2).
\[153\] Schedule 2, Para. 18(3). Richard Arnold, op.cit., p.133.
\[154\] Schedule 2, Para. 19(1).
\[155\] Schedule 2, Para. 20(1).
\[156\] Schedule 2, Para. 21(1).
assignment and licensing is dispensed only with respect to non-property rights. In relation to secondary infringements, the consent is a defense either to the making of the recording or consent to the deal in question. Consent can be given by the performers' agent, the assignee, performers' estate by a person falsely so representing, or by the Copyright Tribunal. Consent with respect to the recording rights can be granted by the performer, by the owner of the recording rights, by the proper agent and by the Copyright Tribunal. Besides this a 'defense of innocence' can be tendered on the ground that the alleged infringer did not have the required knowledge or reason to believe that the record was not sanctioned.

**Remedies**

Both civil as well as criminal remedies are offered to the performers' whose rights are violated. The civil remedies for the violation of the property rights include injunctions, damages or accounts for profit, delivery up, seizure and forfeiture. With respect to the non-property rights, a civil action for infringement arises only as an action for breach of statutory duty. Therefore the remedies available for a breach of statutory duty has been granted to the performers' non-property rights and they include injunctions, damage, delivery up, seizure and forfeiture. With regard to penalties prescribed for the different offences for infringing the performers' rights different penalties are prescribed for summary convictions and those for indictments.

**Persons having recording rights**

It is noteworthy that persons having exclusive recording rights have also been granted similar protection against infringement (Sections 185 to 188 & Sections 198 and 201).

**Impact of the Developments in the United Kingdom**

The evolutionary pattern points out to the inevitability of the recognition of the proprietary character of the performance despite the initial Act being solely

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157 Richard Arnold, op.cit., p.137.
158 Section 191-1, Section 195-order for delivery up, Section 196 -right to seize illicit recordings.
159 Section 194(a)-(b) and for those with recording rights.
160 While the summary conviction for making, importing and distributing illicit recordings carries imprisonment up to 6 months or a fine not exceeding the statutory maximum (presently 5000 pounds or both). The penalty on conviction on indictment is imprisonment for up to two years or a fine or both. The fine is to be limited to the offenders' means. There is the right to prosecute through initiation of parallel proceedings-that is civil and criminal proceedings being allowed to progress or pursued side by side.
161 Section 180(1)(b).
intended to provide a criminal remedy. The juristic, legislative and administrative developments in the United Kingdom show that performers’ rights in both audio as well as audiovisual has become inseparable part of the intellectual property framework. The misgivings over the attribution of rights have been a great deal diminished with innovative legislative provisions and concepts being implemented in particular the concept of presumptive transfers (rental rights) and equitable remuneration. These are also ably supported by the inevitable constructs of collective administration societies ably scrutinized by Copyright Tribunals. It is important to note that the Act does not mention employer–employee relationship as scorching the rights of the performer (nor as a commissioned work) and therefore it provides rights to the performer in circumstances in which even literary and artistic workers do not possess rights. The unobstructed manner in which rights are being administered and enforced clearly point out that the provisions have not affected commercial interests. There have been no reported cases on this aspect since the provisions have come into effect. A drawback of the Act is with regard to the non-availability of moral rights. However the collective bargaining practices in United Kingdom seem to have taken notice of the same. The performer would have to take recourse to the common law remedies of either misrepresentation or passing off for either the right of credit or the right of integrity.

The aforementioned features of the law and judicial perspectives in the United Kingdom point out to the positive effort exhibited in tackling envisaged apprehensions and difficulties in administering rights. The legal concepts and mechanisms created to facilitate both the protection of rights as well as the unhindered exploitation of the commercial product realizes the intent of maintaining the balance of interests. The intent appears to have been to secure the maximum security for the performer without jeopardizing smooth commercial exploitation.